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**Book release**

Setting the Course for Thailand? – Content, Structure and Impact of the 2016 Constitution Bill

Henning Glaser*

Thailand is on the way to promulgate its 20th Constitution. This article aims at providing an introduction to the Constitution Bill which is expected to soon replace the currently still ruling Interim Constitution 2014. The latter has been established after the Coup d’état of 2014 that has turned the country into a military dominated (soft) authoritarian regime. In times of a coup-frozen, yet lingering divisional crisis, and facing profound shifts at heart of the socio-political system, the new Constitution is supposed to become the country’s supreme law for the foreseeable future. Technically well expressed in terms of conceptual craft and coherence, the draft’s propositions to shape the political process are highly determined. Providing some significant modifications to established Thai constitutionalism, the draft’s major direction is still conservative and profoundly anti-electoral, while establishing a rigidly preservative constitutional hegemony of the powers-that-be.

Introduction

By a national referendum of August 7, 2016, the electorate adopted the Bill of the 20th Thai constitution with around 61% of the votes.¹ Being currently still under some adjustment, it will soon be presented to the King of Thailand to command its enactment as the new supreme law of the land.² The present article tries to explore the major structure of the Constitution Bill and its prospective effects on the political process. With respect to the previous 2007

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¹ In fact, 61.4% of the voter turn-out of 59.4% approved the draft constitution, while 38.6% rejected it. Concerning a second referendum question pertaining to an interim period on the participation of the Senate in the creation of the government during this 5-years transitional period the ratio was 58% “yes” and 42% “no”. See http://www.bangkokpost.com/news/politics/1058026/official-charter-referendum-figures-posted.

Constitution, some significant pattern of continuity and change of Thai constitutionalism will be taken into account, with regard especially of constitutional identity. Like Thai constitutionalism in general, the present Constitution Bill should indeed not be underestimated as a mere façade, but rather understood as a determined proposition of constitutional governance albeit not one of Western provenance. Expressing the respective decisions of the ruling authoritarian regime, it offers a comprehensive, technically well-conceived, hard-line formula of how to rule the country. Produced by a small circle of carefully selected experts in a highly exclusive way, its nature fully corresponds with the process of its generation. Excluded was not only one of the two contending political camps of the country’s divided polity but the entire political party caste as such. Moreover, in the absence of a free debate before the referendum, the latter appears rather as an act of acclamation in an authoritarian setting than an expression of public participation in a discursive context even if voting itself was largely free and free from allegations of fraud. Accordingly, the Bill matches the hegemonic demands perfectly well and proves the technical ability of Thai drafters once more to create a constitutional frame that is responding neatly to the order of the day. It will shape future constitutional politics profoundly and pave the way for continuity of the current regime against potential challenges by an electorate whose majority has consistently voted for those forces that is sees as challenging the established hegemonic social contract since 2001.

Since neither the final bill has been presented to the King nor the organic laws supposed to complement it having being completed yet, only a rough and tentative overview is possible here.

**Overarching Status: Four Constitutional Regimes**

The 2016 Constitution Bill which is supposed to replace the 2014 Interim Constitution provides as a special feature in comparison to most other constitutions three subsequent stages of constitutional rule that differ significantly from each other, effectively constituting three distinct constitutional regimes. The final, permanent stage of constitutional rule under the future constitution will be antecedent by two subsequent transitional stages. Additionally, there is still the Interim Constitution, which is closely interconnected with the first transitional phase of the future constitution. At present, there are thus effectively four subsequently activated stages of the constitutional process based on two constitutional documents. One link

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3 This kind of multi-phase constitutionalism is not new in Thailand constitutionalism. It has, in fact, been displayed for the first time by the country’s permanent constitution of December 1932 as well as in the 1976 Constitution, which, however, turned out to be quite short-lived paving the way for the 1978 Constitution that lasted until 1991.
between the Interim Constitution and the first transitional regime of the Constitution Bill is the stipulation of continuation in office for the members of some constitutional bodies established or acknowledged under the Interim Constitution respectively. This applies for instance for the NCPO, the cabinet and the present NCPO-selected legislature – the National Legislative Assembly (NLA). They will hold office until the new government or the House of Representatives and the Senate respectively are formed after the first national elections (section 263, 264, 265). Other constitutional bodies originating in the current regime supposed to continue to hold office during the first transitional period are the National Reform Steering Assembly and the Constitution Drafting Committee (section 266 and 267). The exact duration of this first transitional regime is dependent on two variables: the eventual promulgation of the ‘permanent’ Constitution as its starting point and the election-based formation of the two Houses and the Cabinet as its endpoint. Most important in this context is section 265 of the Constitution Bill.\(^4\) It stipulates that the National Council of Peace and Order (NCPO), – the constitutionally institutionalized military junta\(^5\) –, continues to hold office until the new government (Council of Ministers) is appointed after national elections. Currently, the first general elections after the 2014 Coup might be expected earliest in the second half of 2017.

During this first transitional period, which forms the first of the two phases of a long ‘transitional regime’ and runs from the promulgation of the Constitution to the constitution of the government, the NCPO will retain its powers as provided by the 2014 Interim Constitution (section 265 (2)). This includes in particular the exceptionally vast powers conferred to the Head of the NCPO and incumbent Prime Minister\(^6\) according to section 44 Interim Constitution. While section 44 is one of the most important norms of the Interim Constitution, the continued effectiveness of section 44 is the single decisive feature of the first transitional regime under the Constitution Bill. Effectively, section 44 acknowledges the concentrated supreme power of the state in the hands of the NCPO Head. According to it, he can take every measure, no matter whether it is of legislative, executive, or judicial nature, to repel a danger to public peace and order, the monarchy, the national economy, or the state administration. Unlike similar provisions of older post-putsch constitutions, however, this undivided power is also conferred to him for the

\(^4\) Reference to provisions of the Constitution Bill follows the form ‘sect no (no of paragraph)’.
\(^5\) Meanwhile the NCPO encompasses also some civilians but is still dominated by its military members most notably its head.
\(^6\) Head of the NCPO General Prayuth Chan-o-cha serves currently also as Prime Minister having been elected by the National Legislative Assembly that has been inaugurated by the NCPO after the 2014 Coup.
purpose to strengthen national unity and harmony and to promote reforms in any field. It is thus not solely an emergency power but *fundamentally sets aside the boundaries between emergency rule and the ordinary exercise of state power*.

In effect, section 44 enables the regular application of a supreme power that supersedes any other constitutional competence or mechanism. It should, however, be noted that this legally unbound power is still – even if vaguely – derived and defined within the *unwritten* framework of established Thai constitutionalism that provides a notion of how to appropriately exercise this vast power. Actually, section 44 is currently not applied as an expression of an excessively suppressive regime or for primarily selfish purposes. Rather it is the basis of a ‘benevolent’ form of “despotic paternalism”. Tellingly, this term has been used to describe the authoritarian regime of Field Marshall Sarit Thanarat (1957-1963), who set the necessary conditions for the emergence of the very governance system whose struggle for preservation is the raison d’être of the 2014 Coup that lead to both, the 2014 Interim Constitution and the Constitution Bill. Practically, the present section 44-regime is applied in a consequent yet still comparatively restrained repressive manner reaching just as ‘deep’ as considered to be necessary to maintain control. The main reason to make use of this elementary constitutional power instead of the previously used martial law is probably the symbolic impact of section 44. Arguably, the frequent use of the absolute, undivided state power in conducting governmental business as usual is continuously conveying an important message to the Thai people. This is the assurance that there is an actual manifestation of the supreme power, which will ensure that the country is not falling into destruction after the ailing King, the “father of the nation” in an essential sense, has become unable to defuse the protracted national crisis. The danger potentially evolving from this divisive crisis are claimed by the current regime as a key reason for the coup. The significance of the calamity to experience such a crisis while lacking the royal guidance has been stressed to foreign observers by two leading figures of the first Constitution Drafting Committee (CDC) in 2015, Borwornsak Uwanno and Navin Damrigan:

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8 Thailand is inclined for the meanwhile to remain still more liberal than most other ASEAN member states.
9 Borwornsak Uwanno and Navin Damrigan, “Constitutional Drafting in Thailand”, p. 1. The untitled, unpublished text has been circulated on the occasion of a panel presentation of Prof. Borwornsak, Gen-Lt Navin and three other members of the then CDC at the Foreign Correspondents Club Thailand in Bangkok on 8 April 2015. The author is in possession of the paper handed out by the authors at this event.
His Majesty, the soul of our nation, being hospitalized, could not play any mediatory role in our ten-year long conflict. The institution has been unfairly criticized by those who are republican for not condemning the military. But if the crown had done so, the institution itself would have been in grave danger and perhaps this would have led the country into a civil war.

The statement fairly reveals both the centrality of the King in established Thai constitutionalism and the magnitude of its current convulsion. To respond to the ensuing challenge of restating and preserving the established system as far as possible is the major rationale that underlies both the 2014 Interim Constitution and the 2016 Constitution Bill. They are, as indicated above, interlocked by the institutional continuity of the constitutional bodies under the 2014 Constitution and, in particular, the stipulated continuation of the powers of section 44 Interim Constitution by section 265 (2). This is the hallmark of the first transitional regime, which is forming the first ring of fortification against the looming perils for system-survival, and its strongest cannon.

It will be in force until the formation of a new cabinet after the first elections. It will be replaced then by the succeeding, second transitional regime which starts with the royal appointment of the Senate after the elections and will govern another period of five years. This second transitional regime is mainly characterized by the regulation of the selection, composition, and function of the Senate, which will be in office for five years. During this time, the design and commissioning of the Senate in this period will therefore be different from the one under the ‘permanent’ final stage of the stipulated by the Constitution. Due to its specific design and its function to contribute to the selection of the Prime Minister this ‘transitional’ Senate is of crucial importance. As it will be involved in the creation of at least two administrations it will have not only a decisive impact on constitutional politics during the second five-years transitional period but have an impact on constitutional politics far beyond the end of these five years. As the government’s term is only four years, the Senate will contribute to the formation also of the first administration that will govern under the third, ‘permanent’ stage of constitutional rule under the new constitution. In this final stage, the major safeguard against serious challenges to hegemonic vision of constitutional politics in the country, besides a compelling 20-year reform plan, is section 5. It provides the formation of an ad hoc-committee charged with supreme and final decision-making powers in
times of crisis. This crisis committee is constituted by the Prime Minister, the presidents of the three apex courts, the chairmen of the independent constitutional organizations, the presidents of the House of Representatives and Senate, and the opposition leader in the House of Representatives. With its vaguely circumscribed power to take any measure deemed necessary, section 5, which will be analyzed in more detail below, provides a mechanism that almost amounts to a latent coup in permanence, one, however, that is cloaked in constitutional guise.

The purpose of this complex system of subsequently activated constitutional regimes is to shield an inevitable, long transition from any turbulence that could threaten the preservative agenda of the current regime. Overarching goal is to maintain the established political system to the greatest extent possible as the transitional challenge is accompanied by a transformative one as well represented by those demanding democratic reforms. The subsequent constitutional regimes provided by the Bill promise to serve this overarching end with the formation of a robust, well thought out system of staggered lines of defense indeed.

If the still governing Interim Constitution which is inhabited by the same spirit as the Bill is also counted in, the four subsequent constitutional regimes defining the current perspective on the constitutional process at present in the framework of both the 2014 Interim Constitution and the Constitution Bill 2016 might be distinguished as follows:

1. the *Interim Constitution 2014* which is still in force until the Constitution Bill will be promulgated as Thailand’s 20th Constitution and which is dominated by section 44;

2. the *first ‘transitional regime’* under the Constitution Bill 2016 that is valid from the latter’s promulgation until a government is formed after elections and which is characterized by the continuous empowerment of the NCPO head by section 44 Interim Constitution;

3. the *second* five-years ‘transitional regime’ beginning with the royal appointment of the Senate following the first elections after the Coup which is characterized by a specially composed Senate that will participate in the creation of the government;

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10 The rule is applicable already with the promulgation of the Constitution Bill as Thailand’s 20th Constitution already. Its main purpose will be, however, to function as a safeguard during the third, the ‘regular’ constitutional regime which can neither rely on the powers of section 44 nor reliably produce governments in line with the drafter’s understanding of the constitutional basic structure as during the second transitional regime.
4. the ‘permanent regime’ after the end of the second five years-transitional regime which will be mainly marked by the ongoing possibility to convene a supreme ad-hoc crisis committee based on section 5.

Given the reach and the ‘teeth’ of section 44 for the time being and the first transitional regime as well as the duration of the second ‘transitional regime’, it is indeed not only the final stage of constitutional rule which deserves attention but, especially at present, very much also the subsequent transitional regimes. Together with the Interim Constitution, they will, after all, last at least more than six years, a period which already transcends the average lifespan of Thai constitutions significantly.¹¹

**Graph 1: Subsequent constitutional regimes**

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¹¹ Since 1932 Thailand has had 19 constitutions with an average life span of 4.3 years. The transitional regime of the Bill would rank in terms of duration at least at place six after the 1932, 1978, 1997, 1959 and 2007 Constitution. If elections are eventually not held in 2017 – after all an absolutely possible option – the duration of the transitional regimes could even easily exceed the duration of the 2007 Constitution.
Character and Basic Structure of the Constitutional Order to Come

With this look at the finely graduated differentiation of distinct constitutional regimes, it shall be asked about the Constitution Bill’s overarching character before single elements of the new constitutional setting will be analyzed in more detail.

Interesting and practically important in approaching the Bill in this sense is to explore the patterns of continuity and change in Thai constitutionalism as they are displayed by this document. This applies even more as the provisional and still valid Interim Constitution has expressed fundamental change so far already.

Basically, it might be said that the Constitution Bill is from the same model series as the 2007 and 1997 Constitution, – albeit with much greater deviations from its predecessors than it had been the case with the 2007 Constitution following the 2006 Coup. In particular, this new model in a series of similar constitutions is presented with a considerably newly designed ‘engine’, namely an adjusted basic structure that affects both the normative identity as well the ‘physics of power’ of the constitutional framework.

Building otherwise largely upon conventional structures and elements of Thai constitutionalism, these peculiarities represent indeed a difference in kind compared to the 2007 and 1997 Constitution while other significant changes rather affect the degree to which the established constitutional program has been modified. This is true especially for the notable anti-electoral stance of Thai constitutionalism. Varying and intensifying the anti-electoral regime of the 2007 Constitution, the Bill markedly tightens the anti-electoral screw to a new degree that leaves no doubt that the ensuing system will not be mistaken for a Western-like form of a democracy. Moreover, partly contributing to this effect, the Bill also displays notions of a ‘retro-design’ that resembles rather older features of constitutional design that have characterized constitutions prior to the TC 1997.

Essentially, in terms of innovation, however, the Bill features the above indicated second restatement of nothing less than the constitutional basic structure, the ‘democratic regime with the King as head’ (DRKH), which has already been altered profoundly by the Interim Constitution 2014.

All these changes and modifications have to be seen as reactions to the challenges to the established socio-political order and the hegemonic social contract that have been encountered in recent years; – reactions, however, that obviously represent the particular preferences of the governing regime. As evidenced by the first draft Constitution of 2015, which had eventually been rejected, they represent a choice among other options even from the point of view of the society’s conservative forces and their joint preservative agenda.
Most important among all new features of the Bill is, however, the outright alteration of the constitutional basic structure. The latter is generally understood as representing any constitution’s main answer to the ultimate question of constitutional identity. It is, so to say, the manifestation of the ‘social contract’ in the form of positive constitutional law, the core of the constitution’s normative formula.

Thus, while the Bill continues to state its adherence to the ‘democratic regime with the King as head’, which is the label of the long established constitutional basic structure in Thai Constitutionalism, it adjusts this normative core-figuration fundamentally. With this change, the Bill – like the Interim Constitution before – reflects the somehow compelling demands of the current context of constitution making that is influenced by substantial factual change as it has been indicated by the quotation of two of the drafters above.

Noteworthy are also other significant deviations from the 2007 Constitution or 1997 Constitution. Generally, it might well be said that the constitutional set-up of the 2016 Bill displays much greater distinction from the 2007 Constitution than the latter has displayed with respect to the 1997 Constitution. Compared with the obsolete 2015 draft on the other side, the 2016 Bill expresses much less eagerness to explore new and stronger elements of civil society participation in politics in pursuing the manifest anti-electoral cause that characterizes both drafts. Arguably, the change from the first to the second (present) draft reflects a certain re-balancing within the preservative ‘loyalist’ camp in favor of its military-bureaucratic wing and to the disadvantage of the ‘civil society’ wing. This process parallels an ongoing inclination to marginalize the grand loyalist political party, the Democrat Party, and a tendency to rather weaken than strengthening the Constitutional Court.

While the 2015 draft would have had accommodated the pseudo-progressive discourses and forces within the preservative camp that dominated the 2013/14 anti-government street movements, – partly resonating religious fringe discourses of Buddhist provenance –, the present Constitution Bill is rather the expression of a rational, mundane narrowing down of the regime-enabling elites to the advantage of more ‘classical’ conservatives.12

This shift might have been motivated by two related factors. On the one hand, to obtain power from an adversary government as it has been managed in 2014 and to maintain it for a longer period of time are two very different things. To maintaining power for a long time the powers-that-be will have to accommodate the demands of their own core ‘constituency’ which is the

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military at the first and the bureaucracy at the second place. On the other hand, any form of popular empowerment, even one that targets conservative-nationalist civilians as the ‘yellow’ mass movements, might turn out as a twofold sword which might also be wielded someday against a government of formerly likeminded forces.

Accordingly, the 2016 design shows a more military-bureaucratic leaning whereas significant quarters of the driving forces behind the 2013/14 pre-coup street protests seem to be inclined to become decoupled from the efficient power structure.

By not attempting to involve the loyalist civil society as an active force within the constitutional structure as the 2015 draft decisively did, the 2016 Bill is also constructively less ambitious and, arguably, also less broadly and enthusiastically supported from within the generally system-preservative loyalist camp.

At the same time, the new constitutional set-up will create a more predictable constitutional order for the powers that be than the 2015 would probably have. Accordingly, the self-bestowed labels of the 2015 draft constitution and the 2016 Bill have tellingly changed: The “People-centered Constitution”\textsuperscript{13} has become the “Anti-corruption Constitution”.\textsuperscript{14} What has not been changed, however, that has to be reiterated again, is the deeply anti-electoral stance of the draft that is accompanied by an explicit display of conservative moralism. Both notions, which are typically interrelated in historical-comparative perspectives, have characterized Thai constitutionalism for a long time. Yet, they surface now in a more determined form than ever before, manifest especially in form of an ethical code binding constitutional actors, enhanced sanctions against individual political office holders, a more robust tendency to not only contain the ‘vagaries’ of electoral politics but refuse democratic governance in its ‘Western’ form and, lastly, in form of a more forcefully expressed mission to ‘morally’ educate the people. These aspects shall be regarded more closely with a special focus on the (re)shaping of the basic structure and the profound anti-electoralism necessitated by it.

\textsuperscript{13} The Nation, November 7, 2014.
\textsuperscript{14} “The constituents and the constitution”, Bangkok Post, July 31, 2016.
The Anti-electoral Stance as Negative Expression of the Basic Structure

Concerning the Bill’s anti-electoral, anti-political stance it might be remembered that the basic trend has been set decades ago. All but unknown to early American and European constitutionalism, it has always dominated Thai constitutionalism to different degrees. Before then Prime Minister Thaksin Shinawatra successfully employed electoral politics as a tool to pave his way to power, this anti-electoralism had been markedly muted or superseded by majoritarian progressivism only with two short and exceptional intermezzi in 1946 and 1974, which itself remained restrained as compromises with royalist-conservative forces. With the adoption of a more entrenched constitutionalism – even if still more as form rather than substance –, the 1997 Constitution provided for the first time a differentiated legal regime to contain electoral politics that, however, could not prevent Prime Minister Thaksin from exploiting electoral politics to challenge the existing system at heart.

Different from the proponents of majoritarian politics back in the 1940 and 1970s, Thaksin’s notion towards electoral politics was a rather instrumental one. By it, he contested the established, entrenched and distinct anti-electoral constitutional basic structure from an unprecedented position of strength no other elected Prime Minister ever had in Thailand. Naturally, the reaction was anti-electoral in nature again. This became manifest in the constitution and especially the constitutional process adopted after the 2006 Coup that ousted Thaksin without, however, rooting out his influence. If electoral politics represented a rather abstract danger for the drafters of the 1997 Constitution, the 2007 Constitution envisioned them as a concrete danger. In so far, they responded from their perspective to the living manifestation of the vagaries of electoral politics in the person of Thaksin and the Redshirts that partly supported him personally, partly rallied behind him for another, more genuinely progressive cause.

15 Only since the 1997 Constitution however, it has been inscribed in the letter of constitutional law while it formed a lead theme of the grand political narratives since the restoration of royal authority after WW II.
Since 2006, the dominating anti-electoralism became thus more vigilant and was practically reinforced especially also by the courts. Since the 2014 Coup, this stance takes an even more vigorous shape.

Before the current stage of this particular anti-electoralism will be assessed more closely, it is necessary to acknowledge the fact that it functionally represents a negative manifestation of constitutional identity and the corresponding basic structure as it shapes Thai constitutionalism. Anti-electoralism might well be understood as the natural shadow of the ‘democratic regime with the King as Head’ (DRKH), notwithstanding the fact that the electoral mechanism might well be adopted as an important constitutional feature under the DRKH.

Since its emergence during the 1970s, the DRKH has actually been characterized by an inherently ambiguous attitude towards the principle and processes of electoral democracy. While the electoral mechanism was deemed expedient if eventually not even necessary to provide a more inclusive, legitimate and dynamic, thus stable political system, it was always also considered dangerous and to be carefully contained.

Besides a general distrust concerning the suitability of Western electoral democracy in Thailand, the project to discipline and control electoral democracy was especially supposed to prevent the electoral principle from thwarting one of the central emanations of the ‘democratic regime with the King as Head’. This is the constitutional key norm ordering that it is the King who exercises the sovereign power of the People through the executive, legislative and judicial state power, – even if in rather discrete and indirect than in form of direct orders and interventions.18

This constitutional core principle had to be shielded against possible overspill effects especially when the 1997 Constitution acknowledged a greater role for electoral politics in Thailand. Arguably, it was largely the ensuing demand to control and contain the dynamics of electoral democracy that was the main reason for the shift towards the unprecedented legalism that took shape in the high number of newly introduced scrutinizing institutions and mechanisms.

Outmaneuvering several of these mechanisms Thaksin’s claim to rule the country based on a legitimacy derived from elections and a high performing governance practice – his ‘CEO-style’ administration that was characterized by direct and effective managerial interventions –, challenged both the written and the unwritten tenets of Thai constitutionalism. Instead of complying with his role to serve His Majesty’s loyal government under the ‘democratic regime

18 See section 3 of the 1997, 2007 Constitution and the Constitution Bill respectively that stipulates: “The Sovereign power belongs to the Thai people. The King as Head of the State shall exercise such power through the National Assembly, Council of Ministers and the Courts in accordance with the Provision of this Constitution.”
with the King as Head’. Thaksin’s performance-oriented populism was seen as an attempt to push a ‘democratic regime’ of prime-ministerial provenance at the top of the normative hierarchy, threatening to leave the DRKH as a mere shelf. With this daring bid for power, the formerly abstract caution of system-loyal forces towards electoral democracy transformed into an acute alertness. Result is the 2007 Constitution, which can well be read as an ‘anti-Thaksin Constitution’\(^\text{19}\), and the stunning judicialization of politics that defined the constitutional process at critical junctures from 2008 until 2014.

The Constitution Bill represents the latest stage of this intensifying anti-electoral trend. As such, it forms also its climax.\(^\text{20}\) At this stage, the notion of electoral politics as an acute danger that had been attributed to the Thaksin challenge has been merged with the older, more abstract anti-electoral notion of the 1997 Constitution. Now, electoral politics are even considered as inherently flawed \textit{in principle} and \textit{acutely dangerous} for the common good – at least as long as they are entrusted to the established political caste.

The corresponding anti-electoral determination of the current regime has most visibly manifested already in its decision to exclude political party members entirely from the National Legislative Assembly by the Interim Constitution.\(^\text{21}\) Presently it continues in form of a NCPO order that prohibits political parties from engaging in any political activity. The anti-electoral stance is also reflected by constitution making. Compared to the creation of the 2016 Constitution Bill, the drafting of the 2007 Constitution was much more inclusive and subject to free public discursive deliberation than those of 2016 Bill, not to speak of the severe limitations on the public discourse on the draft constitution before the 2016 referendum.

That this intense alertness and rejection even includes the traditionally loyalist Democrat Party came as a surprise for many indicating a crack in the established hegemonic structure.\(^\text{22}\)


\(^{20}\) See for the context of the 2007 Constitution Harding, above fn. 17, p. 123.

\(^{21}\) Section 8 Interim Constitution stipulates that “a member of the National Legislative Assembly shall not be under the prohibitions as follows: (1) being or having been a person holding any position in a political party within three years prior to the date of appointment as a member of the National Legislative Assembly […]”

\(^{22}\) This crack is reminiscent of times when the card of electoral politics has been partly played to counter an autonomous pursuit of military influence as during the 1970s and 1980s.
Shifts in the basic structure and a rebalancing towards a more moral-political constitutionalism

Another further entrenchment of an already established tendency pertains to the dominant mode of constitutionalism, its leaning toward abstract ideological terms on the one hand and a more legal or more political form of channeling and checking political power on the other.

Concerning the abstract ideological leaning, the anyway deeply conservative-moralist notion of dominant Thai constitutionalism appears further strengthened. As indicated above, this complements the Bill’s anti-electoral stance in both epistemic and functional terms. Having been equally reinforced since the Coup, both discourses – those on moral values and the anti-electoral one – have shaped public policy and the constitutional content and design much more than before. Yet, this stronger conservative notion is accompanied by a similar trend towards a valorized political element in the dominant mode of the coming constitutional order vis-à-vis the predominantly legal one. While retaining a differentiated system of legal checks on electoral power, the Constitution Bill gives way to more political rather than legal forms of decision-making at some particularly critical junctures of its normative architecture.

In comparative perspectives general experience shows that a tendency towards a more ‘political’ vs. more ‘legal’ form of constitutionalism often implies such a distinct moral stance which basically occurs in two possible variations. A ‘progressive’ one is based on a forward-looking utopian morality of societal change. In Thailand, such a leftist agenda has shortly dominated after the 1932 revolution. Mainly carried by the civilian wing of the then ruling People’s Party it failed, however, to gain sustainable traction after a short revival of the corresponding political discourse in the mid-1940s. Arguably, this influence ended in 1951.


24 Pridi Panomyong, one of the leaders of the 1932 revolution, and his likeminded associates were progressives or socialists (albeit of a Thai, Buddhist leaning) respectively. Yet, they dominated the ruling People’s Party only for a short time after the coup to celebrate a short comeback at the end of WW II. Under the Pridi-influenced 1946 Constitution, they formed a considerable political weight until a military-royalist coalition took over with the 1947 Coup. An attempted coup by Pridi in February 1949, the ‘Palace Rebellion’, failed. In June 1951, supporters of Pridi, most of them from the navy and the marines, staged another coup, the ‘Manhatten Coup’. Its failure in bloodshed ended all chances of the progressives to significantly influence political life in Thailand again. See for the developments in 1951
The conservative variant of a political form of constitutionalism is based in contrast on a preservative stance that is inclined to orient itself at the moral values and the corresponding normative order of the past which is often envisioned as a ‘golden age’. Such a moralist stance dominates Thai constitutionalism since 1947 almost uninterruptedly. Initially, this conservative constitutionalism did not prominently employ any differentiated legalism. That changed only with the 1997 Constitution which employed a highly differentiated legalism without, however, transforming this legalism in a mutually reinforcing nexus of representative democracy, rights and the rule of the law and thus refraining from adopting a Western-like rule-of-law.

In other words, neither constitutionalism nor legalism have represented an end in itself. In the contrary, elements of a Western form of constitutionalism have always been regarded as a mere instrument to protect non-written constitutional values of conservative-moralist provenance rather than representing the said nexus of representative democracy, rights and the rule of the law as the supreme manifestation of constitutional identity.

Now, with respect to the Constitution Bill, the inherently conservative moral notion of Thai constitutionalism surfaces even stronger, yet in an adjusted form. Whereas legalism is still consequently employed, the relative weight of this essentially instrumental legalism has been slightly decreased. Increasingly, the Constitution takes resort to more political mechanisms instead. After the 1997 and 2007 Constitution significantly strengthened the legal fabric within the constitutional order to stabilize the unwritten “Cultural Constitution” and to contain electoral democracy, the 2016 Bill basically continues this path where it comes to containing electoral politics while it reinforces ‘political’ elements to concurrently enable a necessary exercise of political power. At the most prominent juncture which is reflecting this trend, this even affects the normative core of the Constitution, the now reformulated constitutional basic structure.

This observation gives an opportunity to reflect on the most significant change in the entire Constitution Bill, the now adjusted basic structure which resonates not only the trend to a more political form of constitutionalism but also shifts in the balances of power that seem still fluid.

At this point, the most important innovation of the Constitution Bill, the provision recalibrating the basic structure which is also one of the core norms re-defining the balances of power in the new constitutional setting shall be analyzed more thoroughly. This central provision is section 5 which is a new version of what has been section 7 in the previous 1997 and 2007 Constitution. No other provision of the Constitution Bill reflects the current patterns of

continuity and change of Thai constitutionalism more than this one and no one is more important with respect to the shape of the constitutional basic structure.\textsuperscript{25} In accordance with the corresponding section 7 of the previous 2007 and 1997 Constitution the new section 5 (2) of the Constitution Bill stipulates that:

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

With almost the same wording as in the 1997 and 2007 Constitution,\textsuperscript{26} the content of this central norm has substantially changed since the coup due to additionally introduced subsections.

The basic principle formulated by the former section 7 of the 1997 and 2007 Constitution was the arguably most important norm of the entire constitution as it acknowledged a supreme layer of unwritten constitutional norms centered at the ultimate sovereignty of the King, valid before and beyond the positively established constitutional law.\textsuperscript{27} Essentially it had been constituted by a vague and unchecked monarchical prerogative. This unwritten ‘super-constitution’ has frequently been invoked by system-loyal forces between 2006 and 2013 calling for the exercise of royal prerogative powers to replace then Prime Minister Thaksin and the subsequent Thaksin-close Prime Ministers respectively (namely Prime Ministers Samak, Somchai, and Yingluck).

Regarding the nature and rank of the norms referred to by the unwritten principles of the “constitutional practice in the democratic regime of government with the King as Head”, the 1997 and 2007 Constitution neither prescribed any procedure of how to operate section 7 nor any competence of a designated institution charged with this duty.

Both have been changed after the 2014 coup, in the form of the Interim Constitution. Though being profound the change has remained largely unnoticed in the literature. Moreover, it did not remain the last change of the principle formerly regulated by section 7 of the 1997/2007 Constitution. Meanwhile, the Bill introduces another version which is yet not less profoundly different from section 7 of the 1997/2007 Constitution. Any change of section 7 of the 1997/2007 Constitution had previously been hardly imaginable, yet the principle has thus been changed two times already, first by

\textsuperscript{25} See Glaser, above fn. 17, pp. 331 ff.

\textsuperscript{26} Newly introduced with the Interim Constitution is the word ‘act’ (“it shall be acted or decided”) which arguably reflects the trend to a more political form of constitutionalism as well.

\textsuperscript{27} See Glaser, above fn. 17, pp. 298 ff.
the Interim Constitution and second by the 2016 Bill. Representing the single most critical change of the established tenets of Thai constitutionalism, it is crucial to recapitulate the genesis of the principle in some detail.

Section 5 Interim Constitution – to start with the presently still valid law – has introduced two major novelties with respect to the former section 7. First, section 5 Interim Constitution requires that a decision based on the unwritten principles of the “constitutional practice in the democratic regime of government with the King as Head” would have to be in accordance with the written constitution. Secondly, it designates the one who is charged with ultimately deciding if such decisions on the basis of the unwritten principles of the “constitutional practice in the democratic regime of government with the King as Head” are in accordance with the written constitution:

In the case where the question concerning the decision […] arises in the affairs of the National Legislative Assembly, it shall be decided by the National Legislative Assembly. If the question does not arise in the affairs of the National Legislative Assembly, the National Council for Peace and Order, the Council of Ministers, the Supreme Court or the Supreme Administrative Court may request the Constitutional Court to make a decision thereon […].

Together, these modifications turn the normative character of the former section 7 upside down. Effectively, they transform the acknowledgement of an unwritten ‘super-constitution’ formed around a non-delineated and unchecked monarchical prerogative merely into a reference to constitutional customary law to be applied subsidiary to the written constitution and to be formally reviewed with respect to its conformity with the latter.

This change – as dramatic as it is – seems, however, not to be the last word on the changing content of this key norm. The 2016 Constitution Bill substantially modifies the principle again. After repeating the basic principle that “whenever no provision under this Constitution is applicable to any case it shall be acted or decided in accordance with the constitutional practice in the democratic regime of government with the King as Head” (section 5 (2)), the new section 5 (3) stipulates another major innovation. First, the drafters drop the required consistency of decisions based on the unwritten principles with the written constitution and their justiciability. Second, they designate a new body to apply the resurrected super-power. The new subsection three reads:

In the event where the circumstance under paragraph 2 arises, the President of the Constitutional Court shall convene a joint
meeting of the President of the House of Representatives, the opposition leader in the House of Representatives, the President of the Senate, the Prime Minister, the President of the Supreme Court, the President of the Supreme Administrative Court, the President of the Constitutional Court, and the Presidents of the constitutional organizations to make a decision thereon.

This new version of section 5 shifts the power to decide or act on the basis of the unwritten principles of the “democratic regime of government with the King as Head” from the Constitutional Court/NLA respectively to a joint committee consisting of the heads of the numerous constitutional bodies. According to section 5 (6), decisions of this ad hoc committee are made by a majority of votes among the present office holders and shall be deemed final and binding. Notably, the new section 5 requires no longer that decisions have to be made in accordance with the constitution and stipulates no review instance any more.

This change is flipping the character of the constitutional principle once more. This time, the norm enables an ultimately superseding power again while it switches the empowered actor: First, the reference by the new section 5 is not anymore directed at a subsidiary customary law rather than restoring the prerogative power that formerly inhabited the unwritten principles of the ‘democratic regime of government with the King as Head’. With the new version of section 5 these principles at least approximate their former place at the normative firmament of Thai constitutionalism. The ad hoc committee commissioned to operate them is, after all, empowered to exercise an unreviewable power above all others by which it is turned in a kind of supreme leadership committee for ‘special situations’ – situations which, however, are not defined at all. Neither is the scope of its actual powers. In effect, section 5 creates an almost unlimited commissarial power entrusted to a politbureau-like ad hoc committee that would rest above and supersede the normal constitutional mechanisms. Due to its composition, the large majority of its members can be expected to be more or less attached to the powers-that-be.

At this point, it is interesting to note, that section 5 somehow resonates an older suggestion having been unsuccessfully proposed in the wake of constitution drafting after the 2006 Coup. Back then, some drafters of the 2007 Constitution suggested an implementation of a similar supreme ad-hoc leadership committee yet not at the most prominent position defined by the former section 7 as one of the entire Constitution’s most central norms in chapter one of the Constitution but in a subsection of section 68 of the 2007 Constitution which had dealt with the ‘defense’ of the basic structure. Besides the fact that the innovation was eventually not introduced – as it went too far
under the conditions then – it was also not supposed to replace section 7 which remained as an unchallenged and untouchable pillar of the Constitution’s architecture. This episode highlights not only continuity and change of Thai constitutionalism once more but also the shift from section 7 to section 5. The inter-temporal comparison to a finally unsuccessful suggestion also accentuates the fact, that the new ‘supreme committee of state’ occupies a constitutional place that had been one related to the sovereign power.

With that another observation surfaces that concerns a striking functional similarity of section 5 of the Bill with the most important norm of the Interim Constitution, its section 44. Regarding the possibility to switch from regular constitutional rule to such an extra-legal rule by political decision making section 5 somehow emulates section 44 Interim Constitution notwithstanding the fact that there is a twofold difference between both norms. First, the powers according to section 44 are concentrated in the hands of the NCPO Head while section 5 establishes a committee of twelve. Second, and more importantly, the powers according to section 5 (3) are not supposed to be regularly exercised on a permanent basis as it is the case for section 44 but by an ad hoc organ to be convened under special circumstances – even if not necessarily in a situation of national emergency. Functionally closely related, section 5 might thus be described as a ‘small section 44’ for the permanent constitutional regime.

Another interesting difference is posed by comparing section 5 Interim Constitution and section 5 Constitution Bill. Both have a highly important impact, yet in quite different ways. Section 5 Interim Constitution is primary negatively significant as it transforms a formerly untouchable supreme of constitutional ordering into a secondary one, one that is not above but below the written constitutional regime in rank. Section 5 Constitution Bill on the other side is positively significant as it introduces and enables a new, highly potent constitutional body superseding all others. While section 5 Interim Constitution primarily affects the normative character of the unwritten principles of the ‘democratic regime of government with the King as Head’, section 5 Constitution Bill implements an Archimedean point in the constitutional power structure. Section 5 Interim Constitution takes away a normative dimension, section 5 Constitution Bill constitutes a central lever of the Constitution’s ‘mechanics of power’, decisive for the endeavor to define a factual center of gravity in the new constitutional framework. This latter observation points to the difference between section 5 Constitution Bill and section 7 of the 2007 Constitution. The former might restore a power center above the Constitution that has been neutralized by the Interim Constitution but does, nevertheless, not root this new power center in a tangible layer of normative ordering as the 2007 Constitution did. Here, the Bill meets the unavailability of a changing reality: The ‘Cultural Constitution’ which had
been enshrined in the unwritten principles of the ‘democratic regime with the
King as head’ based after all on the inherent link between the ‘actor’ and the
extra-constitutional norm enabling this ‘actor’ when it comes to the unwritten
royal prerogatives. As a sort of Thai natural law, the powers of section 7 are
intimately linked to the whole body of norms, narratives and historical
experiences of Kingship, not a merely positivist allocation of powers. Essentially, norm, power and actor form a continuum in the political theology
of section 7. If the equation provided by it lacks one of its terms the other one
is endangered to either denature or to escape the conceptual grasp. The point
is, at core section 7 has regulated royal prerogatives, not those of a committee
just acting on behalf of a normative concept that is based on the
acknowledgement of such royal powers. As difficult as these differences and
changes surrounding the mutations of the former section 7 might be to grasp
as much do they point to a watershed in Thai constitutionalism that leaves the
ultimate frame and fundament of the prospective constitutional order under a
veil of uncertainty.

At this point, the considerations are leading back to the initial question
concerning the dominant mode of constitutionalism as to be expected from the
Bill. Especially section 5 of the Bill seems indeed to reinforce and epitomize
the indicated inclination from a predominantly legal to a more political
constitutionalism. The shift from a juridical application of the principles
provided by section 5 of the Interim Constitution to a political form of crisis
mechanism as established by section 5 represents the most visible sign of this
tendency. Noticeably, the Constitutional Court had its most significant
impact in providing a sort of ‘crisis’-protection of the basic structure with ‘law and
justice’ appearing as mere strategic Hobbesian values, “valued not per se but
rather for their beneficial regulation of social action.”28 Obviously, the Court
will play a less inevitable role as the savior of last resort within the
constitutional frame, increasing the notion of political rather than legal
constitutionalism within a continuum in which decisionism has always played
an important role.

Even if this latest stage of the development does not reverse the established
trend it sets a different accent compared to the dominating tone set first by TC
1997. Much more than this Constitution’s often claimed democratic character
it has been one of its most significant novelties after all to instrumentalize a
predominantly legal form of constitutional rule to a degree that had previously
been unknown to Thai constitutionalism. This trend continued under the 2007
Constitution with a preference for ‘legally’ shaped mechanisms that were
supposed to deal with the vagaries of electoral politics as they had manifested
so threateningly in form of the Thaksin-challenge. The ensuing unique

judicialization of mega electoral politics that was accompanied especially by loyalist civil unrest does not any more the constitutional rescue of last resort. Through section 5 (3), there is an understanding that the current context of a still looming system crisis requires means other than legal mechanisms that stop short of a military coup. It might, however, be asked if this is the only rationale for section 5 (3). True, the formerly applied legal means might be regarded as being ultimately insufficient to prevent the Thaksin camp from ruling the country again from the perspective of the drafters while another putsch is obviously deemed to be too costly to be avoided by all other available means. It is, yet, also possible that the modification of the Constitution’s ‘militancy’ is not only due to the matter of efficiency but also of style or strategy respectively. The reliance of judicial mechanisms might in other words not only be regarded as less efficient but to a certain degree maybe also less attractive than an alternative political mechanism like those of section 5 (3). This would be in line with the inclination to drive back the influence of both the Constitutional Court as well as loyalist civic unrest as it will be shown below.

Summarizing the development from section 7 of the 2007 Constitution first to section 5 Interim Constitution and eventually to section 5 Constitutional Bill indicates a shift not only of the constitutional basic structure but a development also pertaining to the predominant mode of crisis-related decision making. Here the Constitution Bill represents a move from a more legal to a more political mode of constitutional crisis management as reflected by the re-design of the Constitutional Court and the vacation of the civic right to resistance against coup d’états (see below).

**Constitutional identity and the preamble**

A telling ‘architectural’ feature to help grasp the agenda behind or the underlying trend that inhabits a constitution is its preamble.\(^2^9\) Traditionally,
preambles of Thai constitutions often reveal indeed mission statements on the spirit of constitution making and the constitutional identity the drafters strive to preserve. This applies also to the 2016 Bill. Three aspects of its preamble shall be highlighted in this sense.

Firstly, the preamble confirms once more one of the central elements of the traditional view on Thai constitutionalism by distinguishing the written constitution as a merely ephemeral phenomenon from the invoked longevity of the “democratic regime with the King as head”. The DRKH is referred to as separated from the written constitution. Generally, in a broader sense, the DRKH can be described as a supreme canon of normative ordering that is intersecting the written and the unwritten as well as a distinct legal and a ‘cultural’ layer of the constitutional order. Here, however, it is addressed as the permanent element of a Thai constitutionalism shaped otherwise by the elusiveness of the single Thai constitutions. According to the preamble the King is so far graciously pleased to proclaim that; whereas the Prime Minister has informed the King that since His Majesty Prajadhipok Phra Pokklao graciously granted the Constitution of the Kingdom of Siam, B.E. 2475 [1932], Thailand has continuously upheld its intent to adhere to ‘the democratic regime of government with the King as head’. Despite annulment, amendments, and promulgation of Constitutions on several occasions […] the administration has not become stable or orderly owing to various problems and conflicts.

These words reflect more than just the fact that Thailand has had several codified constitutions since 1932. Implicitly it juxtaposes the obvious limitations of their endurance with the invoked permanence of the Thai nation’s adherence to the “the democratic regime of government with the King as head” as both the core and transcending normative dimension of positive constitutional law.30

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30 See also the preamble of the 1997 Constitution according to which the King is “graciously pleased to proclaim that whereas Constitutions have been promulgated as the principle of the democratic regime of government with the King as Head in Thailand for more than sixty-five years; and there had been annulment and amendment to the Constitutions on several occasions, it is manifest that the Constitution is changeable depending upon the situation in the country.”
In this regard, as many preambles before, the preamble reinforces continuity, albeit at a particularly critical juncture now. At the same time, the claimed continuity of the “democratic regime of government with the King as head” has to be read contextually with regard to the profound changes of the former section 7 of the 2007 Constitution in form of the modifications introduced by section 5.

Another notion of continuity is implied by the reference to King Prajadhipok Phra Pokklao – Rama VII – as the one who has granted Thailand’s Constitution of 1932. Repeating an important narrative of traditional Thai constitutionalism, it claims that it has been King Prajadhipok who has graciously granted the first Constitution of the Kingdom of Siam – regardless of the successful coup against his formerly absolutist rule by the revolutionary People’s Party in June 1932.

This narrative also reinforces an often-repeated hegemonic claim of a Thai Sonderweg of democratization as having been implemented from above. Part of the overall narrative is also a view that this positively connotated Thai democracy has always been compromised and polluted by unduly demands and transgressions from ‘below’. Such ‘corrupted’ democratic demands are seen as responsible for the inherent weakness of the numerous ‘failed’ constitutions from this perspective.

Secondly, resonating with aforementioned political narratives, the preamble also reflects a more current manifestation of the anti-electoral stance that characterizes Thai constitutionalism since its beginnings. In this regard, it invokes the “constitutional crises” that accompanied Thaksin’s challenge since 2006 and led in particular to the 2006 and 2014 Coup as expressions of a national calamity caused by the corruption of ‘certain’ people. Making clear to the ‘audience’ who is to be blamed for all problems that brought about the Coup and eventually also forms the Bill’s raison d’être thus, it claims:

Sometimes there have been constitutional crises with no solutions and partial causes thereof were attributed to people who ignored or disobeyed administrative rules, corrupted or distorted power or did not recognize their responsibility to the nation […].

The reference to “people who […] corrupted or distorted power or did not recognize their responsibility to the nation” is in fact a not even a carefully concealed but very obvious allusion to the ‘Thaksin-camp’. In other words, the preamble openly expresses the Bill’s decisive anti-Thaksin agenda. It has to been seen though with regard to the extent to which former Prime Minister Thaksin’s sustaining bid for power struck at the fundamentals of both the constitutional basic structure and the hegemonic social contract.
Furthermore, the preamble also presents a critical evaluation of Western-style democracy, thus, basically a conception of government based on the translation of people’s sovereignty through elections into political power. The preamble rejects this conception of democracy for the Thai context – at least for the current one. It clarifies that the “political and administrative rules” of the past – those leaning closer at the model of Western-style electoral democracy – have proven to be “not appropriate for the situation of the country and the [current] time period.” Moreover, the preamble claims that importance had been wrongly attached “to the format and procedure rather than the fundamental principles of democracy”, in other words: to the electoral mechanism rather than good governance in the understanding of Thai-style democracy. The latter is, in a nutshell, embodied by the King’s centrality, the conception of a direct bond between king and people, and the governance values the King represents.\footnote{See Henning Glaser, “Visions of the Good Society: Good Governance, Corruption and Public Law – Reflections on Selected Thai, German and Global Discourses,” in: \textit{Thammasat Law Journal} Vol. 44, No. 2 (2015), pp. 384-414.}

The explicit and manifest anti-electoralism expressed by the Bill runs like a red thread through the entire constitutional set-up indeed. As such it forms a kind of ‘negative’ string of the constitutional DNA that defines the identity of hegemonic Thai constitutionalism since the 1997 Constitution with remarkable constructive consequence. Now, however, this anti-electoralism reaches another level which is also reflected by the preamble. Neither in the 1997 nor the 2007 preamble, the notorious anti-electoral stance of Thai constitutionalism surfaced so obviously as it does now.\footnote{Similarly blunt is only the preamble of the 1976 Constitution.}

Another observation pertains to the preamble’s ‘ritual’ semantics. As indicated, Thai preambles traditionally contain similar key phrases such as the reference to the foundational narrative of Rama VII’s original gift of modern constitutionalism that has been analyzed above. The respective phrase on constitutionalism and democracy as a generous endowment of King Rama VII regularly repeats certain semantic set-pieces: Thai preambles refer to the foundational narrative not as a statement of ‘We, the People’ – with the people anyway not directly ‘speaking’ in the preamble. Instead, an omniscient narrator is reporting that the King – the one who gives the respective constitution – has been “informed” about the foundational act of his Uncle: “[…] has informed the King that since His Majesty Prajadhipok Phra Pokklao graciously granted the Constitution […] 1932 […].”\footnote{Different from the usual foundational monologue embodied in the claim of a “We, the people”, Thai constitutions’ preambles have typically recounted a ritual dialogue between the king as the holder of the ultimate, un-constituted sovereign power and the representatives of the constituted power, normally the somehow addressed legislature (or the de-facto power of a coup-group respectively which, however, would be considered to
is used in various constitutions as an often-repeated semantic set-piece in the construction of a ritually reproduced fictive dialogue.\textsuperscript{34} The same is basically true here, yet with a remarkable modification. The point now is a replacement of the actor who normally makes reference to the foundational narrative as reported by an omniscient narrator who provides a ‘frame report’ of constitution making in the preamble. This narrator, tells about the one ‘who speaks’ to the King, normally the President of the National Assembly (1978, 2007) or the National Legislative Assembly itself (1974). To give an example: “[…] the President of the National Assembly has informed the King that […].” In all variations of this frame report, the origin and nature of Thai democracy is, in other words, reported to the King by or on behalf of the National Assembly.

For the first time, this is different in the present preamble of the Constitution Bill. Here, the constitutional ‘narrator’ reports that it has been the Prime Minister who “informed” the King about the historical origin of modern Thai constitutionalism. This shift from the National Assembly to the Prime Minister as the one ‘who speaks’ at this important juncture of the Constitution’s legitimizing texture has been largely overlooked. First, the shift brings about an unprecedented ritual role of the present post-putsch government in the preamble where the National Assembly plays a correspondingly less dignified role. Second, the small but telling detail might be read in relation to the unique powers of the NCPO Head under section 44 Interim Constitution. In this sense, both, the preamble and section 44 reflect the NCPO Head’s role as the commissary guardian of the Thai nation, the one who is entrusted with safeguarding its continuous integrity, towering above all other constitutional actors.

In other words, the drafters have woven a new and significant pattern they added to the semantic fabric of the constitutional dialogue that traditionally anchors a given constitution in the foundational narrative of Thai constitutionalism. It conveys the message that leaves no doubt about the current regime’s determination to restate the national order. Lastly, the preamble contains three important mission statement pertaining to the future constitutional process. Firstly, it dedicates the constitutional project to the goal of national (re)education, the education of the people to be good citizens for the sake of “a moral and ethical system”. Secondly, the preamble decisively directs the constitutional endeavor at “preventing leaders or officials of no morals, ethics and good governance from taking power”. Both missions are combined in the third mission statement to determinately undertake national reform. The suspension of full-blown Western-style

\textsuperscript{34} See the preambles of the 2007, 1978 or 1974 Constitution.
democracy under the ‘transitional regime’ has to be seen in direct relation to these three interconnected projects of national reform, public education and, most importantly, preventing a coming-back of the Thaksin regime. These mission statements highlight also what has to be understood first and foremost under the adopted label of an ‘Anti-Corruption Constitution’, namely a constitution that prevents ‘bad’ people from obtaining public power and one which ‘produces’ citizens who also understand to distinguish between ‘good’ and ‘bad’ politicians.

**Stability and ‘Militance’ of the Constitution**

Two important issues of any constitutional arrangement are its stability and militancy, the resistance of the original constitutional formula against later amendments and the constitutionally provided arsenal to tackle anti-constitutional forces and advancements.

Pertaining to the stability of the new constitution, the Constitution Bill provides a quite original mechanism for amendments. Insofar it has to be differentiated between the permitted subjects and the procedure of constitutional amendments.

Like many constitutions that are specifically protecting their basic structure against amendments, the Bill excludes any changes of the monarchical form of state and the ‘democratic regime of government with the King as Head’ by means of an amendment (section 255).

Furthermore, it provides a comparatively unusual procedure for constitutional amendments. Effectively, it will make the coming Thai Constitution to be one of the most rigid in the world – a quality the Bill shares with the US Constitution for instance. While an amendment of the constitution requires only an absolute majority of both legislative Houses – instead of the two-thirds majority that many other constitutions would require – the quorum is nevertheless an unusually demanding one. In fact, this seemingly moderate majority must contain not less than 20% of the total number of those members of parliament that belong to the political parties that are not represented in the cabinet or among the President and Vice-Presidents of the house (section 256 (6)). The last aspect is especially interesting. As the ‘leader of the opposition’ enjoys a traditionally acknowledged constitutional role in Thai constitutionalism which is reflected for instance in section 106 (1), a member of the biggest opposition party will be among the Vice-presidents of the House. Given that the President and Vice-Presidents of the House would thus represent both the governing party as well as the biggest opposition party, the 20%-clause implies a unique and substantial role of what could be called the ‘minority-opposition’, the smaller opposition parties. They also would
have to support an amendment with at least one fifth of their members. Effectively, this introduces a third parliamentary sub-division adding to those of the parliamentary majority and the institutionalized opposition. This ‘minority opposition’ would therefore be able to prevent an amendment of the constitution even if it is supported by both the governing and the biggest opposition party.

Furthermore, as another hurdle, not less than one third of the existing members of the Senate have to additionally support the amendment (section 256 (6)). As the Senate is not constituted by general vote of the electorate, the rule constitutes another counter-majoritarian mechanism. Especially during the second transitional stage of constitutionalism, the Senate selection will be effectively controlled by the powers-that-be.

Lastly, an amendment has eventually to go through a referendum if it affects a number of enumerated issues, especially those constituting the tight disciplinary regime imposed on electoral politics (section 256 (8)).

In effect, any amendment of the Constitution is not only highly unlikely but even outright impossible if it is not supported by virtually all political powers represented in the National Assembly including non-elected Senators and substantial parts of the minority opposition parties. Concluding, the Constitution will provide a rock-solid fundament of hegemonic constitutional politics of rare rigidity.35

Concerning the Constitution’s militancy, its ‘defensive ability’, section 49 contains a mechanism of militant constitutionalism that had first been introduced by the 1997 Constitution and was later readopted by the 2007 Constitution (section 63 and 68 respectively).

The regulation gave everyone the right to request the Constitutional Court to intervene against anyone’s attempt to exercise fundamental rights against the constitution. Having been of lower practical importance under the 1997 Constitution, section 68 of the 2007 Constitution turned out to be instrumental to prevent Thaksin-loyal forces from changing the constitutionally induced balances of power by amending the Constitution. In 2012 and 2013, the provision served as a vehicle of ‘loyalist’ forces to challenge various amendments before the Constitutional Court which led to some of the Court’s most divisive decisions on ‘mega politics’. In 2013, two amendments that

35 Even if all these hurdles are taken, constitutional amendments can be subjected a-priori constitutional review by only one-tenth of the total number of each House or of both Houses if the amendment is affecting the Constitution’s general provisions of Chapter I, Chapter II on the King, Chapter XV on amendments to the Constitution, or the qualifications and prohibitions of the persons holding positions regulated by the Constitution or the duties and powers of the Courts and Independent Organs. Effectively, this is anything relevant to the country’s (constitutionally regulated) power structure in a broad sense and noteworthy not including rights.
were supposed to introduce a fully elected instead of a half-appointed Senate and to increase the government’s ability to engage into international treaties were invalidated. The challenges against these amendments formed the prelude to the anti-government movement’s concerted advances to finally unseat the Yingluck administration in 2014. This important defense mechanism of the 2007 Constitution that had previously been used to dissolve political parties on side of the Thaksin camp, returns in principle in section 49 Constitution Bill – yet in a modified form.

What was the original defense mechanism about? In essence, section 63/68 of the 1997/2007 Constitution stipulated a civil right to act as a defender of both the basic structure and the constitutionally constituted government. Everyone could request the Constitutional Court to intervene against all acts by which civil rights were exercised in a way aiming either at overthrowing the ‘democratic regime of government with the King as Head’ or at acquiring “the power to rule the country by any means which are not in accordance with the modes provided in this Constitution”, – in other words by non-electoral means.

Two changes have been made to the rule as it had been provided by the 1997 and the 2007 Constitution. The first change pertains to the provision’s scope, the second to its procedure.

Regarding the procedure to request an intervention of the Constitutional Court the provisions of the 1997/2007 Constitution requested concerned citizens that aimed at guarding the constitution to request the Prosecutor General to investigate the facts of an alleged attempt to undermine the constitutional order as described above. In case that the prosecutor would have sufficient reason to believe that such an attempt would actually be undertaken, it would then submit a motion to the Constitutional Court for ordering its cessation. In the mentioned amendment cases of 2013 and another one in 2012 the Prosecutor General did, however, not submit a request to intervene in the ongoing amendment of the constitution as applied by the private parties. This prompted the complaining citizens to directly turn to the Constitutional Court. The Court accepted the requests irrespective of the Prosecutor General’s involvement and dismissive decision causing a fierce dispute over the interpretation of section 68. While some scholars claimed the Court had unconstitutionally bypassed the Prosecutor General’s authority, the Court argued that its broad interpretation was required to enable interventions for the sake of protecting the basic structure as effectively as possible.

It is against this background that section 49 (3) of the Constitution Bill stipulates that everyone has a right to directly submit a request to the Constitutional Court in the case that the Prosecutor General either rejects the request to intervene or fails to act as requested within 15 days after having received it. In other words, the procedural involvement of the Prosecutor
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General has effectively only the function to stall the forwarding of a request to the Constitutional Court for maximal 15 days. This reduced role of the Prosecutor General might be seen as a reduction of legal rationality to the advantage of political considerations.

The other change of the formerly established defense mechanism of section 63/68 of the 1997/2007 Constitution affects one of the two possible grounds for intervention which has been scrapped now. Section 49 of the Bill does not provide anymore the right to request the Court’s intervention against attempts to obtain the governmental power by unconstitutional means. Intervention is thus possible only against acts claimed to be directed at overthrowing the ‘democratic regime of government with the King as Head’.

The scrapped provision allowing interventions against attempts to obtain governmental power by unconstitutional means covered basically two possible scenarios. One scenario were military coup d’états, the other civic mass protests aiming at the obstruction of an elected government by a misuse of the freedom of demonstration.

Such an attempt to paralyze the orderly administration of the country and the upholding of elections has indeed manifested in 2013/2014 according at least to some government supporters. They repeatedly invoked the provision against the protest movement that tried to end the Yingluck administration under the leadership of former Democrat Party secretary-general Suthep Taugsubhan.

Even if this remained eventually unsuccessful, the attempts exemplify the possible impact the provision had. Concerning the other possible scenario of a military coup, the provision had a certain sense. Practically, it would hardly help against successfully conducted coups creating a constitutional fait accompli. Yet, it would still have some symbolical impact to delegitimize preparatory stages of a coup if they would become known. Moreover, the provision simply puts the rule of law guarded by citizens against coups d’états and therefore contains a general valuation of some symbolic impact at least. In this light, it is in any of the two possibly affected scenarios constitutionally not irrelevant to scrap the defense against attempts to acquire governmental power by unconstitutional means. It is difficult to say if the change has been more motivated to favor either the armed forces or the civic loyalist movement or both. In any way, it expresses a more relaxed attitude towards ‘unconventional regime change’, given at least that the ‘regime’ is an unwarranted one. That the change is no accident follows in systematic analysis from another modification of the established arsenal of militant

36 Many coups in Thai constitutional history came, in fact, not totally surprising. Often there were rumors and even threats of looming coup politics by which the field could be tested in terms of expectable resistance, legitimacy for the future move be prepared or unwanted behavior be possibly prevented without the full execution of the actual coup.
constitutionalism. As a second noteworthy innovation, the Bill deviates once again from a standard initially set by the 1997 Constitution which the 2007 Constitution had continued unaltered. This principle, previously regulated in section 65 and 69 of the 1997/2007 Constitution respectively, has been deleted in the Bill. It gave any citizen the right to “resist peacefully any act committed for the acquisition of power to rule the country by a means which is not in accordance with the modes provided” by the Constitution. Evidently, the deletion of the right to peaceful civic resistance resonates the narrowing down of the scope of section 49. The constitutional acquisition of the power to rule the country is not any more protected by a militant constitutionalism to be provided by the people.

These modifications with respect to the previous two constitutions also mark one of the major differences in relation to the rejected 2015 Draft Constitution and its section 31 and 68. While the first draft aimed at increasing autonomous civilian control of government conduct, the Bill seems to be inclined to curtail it. The shift from the 2015 to the 2016 draft expresses the emergence of a dominant notion of a profound distrust towards civic mass movements – including the ‘loyalist’ ones. In this, the 2016 modifications of militant constitutionalism stand in a broader context of the mentioned skepticism even towards ‘loyalist’ political parties such as the DP and, as will be shown below, a certain reservation concerning core guardian institutions of the loyalist cause such as the Constitutional Court.

Electoral Democracy and the Efficient Center of Power

Based on these findings, the overarching set-up of the prospective constitutional order can be approached with greater clarity. Concerning the larger constitutional structure, the drafters faced a difficult task to calibrate the balances of power, the mere ‘mechanics’ or ‘physics of power’ of the new Constitution.

Within the framework of the parliamentary system of government that traditionally dominates Thai constitutionalism and bound also the drafters, a task emerged:

On the one hand, the drafters were supposed to pursue a profoundly anti-electoral agenda. Their task was insofar to contain and discipline electoral politics both in general and with respect to the red camp. This meant to prevent the ‘wrong’ people from acquiring power through electoral means and to limit

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37 Another marginal condition besides the parliamentary system as a constructive starting point was the fact that the drafters had to somehow meet the – decreasingly ambitious – demands of Western governments and international organizations requesting Thailand to remain somehow ‘democratic’ as basically proved by holding elections.
the margin of maneuver of an unwarranted government exposing it to scrutiny and intervention.

On the other hand, the drafters had to retain the possibility of a strong government by ‘good men’. The ‘right’ people in charge were still supposed to emerge as an efficient center of the constitutional order. After all, the nation was still deeply divided, still suffered from the consequences of a protracted constitutional crisis and, maybe most important, faced a serious transitional challenge, while it also faced an increasingly competitive regional environment. Such a context normally required a strong government able to set sufficiently steady steering impulses to sail through the rough waters ahead.

With these equally important, competing targets – containing electoral democracy and retaining the chance of strong government – under the conditions of a parliamentary system, the ensuing constructive challenge turned out to be a true litmus test of the drafters’ technical abilities.

To pass it would indeed be almost impossible in the framework of Western constitutionalism. In the framework of hegemonic Thai constitutionalism though, it remained a considerably ambitious, yet manageable task. Eventually, the drafters seem to have mastered the challenge quite well. Two major lines of constitutional design shall be analyzed in this sense. The first challenge was it so far to shape the mechanisms of electoral democracy with regard of political office holders and political parties, the second, the selection of the Prime Minister.

**Containing electoral democracy: Political parties and office holders**

Generally, the complex regime governing electoral politics is entrusted to a range of constitutional bodies with scrutinizing and interventionist powers including especially the Constitutional Court, the Supreme Court of Justice, the National Counter Corruption Commission and the Election Commission. At this point, some selected powers of the National Counter Corruption Commission (NCCC) and the Election Commission (EC) shall be presented to highlight the trend, even if the final powers and duties will be concretized by the respective organic laws which are not yet completed.

Providing for a detailed catalogue of positive and negative qualifications for Representatives and Senators, section 82 entitles a group of 1/10 of the members of both houses for example to lodge a complaint on the termination of the membership of any of their colleagues for a variety of reasons.

Section 82 (1) in connection with section 101 (1), 6 and section 98 (1), 1 for instance foresees the possibility of such a complaint due to the allegation
that representatives are addicted to narcotics. A complaint to the President of the respective House would have to be forwarded according to section 82 (1) to the Constitutional Court. Before the court renders its final decision on the membership, it shall order such member to cease to perform duties on reasonable suspicion that the allegation is true (section 82 (2)). Not so much the various possible grounds to demand the termination of membership of a colleague but the possibility to suspend the mandate on mere grounds of suspicion is actually noteworthy and new.

Another, more efficient mechanism to hold political office holders and members of public bodies tightly accountable is entrusted to the Election Commission and the National Counter Corruption Commission (NCCC) respectively. Both are commissioned with supervising the proper conduct of electoral politics and public power respectively and are requested to take similarly drastic action, – in some instances conclusively, in others in cooperation with the Supreme Court’s Division for Political Office Holders.

The Election Commission, according to section 224 (1), 3 has the far-reaching power to suspend, restrain, alter or cancel any national or local election or selection if there is a reasonable doubt that the election or selection in question was not honest or fairly or lawfully conducted. The provision entitles the EC which is called to “govern” the respective election/selection (section 224 (1), 2) with an unusual power. As even smaller transgressions of the tightly defined rules of political campaigning might be considered as relevant incidents, the provision provides a practically immensely powerful instrument to intervene on basis of a reasonable doubt in any public election/selection. The practical relevance of such a power is obvious. With respect to national elections it has been proven during the constitutional crises in 2006 and 2014. Then Prime Ministers Thaksin and Yingluck respectively had called for new elections to strengthen their heavily challenged political position. In both cases, the Constitutional Court ended the attempt, annulling the elections. In both cases, it needed some argumentative effort however to state that the respective election was not constitutional. Now, the EC is enabled to robustly intervene with its encompassing powers in entire elections even if on grounds of single incidents and suspicion.

Moreover, the EC, which is also governing the operations of political parties as to the Organic Law of Political Parties (see section 224 (1), 5), can suspend the right of a candidate to apply for candidacy in an election/selection for up to one year based on a reasonable suspicion against the respective person (224 (1), 4). This suspicion can cover the belief, “that such person has committed an act or [has] known of an act committed by another person in a dishonest fashion or causing the election or selection to be dishonest or unfair.”

This extremely broad formulation might have to be interpreted in the sense of ‘dishonest behavior in relation to the election/selection’. Similarly, the
penalized knowledge of such a behavior might be interpreted in the way that such knowledge is only sanctioned if the respective candidate had the relevant knowledge ‘without taking measures against this behavior’. These clarifications might be stipulated in the Organic Act.

However, even with these restrictive interpretations, the provision provides an unusually far-reaching competence to eliminate candidates from elections/selections on grounds of suspicion and without stipulating (yet) what would have to happen if the suspicion turns out to be wrong after the respective selection/election.

Moreover, the Supreme Court is commissioned with the final decision in these cases. If the alleged person is a member of the House of Representatives or Senate her or his legislative mandate will be suspended until the Supreme Court “has rendered its decision of innocence” (section 226 (4)). The implied reversal of the burden of proof matches the general trend.

Furthermore, the EC is entitled to request the Supreme Court to revoke the right to candidacy and the right to vote of the culprit for up to 10 years (section 226 (1) and (3)), doubling the period foreseen by the 2007 Constitution.

Similar sharp are the measures the NCCC is entitled to take or to seek from the Supreme Court. Basically, the NCCC has to inquire if persons holding political positions, Justices of the Constitutional Court, persons holding office in one of the constitutional organizations or the Auditor General, might be unusually wealthy, having been corrupt, having unlawfully over-exercised their powers, having seriously failed to comply with the ethical standard, or else having deliberately declared their assets wrongly (234 (1), see also section 235 (7)).

If more than a half of the nine members of the commission is convinced that an alleged violation has occurred, the NCCC will refer the case to the Supreme Court Division for Political Office Holders. Until the judgment is made, the accused person shall cease to perform duties (according to section 235 (3)).

If the Supreme Court finds the accused person guilty of the offence it will revoke the right for candidacy in an election for life (section 235 (3) and (4)). The potentially most incisive grounds for interventions are the unlawful over-exercise of powers and the serious failure to comply with the ethical standard which will have to be jointly stipulated by the Constitutional Court and the Constitutional Organizations (section 219).

That this ethical standard is considered as a very serious instrument by the Constitution Bill is implied by section 276. According to it, all members of the organizations commissioned with developing the standard will vacate office if they do not provide the standard within one year from the promulgation of the Constitution.
Altogether, the Bill obviously provides a considerably tight and sharp regime governing political office holders. Especially the combination of temporary suspensions based on suspicion, of broadly defined grounds for intervention and draconian consequences such as the cancellation of elections or the revocation of the right to be election candidate will equip the designated agencies with powers that will strongly impact on electoral politics. Details, however, will be implemented by the respective organic laws yet to be drafted.

Concerning political parties, basic decisions on election law in section 83 ff. will be concretized in the Organic Act on Elections which is still to be drafted. Most probably the election regime will however be inclined to weaken the bigger parties, especially the PT and the DP. Middle-sized parties on the other hand will have better chances to gain relatively in weight. The result will be a more fragmented and generally weakened parliament.

What can be followed from these observations is a tendency to continue the established anti-electoral regime in a way that further magnifies the anti-electoral arsenal available yet rather with respect to single politicians and office holders than political parties. This accentuation is reflected by a remarkable change in comparison to the previous 2007 Constitution. This is the deletion of one of the key instruments of the anti-electoral regime of the 2007 Constitution that was directly affected also the political parties. Having been introduced as a Junta Regulation after the 2006 Coup d’etat, this norm became regulated by section 237 of the 2007 Constitution.\(^\text{38}\) It stipulated:

Any candidate in an election, who has committed, created or supported any person to commit any act in violation of the Organic Act on Election of Members of the House of Representatives and the Taking of Office of Senators or orders and announcements of the Election Commission, causing the election not to be proceeded in an honest and fair manner, shall be deprived of his or her voting rights in accordance with the Organic Act on Election of Members of the House of Representatives and the Taking of Office of Senators.

If any such act of person under paragraph one appears to have convincing evidence that the leader or an executive member of his or her political party has acknowledged or ignored that action or has known of the act but failed to prevent or rectify it in order to ensure an honest and fair election, that political

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party is assumed to have sought to gain power in state administration by means other than what is provided in Section 68 of the Constitution, and in case the Constitutional Court consequently orders its dissolution, the voting rights of its leader and executive board members shall be revoked for a period of 5 years as from the date of issuance of the party dissolution order.

In other words: Any election candidate who violated the election law lost in a first step his/her electoral right. If any leader or member of executive committee of a political party knew about this violation without thwarting or correcting it, the provision ordered the fiction that this party acted to acquire the ruling power over the country through means not in accordance with the way prescribed in this Constitution as to section 68. This allowed the Constitutional Court to dissolve that political party in a second step. In a third step, the provision ordered then the revocation of the electoral rights of the leader and members of the executive committee for a period of five years.

This unique provision allowed it to link a political party’s fate to the wrongdoings of a single election candidate and the fate of the party to those of its leadership league banning it from politics for five years, a rule that would have devastated entire party landscapes in Europe. Effectively, this rule created a veritable demolition block within the political system whose activation heavily hit the Thaksin camp. It was leading not only twice to the dissolution of political parties representing it but also to the political beheading of the remaining political movement by banning its executive leadership for five years from politics.

That this mighty mechanism is not anymore contained in the Constitution Bill raises the question ‘why’. – After all, it had proven to be immensely efficient for the 2007 drafter’s cause, a cause which is still underlying the Bill as well. Yet, while section 237 of the 2007 Constitution was conceivably efficient indeed, it also proved to be a double-edged sword. Soon, it proved to be too sharp on both sides not to be potentially dangerous also for the cause it was serving. This became clear when the Democrat Party – then a cornerstone of the hegemonic loyalist coalition – finally had to be indicted by the Election Commission based on findings of the Department of Special Investigation (DSI). Based on a formal mistake by the EC and a complicated and highly formalistic assessment by the Constitutional Court, it escaped its basically mandatory dissolution only by a whisker.

Even if it is not impossible that a similar provision to section 237 of the 2007 Constitution will later be introduced in form of an Organic Act, there are no indications for such a move which also seems not very probable. Section
237 was, after all, far too important to be omitted in the Constitution Bill just to be reintroduced by an Organic Act. What would the omission mean then?

Firstly, the change seems to express a lesson learnt concerning the risks of handling highly ‘explosive’ constitutional features with mandatory impact. Moreover, it could also reflect a shift in the Constitution’s anti-electoral strategy in general. The application of the previously applied shotgun-approach seems to have been replaced by a more precise strategy of controlling the ‘vagaries’ of electoral politics by more targeted means. This change notwithstanding single political office holders can be struck more flexible and much harder now.

The motivation behind the new strategy has been explained. What can be assumed is that the change does probably not reflect a dominant influence of the political parties as they were altogether excluded from drafting. It might therefore be pondered in how far the change reflects the vested interests of the powers-that-be. They might well feel indeed the need to actively entrench themselves in future politics when elections are approaching.

After all, the polity will require an efficient government which will have ultimately have to be provided on basis of the given parliamentary system. Given that the current military backed government pursues not only a strategy of marginalization with respect to Thaksin-allied forces but an equally determined strategy not to rely anymore on the potential of the established loyalist political parties, the activation of one or several parties backing the military or being backed by the military seems to be the indicated choice. This would also correspond with respect to the notable shift from embracing an active role of loyalist civic mass movements both in the context of the 2007 Constitution and the 2015 draft to the much more restricted stance of the Bill. If thus neither the established loyalist parties but one or more military affiliated parties were to form the regime’s spearhead in the realm of electoral politics, the draconian shotgun approach of the previous Constitution could turn out detrimental indeed.

Interestingly, the adjusted strategy to contain electoral democracy by focusing on single politicians and officeholders could also imply another strategic option. It might in fact serve future ‘reconciliatory’ efforts on unequal terms by allowing the powers-that-be the elimination of persistently ‘problematic’ members of adversary political parties. Those more compliant members of such adversary parties could then be co-opted in broad coalitions or languishing in a muted coalition. The result would be an integrated, politically harmless political caste that would comply with the demands of hegemonic constitutional process. After the 2006 Coup d’ État, the dissolution of former government coalition parties that carried the Thaksin administration automatically led to the ban of the respective executive members for five years from politics. This harsh move drove many ‘traditional’ politicians only
further to the anti-establishment side of the political divide represented by the Thaksin-allied forces.

When the dissolution order and ban were issued, it was clear that those aligning themselves with Thaksin would not be considered anymore as citizens loyal to the ‘democratic regime of government with the King as head’, although many of them were traditional politicians and functionaries that still felt loyal to the monarchy. Due to this harsh exclusion many found themselves eventually with a new conscious on a political side challenging the loyalists social contract, a place that they would most probably have not chosen deliberately.

All in all, the regime that will govern electoral politics under the new Constitution will offer some potential to condition a new type of people’s representative. Such representatives will be easier inclined to accept a narrow frame to participate in the legislative process on a more technical rather than politically defined basis. They will, moreover, also be generally more compliant with the preferences of the powers-that-be. Violations of the rules can, after all, lead to draconian sanctions, potentially including the permanent loss of everything they have invested in their political career. Compliance on the other side will be rewarded with prestige and – more importantly – the chance to be close to the really important circles.

Such conditions will particularly attract certain types of politicians. This might include businesspeople who are wealthy enough to invest time and money for a return in terms of prestige and access. Other stakeholders will be bureaucrats and former officers of the security apparatus who are interested in prolonging their career in public service. Generally, one might expect the emergence of a broad political class which will be compliant with the demands of and listening to the signals from a strong government. The main function of a correspondingly designed political arena would be the election of the Prime Minister and a non-critical support of his/her administration.

**The Prime Minister as an ambivalent constitutional organ**

Pertaining to the executive power, the Constitution Bill continues the path of established Thai constitutionalism in terms of the parliamentary system of government albeit with some notable adjustments. They affect two broader issues, the formation of government and the fine tuning of the government’s position within the power structure.

Before, these issues are assessed in detail, three preliminary questions shall be pondered. Firstly, it is asked, whether a strong government and a strong prime minister especially are needed, secondly, if a strong government could be detrimental to the Constitution’s agenda and thirdly, if a strong government can be derived from election under conditions of an entrenched anti-
electoralism.

Starting point are the presumed expectations and anticipations of the drafters. Clear is that the polity will be in need of an efficient center of gravity in the future. Arguably, it is the Prime Minister who solely is suitable to form such a center of gravity on the long run. This applies especially for the time after the first transitional stage under the new Constitution. During the first transitional stage, strong government is still ensured by section 44 though. Yet, when the NCPO – and with it its absolute power based on section 44 – ceases to exist after the formation of a government based on the first national elections, the polity will need a sufficiently strong steering center of the polity as well.

As an alternative to the office of the electorally constituted prime minister, one might ponder whether the crisis-committee according to section 5 could not be envisioned as forming such an efficient center of the constitutional structure. This seems highly questionable though. The crisis-committee might provide an efficient insurance against unexpected deviations from the preferred path of constitutional politics. Yet, despite enjoying a sort of constitutional ‘super-power’ when activated, it is just an ad hoc-committee that could not form the basis of a steady administration of the country in terms of day-to-day politics. In light of the range and intensity of the challenges the country faces, the creation of such a largely ‘negative’ commissarial power seems therefore a mere necessary rather than sufficient solution to ensure administrative stability and input.\(^39\)

In sum, both, the temporary mechanism of section 44 and the crisis-power of section 5 (3) – as powerful as they are – provide either transitional or exceptional powers only. Both do not create a continuing axis of steady leadership. While the NCPO governs under a sunset-clause, the ad hoc-mechanism of section 5 (3) offers only a subsidiary emergency mechanism. After the post-election termination of the NCPO, there will be thus barely any other constitutional body remaining to function as a steady center of gravity of the political structure than prime ministerial government. It could therefore simply not be excluded from the drafter’s agenda as a key institution. On the other hand, it still carries the ambivalent potential to become both, a curse or a blessing from the drafter’s point of view. Useful to entrench the present government’s hegemonic reform agenda, the office could theoretically also be captured at ballot box.

This risk perception is palpable from a perspective on the developments prior to the 2014 Coup. Election surprises are, after all, everything but new since the first restatement of the hegemonic system by the 2006 Coup. Despite

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\(^39\) The crisis committee is, however, sufficient to eliminate an unwanted government but this creates only a negative power.
all measures to prevent the Thaksin-allied forces, elections persisted to be a major condition for the protracted constitutional crisis that was finally aborted by the 2014 Coup. The landslide election victories of pro Thaksin forces in 2008 and 2011 were in fact hardly anticipated when the 2007 Constitution was drafted.

An upgraded version of the anti-electoral regime will do its part to prevent this from happening again. Moreover, the second ‘transitional regime’ under the new Constitution, provides an additional guarantee. This is the specially designed and commissioned Senate. It will effectively frame the formation of the government with high chances to prevent an unwanted Prime Minister to be explained in greater detail below.

After this considerably long safety period of possibly two legislature periods, unwanted results of subsequent elections can, however, not be excluded as a possibility. Future rifts within the camp of the ‘loyalist’ forces could lead to new alignments across the party spectrum. A joint opposition of forces having hitherto been adversaries comprising at least parts of the biggest two political parties and being reinforced by elements of the respectively aligned civic mass movements could thus emerge as a serious challenge against a government close to the powers-that-be. Even if this seems currently not very probable, it is also not impossible and could even prematurely abort a second government formed with participation of the Senate long before its legislative period ends.

These scenarios and the experiences of previous years could only alert the drafters to the danger of election surprises, notwithstanding all anticipating fine tuning. The lesson seems to have been learnt. The Bill comes up with a number of precautious mechanisms among which two shall be analyzed now, the differentiated procedures to form a government and the ambiguous shaping of the governmental position within the power structure.

The formation of government

Given the overall situation, the creation of government might well be considered to have been one of the greatest challenges for the drafters. To “prevent leader of no morals” with great electoral appeal from taking power again – as the preamble says – and to nevertheless create conditions for a strong government of ‘good’ people was no easy task. After all, this target had to be achieved under conditions of the parliamentary system in which the government is created by and largely dependent on the governing majority in parliament. An aggravating factor is the modification of the basic structure that transfers an ultimate power from an undisputable arbiter to a crisis-committee that lacks an even slightly comparable legitimacy.
Given the various possible impacts of the given choices, the creation of the government could thus be seen as one of the angle points of the whole constitutional project. This applies at least for the period of the second transitional regime. After all, the first national elections after the 2014 Coup will be a critical juncture, decisive for the success or failure of the NCPO’s daring project to restate not only the country’s constitutional order but also the society.

To address the dynamics surrounding this critical juncture most carefully, the drafters found a constitutional formula that seems to address the competing imperatives in the potentially most successful available way. This is the combination of two subsequent transitional regimes. First, the continuation of the NCPO’s rule based on section 44 will safeguard the campaigning, election and post-election period until a government is formed (section 265). The, the second transitional regime with the crucial involvement of the Senate will strongly determine the selection of the Prime Minister. While this direct involvement of the Senate will last for five years, it will effectively exert its influence much longer as will be demonstrated below. This makes the ‘transitional’ Senate so central and this also required the significantly different shape of the Senate during the (second) transitional regime after the first elections.

During this decisive stage which is regulated in the last chapter of the Constitution Bill (section 262-279), the Senate has a markedly different shape and function than under the subsequent ‘permanent’ constitutional regime. Crucial is its enhanced function which is derived from an independent question posed by the referendum on the draft constitution. By it, the voters were asked, additionally to the first question concerning the constitution draft, whether they would allow the joint houses of Parliament to “consider approving the appropriate person to be appointed as prime minister during the first five years after a general election”. In other words, the second referendum question was whether the Senate should participate in selecting the Prime Minister. With the additional referendum question having been positively answered, the Constitution was adjusted accordingly. Based on this special commissioning, the ‘transitional’ Senate forms the backbone of the second ‘transitional regime’.

To reliably fulfill its most important function to participate in the creation of a government, the ‘transitional Senate’ is differently designed than the Senate under the subsequent ‘permanent constitutional regime’. This applies to both the selection procedure of the Senators as well as to their number.

Different from the Senate under the ‘permanent’ constitutional regime which comprises 200 members, the ‘transitional Senate’ has 250 members.

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40 See *The Nation*, September 2, 2016.
These Senators make up one third of the members of the National Assembly which selects the Prime Minister for the first five years after the first post-Coup elections.

Moreover, the selection of the Senators is also quite different during the second transitional stage. While Senators under the ‘permanent’ constitutional regime will be selected in a complicated procedure that isolates them from electoral politics, the ‘transitional Senate’ was deemed too important to be satisfied with just that. Instead, the ‘transitional’ Senate will be selected in a manner that will ensure almost an entire legislative chamber loyal to the powers-that-be. How is that to be achieved?

According to section 269, the 250-member ‘transitional Senate’ will be composed from three sources: A vast majority of Senators is selected by the NCPO from two lists. Each will be prepared by a body commissioned with this task. An additional, very small number of six Senators is finally designated ex-officio.

The first of the two selection-lists is prepared by a special Selection Committee for Senators which will be appointed by the NCPO. The second selection-list is provided by the Election Commission. The six ex-officio members are: The Commander in Chief of the Royal Armed Forces, the three branch commanders of the army, navy and air force, the Commissioner General of the Royal Thai Police and the Permanent Secretary of the Ministry of Defense. Basically, these ex-officio members are either core members of the NCPO or high-ranking security officials that will effectively have been appointed by the NCPO.

Most important among the three sources is the list produced by the Selection Committee of Senators (section 269 (1), 1c). The latter will sign responsible for preparing the selection of 194 of the 250 Senators. It consists of “nine to twelve” NCPO-selected members with a very broad qualification: “knowledge and experience in different fields and political impartiality”. This committee chooses not more than four hundred names to be presented to the NCPO which then selects 194 persons from this list to be appointed as Senator. The remaining fifty Senators will be selected by the NCPO from another list of 50 candidates and 50 reserve candidates which have to be submitted by the Election Commission (EC).

Effectively this mechanism ensures the NCPO’s complete control over the composition of the Senate. To create a correspondingly streamlined Upper House, whose composition might resemble the composition of the current NLA, will be one of the NCPO’s last tasks before it will be dissolved with the formation of a new government after the first elections.\footnote{Precisely the second transitional regime will be set in force as follows: The two selection lists for Senators shall be presented to the NCPO latest fifteen days before the national election (section 269), whereas the NCPO shall have selected all Senators within three}
Raison d’être of the transitional Senate’s design and commissioning is its crucial role to co-determine who will be the first Prime Minister after the first post-Coup national elections. For five years, the National Assembly – including the Senate –, will now select the Prime Minister. After these five years, only the House of Representatives is in charge to elect the Prime Minister.

During the five-years of the second transitional regime, the National Assembly consists of 750 members among which 500 belong to the House of Representatives and 250 to the Senate. Quorum to select the Prime Minister is “more than one-half of the total number of the existing members of the House” (section 159). These are 376 votes out of 750.

To assess the impact of this special selection procedure, some simplified model scenarios might be worked through. Two marginal conditions shall be set for this purpose. First, it shall be assumed that the 250 Senators will vote (almost) unanimously. The Senate would thus function as the de facto largest ‘party’ in the National Assembly, effectively representing the NCPO. Second, it is assumed that the two currently largest parties – the Thaksin-loyal Pheu Thai Party (PTP) and the loyalist Democrat Party (DP) –, will be inclined to have greater difficulties to muster electoral support than in the previous 2011 election. These difficulties have different causes and will probably hit the DP more than the PT.

_days after the announcement of the election results (section 269 (1), 1c) to submit them to the King for appointment. With their appointment by the King the Senate is constituted. This is heralding the start of the second five-years transitional regime.

42 Both parties will relatively loose for instance due to the newly adopted mixed member apportionment system (MMA), that will favor middle-sized parties.
Which are the most probable scenarios regarding the national elections under these circumstances? In any case, the powers-that-be, the NCPO, enjoys the best chances to decide who will become the next Prime Minister.

Since the NCPO commands not less than 33% of the total votes of the National Assembly off the cuff due to the ‘Senate-party’, it would need the support of only 126 votes from among the 500 elected members of the House of Representatives. This is equivalent to 25% of the elected Members of Parliament (MP) and amounting to not more than additional 17% of the total votes of the 750-member National Assembly.

At this point, the constitutional procedure to select the Prime Minister has to be analyzed more differentiated. The Bill provides in fact two procedural avenues to form a government.

The first and regular constitutional channel to form a government is defined by section 159 in connection with section 88. According to it, candidates for Prime Minister are elected from among a list of candidates consisting of names that have previously been submitted by the political parties to the Election Commission (EC). This mechanism, unprecedented in Thai constitutionalism, stipulates that each political party that wishes to provide a candidate for the position of Prime Minister and occupies not less than 5% of the total number of the seats in the House of Representatives can present a binding list with not more than three persons as candidates to the EC to be publicly announced. A
practical impact of the rule is that political parties which might face the refusal or disqualification of their candidates would have much less space of maneuver to switch election candidates if they get aware of such developments too late. By the same token the provision will provide a great deal of predictability for the powers-that-be. The general impact will be the creation of a more rigid frame for future election campaigning.

In case that none of the pre-announced candidates musters enough votes, section 272 opens a second, subsidiary channel during the second transitional regime. If one-half of the total number of the existing members of the House of Representatives agrees, the House can waive the candidate lists of the political parties and initiate a joint session of the National Assembly to elect a Prime Minister. Now, candidates do not need to have been previously announced by the EC. In this case, the necessary quorum is, however, notably stricter. Required is a majority of at least two thirds of the number of the existing members of both Houses.

In public debates on these different procedural channels, there seems to be some confusion. Frequently the mandatory involvement of the Senate in the selection of the Prime Minister is mixed up with the subsidiary channel to elect the Prime Minister if none of the listed and announced candidates is elected. Sometimes, this leads to the assumption that only the secondary channel to elect the Prime Minister would allow a non-MP to become Prime Minister and that the election of an ‘outsider Prime Minister’ would therefore always require a two-thirds majority.

Both is wrong. First, a non-MP is a suitable candidate with respect of both constitutionally opened channels. A non-MP can thus also be elected with 51% of the votes due to the regular procedure under the ‘permanent’ constitutional regime (section 159, 160). Second, a two-thirds majority is only required, if the respective candidate has not been listed by a political party and announced by the EC prior to the election.

Obviously, the first, regular channel to elect a prime minister from a party sponsored candidate list represents the basic model for the election strategies of the involved political forces. Regarding the likely scenarios for the first government formation based on the regular procedure, the primary challenge for the NCPO is to gain the support of at least 17% of the votes of the Assembly additional to the Senate. This is equivalent to 25% of the elected MPs and 126 votes from among the 500 members of the House of Representatives. Based on this calculus, the NCPO will have a very good chance to influence the formation of the cabinet, the PTP a very bad one.

Given that PTP candidates will most likely not be able to attract even a single Senatorial vote, they would consequently need at least 376 votes from the House of Representatives. This is equivalent to 75% of the elected representatives. While it seems nearly impossible for a PTP-led coalition to
achieve a 75% majority, it seems very possible for the NCPO to secure at least the necessary 25%.

In terms of procedure, a NCPO-favored candidate would, however, have to be nominated by a political party then. The safest way to field an own candidate in this way would be the formation of a new government-backed party. According to section 159, a party needs only 5% of the parliamentary seats to obtain the right to provide the name of its candidates for Prime Minister to the EC and 10% of the seats to later nominate its candidate for the prime ministerial election. In fact, there are some indications pointing at the possibility that one or even more new political parties with an affiliation with the NCPO could be formed before the next general election.

The bigger challenge, however, is the eventual mobilization of the necessary 126 MPs in favor of such a candidate. To achieve this quorum, different scenarios are thinkable. The easiest scenario would be based on the electoral success of a pro-military/pro-NCPO party achieving 25% of the votes alone. Even if not very probable, such an election outcome is also everything but impossible. After all, a pro-military/pro-NCPO party would represent the powers-that-be while the established party system is strongly weakened by the long period of NCPO rule during which no party participation or public activity has been possible. Since the 2014 Coup, political parties have no opportunity to publicly present or even restructure themselves. At the same time, the ongoing anti-electoral discourse has reinforced long-learned pattern of public education that consistently provided distrust in electoral democracy and is often linked with the vividly remembered experience of a perceived failure of electoral democracy prior to the Coup.

On the other side, there are various historical examples for the success of newly formed parties in Thailand in general and pro-military parties formed in the aftermath of coups in particular. After the 1991 coup d’état of General Suchinda Krapayoon for instance, the coup-group formed the Phak Samakkhi Tham (Justice Unite) Party which instantaneously became the strongest party in the 1992 elections. Even more remarkable, the second strongest party behind the Justice Unite Party was another, still relatively new party, the New Aspiration Party (NAP) which received almost 20% of the votes. The NAP had been formed by General Chaovalit Yongchaiyudh after his retirement as Commander-In-Chief of the Royal Thai Army in 1990.43

Given these historical examples, the foundation and even significant electoral success of an NCPO backed party are well imaginable given the present situation. Compared to the situation 1992, the NCPO has much more control over the society in general, has already weakened the established political parties by its ban on all political activities and might further weaken

43 Years later, it would be merged with Thaksin’s Thai Rak Thai Party.
them by means of the new Organic Act on Political Parties which will be drafted before the elections.

There is however, one crucial question remaining if the powers-that-be would aim at securing government according to the first channel by means of an elected MP to become Prime Minister. Insofar, it has to be differentiated. Such a candidate could either be a NCPO member or just a more or less loosely affiliated trustee. Obviously, the first alternative would be preferable although it is a constitutionally problematic one. After all, the transitional provisions of the Constitution order that no member of the NLA, cabinet or NCPO may stand as an election candidate for the House of Representatives in the first general elections if he or she has not prior resigned from office within ninety days from the date of promulgation of the Constitution (section 263, 264, 265). Given that a resignation of a core member of the NCPO such as the Prime Minister is hardly thinkable, the only viable way would be a change of this provision. The easiest way would be a section 44-order that would supersede the Constitution. However, such a move would probably lead to some serious criticism by the public. Another way would be an amendment of the Constitution. Almost impossible after the first general elections, this would be much easier during the first transitional period as long as the fully appointed National Legislative Assembly fulfills the function of the National Assembly, the House of Representatives and the Senate according to section 263. In any way, it might be doubted if the effort and possible costs would be worth for a member of the government or NCPO to take this path.

This is leading to second scenario. If a new NCPO affiliated party would either not be founded or, much more probable, not gain 25% of the votes, the powers-that-be would need some reinforcement by other political parties. Candidates for such a reinforcement would be some of the established parties or split-offs of such parties. They could either form a coalition with one or more new, pro-military parties or support a NCPO backed candidate alone. More probable is the first variant as the foundation of a new NCPO backed political party would be highly favored by the present conditions. Based on these model assumptions, the possible scenarios might be further differentiated.

One possibility is that established smaller and middle-sized parties are joining forces with a NCPO-backed party. Among such parties, the Bhum Jai Thai and Chart Thai Pattana might be mentioned as probable coalition candidates. Given the presumable effects of the new MMA election system in relation to the results of the last 2011 elections as a baseline, these parties might manage to command together up to 50 to 75 seats in the House of Representatives. A pro-military party would then need between 76 to 51 seats. Two questions have to be distinguished so far, the probability to get enough votes and the legitimacy and operationability of Prime Minister elected without
significant support by established political parties. While a NCPO backed party would need only a bit more than 10 or 15% of the popular votes respectively in the coalition-scenario which seems manageable, the lack of support by big parties would be bearable. As support by the PT would be unthinkable anyway, the only big party in question would be the DP. Although being exceptional as the one among the established political parties which is traditionally considered to be truly loyalist, it still has the onus to be one of the established political parties blamed by the current hegemonic discourse to have failed. Moreover, despite commanding a base of staunchly loyal core voters, it has not the weight to act as a veto player at all, today less than before.

An interesting historical scenario to remember in this context is the Prime Ministerial election of 1979 which followed the elections of 1979 after the military coup of 1977 that lead to the enactment of the 1978 Constitution. When the Coup leader and incumbent Prime Minister General Kriangsak was elected Prime Minister, major parties such as the Social Action Party of Kukrit Pramote, the Chart Thai of Praman Adireksa, and the Prachakon Thai Party of Samak Sundaravej boycotted the vote, whereas the Democrat Party played no major role after it had collapsed in the election, gaining only one single seat in its stronghold of Bangkok. Eventually, General Kriangsak became Prime Minister with 311 out of 526 votes among which only 89 were from elected MPs.44 Initially, the Kriangsak Administration was nevertheless considered to be broadly supported, but soon got in troubles, partly due to economic problems. Anyway, the formation of a government with the support of only some elected MPs from established parties seems basically still possible, even if the ensuing government would enjoy only weak parliamentary support.

Another scenario would additionally involve a split-off of the presumably second biggest party, the DP, or even the entire DP to reinforce a NCPO-friendly coalition. A split-off of the DP is more realistic than unrealistic given the internal tensions of recent years, the lack of a strong party leader and the party’s disorientation due to the unexpected neglect by the NCPO. As the loyalist party par excellence, it might also suffer from the generally shifting ideological demarcations and possible conflict lines since the 2014 Coup. Such a breakaway could be managed under the leadership of the party’s former secretary-general Suthep Thaugsuban but also other members of the party leadership.

Two historical examples for the formation of coalition governments based on party split-offs might be remembered in this context. First, the second DP-led government during the 1990s was formed with support of a multi-party coalition-government led by Prime Minister Chuan Leekpai that became

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possible only due to a break-away faction of the Prachakorn Thai Party. Resulting in a fierce battle with the party leadership, 12 of the 18 Prachakorn Thai MPs, the so called ‘Cobra-faction’, switched sides to the DP.

Similarly, the Abhisit Vejjajiva-led DP government of 2008 was formed on basis of a break-away faction of the DP’s major adversary, the successor of Thaksin’s Thai Rak Thai party. This break-away faction which was led by Newin Chidchop became the Bhum Jai Thai Party, one of the most probable candidates to support a Senate/NCPO favored government.

Less probable than a party split but not totally unlikely, the DP could be overtaken by its own pro-military faction to entirely support the NCPO. On the other side, the DP has presented itself traditionally strongest in opposition. It could also play the role a game changer one day daring to substantially challenge a NCPO backed coalition government. To obtain such an option would be more difficult if the DP would first have joined a NCPO affiliated government. Moreover, the DP would probable further lose electoral support and appeal after having served some time as a junior partner of a NCPO backed government. In both variants, a DP involvement, a NCPO affiliated government would be provided with additional votes that could prove instrumental to increase its space for action in the legislature.

While the middle-sized parties can expect to obtain an important supportive role if they perform somehow in line of the 2011 elections, the stakes of the DP seem more volatile though. Currently, the DP seems in fact to be the one among the established parties whose election success is most volatile. If the DP would be diminished it would naturally play a different than if it would become the second strongest of the established political parties after the PTP.\footnote{While the PTP is and will further be weakened structurally – it remains to be seen how many party heavy weights will be effectively disqualified from elections –, the PTP might still get most of the votes.}

In any case, it seems manageable for a NCPO-affiliated candidate to gain the necessary 25% support from among the elected representatives, if not even much more. This would allow it to install a Prime Minister of its liking. Given a high probability that there will be new NCPO-affiliated parties to ensure this outcome and take up the ‘NCPO-legacy’ potentially in close contact to military leadership circles, it is difficult to estimate how such parties will eventually be configured and how they will figure in the elections. Long established patterns of public education stressing the value of a strong and ‘good’ leader over democratic procedures might further gain weight among the populace in this context and play in this direction. Electoral success will, however, also be dependent on the economic performance of the NCPO, the degree of its success to implement reforms and to fight corruption, including within its own ranks.

What are alternatives to a NCPO backed government? Currently, there is
no other political party thinkable to form a government without the NCPO’s blessing than the Thaksin-affiliated PTP. To be successful in this sense, the PTP would, however, most probably need the support of a coalition partner. Otherwise it might not be able to achieve the 75% of the votes needed to form a government against the Senate. At present, the most likely way to get 75% plus of the popular vote is a coalition with the DP, its arch rival. This scenario of a joint opposition might be the likeliest to form a government challenging the NCPO, but it is still much unlikely to actually happen.

Based on these considerations it is all in all very likely indeed that NCPO-friendly forces will form the next government. All the mentioned scenarios, however, refer to the first possible channel to create a Prime Minister, his/her election from a party sponsored candidate list. Only if this channel is waived, the second channel would be opened allowing for candidates that have not been previously announced as party candidates. As such candidates without prior party announcement would have to get a two-third majority to become elected, it might seem unlikely that anyone could favor this option strategically.

Behind the establishment of the alternative mechanism based on section 272 stands, however, more than just the need to create a fallback option. In fact, it enables an interesting strategic alternative. First, the second option to elect a Prime Minister would appear as a remedy to the inability of the parliamentary system and therefore reinforce one of the key narratives employed by the NCPO. If a split parliament would be unable to select a prime minister, it could hardly refuse to turn to the politically strongest force for rescue. This will most likely be the NCPO.

In this case, a somehow NCPO affiliated prime minister would come to lead a national unity government. Being elected with a two-third majority, such a Prime Minister would formally enjoy an impressive backing in the House. At the same time, that would symbolically be a double asset in terms of legitimacy, such a prime minister would appear to be completely de-coupled from party politics. This would not only reinforce the national-unity notion of the respective government but also serve the determined anti-political stance that forms one of the most constant peculiarities of Thai constitutionalism.

Against this background, the question can be pondered if the NCPO might not directly wait for the parliament to waive the candidate lists of the political

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46 Two scenarios are possible here. A candidate in the subsidiary round after the candidate lists are waived could still be a former party candidate but would not have to be one. It depends on the NCPO’s calculus if it would field a candidate already in the first round or wait for the second round. Only in case of the second scenario, such a candidate would be fully de-coupled from party politics. In the other case, the candidate would however, also appear less connected to a particular party, especially if the candidate would not also run for a parliamentary seat.
parties. Which channel would finally be more beneficial for an NCPO backed government depends on various variables with both ways to create a government having their pros and cons from the perspective of the powers-that-be.

While the second way promises a more legitimate and less assailable procedure in traditional Thai thought on power, the first one could be still safer. Regarding the second channel, the inherent risk results from the fact that a regime critical opposition would need only 250 votes to form a blocking minority to prevent a NCPO-affiliated candidate. In the last election of 2011 the PTP alone received 265 votes. Moreover, even if a coalition of PTP and DP is hardly imaginable, both parties could agree on jointly blocking a NCPO-affiliated candidate. Given that the DP has gained 159 votes in the 2011 elections, both parties together would probably able to form such a blocking majority in any case.

Even if the PTP and DP will receive less votes than 2011, for example due to the new election system and other factors like a ‘government bonus’ of the NCPO,\(^{47}\) it might be still quite possible that they could jointly block a NCPO candidate.

If, however, the election would diminish the role of PTP and DP, the second option based on section 272 could be preferable. A national-unity government according to section 272 would convey the message that a non-elected – thus ‘pure’ – government is legitimately in charge. A ‘SME-parliament’ that would consist only of smaller and medium sized parties with up to 20-25% of the votes for the bigger parties would be a particularly suitable arena to explore this option to form a government.

Another aspect to ponder is the long-term perspectives of the future government. A new government would, after all, also need to govern. Concerning the first, regular channel of electing the Prime Minister this could effectively require the command of more than just the 25% necessary to create the government. In arithmetical terms, the necessary condition to create the government seems thus very unlikely to be the sufficient one to govern the country.

But how unstable would a minority government actually be? Arguably, it could in fact turn out to be less unstable and weak than it might appear at the first glance. In a fragmented House, with structurally weak parties and a high

\(^{47}\) Voter behavior in the coming elections can in fact hardly be expected to just repeat those of the last election 2011 as adjusted with respect to the new election law. However, the results of 2011 and the changes of the election law are still valuable factors to derive a baseline for extrapolations on the outcome. What might play role as a significant variable is the political advantage that the NCPO enjoys over the established political parties by defining the rules of the game and having neutralized any form of party politics since the 2014 coup with almost total effect.
level of inter-party competition for positions, the chances of a strong institutional self-understanding might not be too high. Reinforced by the impressive arsenal of disciplining measures, the political arena would increasingly favor the dominance of particularly power-compliant politicians.\footnote{Obviously, these conditions would serve the interests of a national government of unity headed by a strong leader who would not be a politician even more.} Under the narrow conditions of the reshaped political system and with respect to the sanctions available, for many delegates, to pursue a political career would almost imply the decision to comply with a rather toothless mandate than to seek expanding the institutional impact of the legislature against a minority government.

In any case, the project to square the circle in terms of a sufficiently strong government in the framework of a parliamentary system with a weak and fragmented parliament could theoretically work out. Nevertheless, all these scenarios are based on factual conditions that are not guaranteed. Therefore, NCPO-linked political powers bidding for government would have to do everything to successfully campaign to get as much votes as possible.

Coming back to the constitutional basis of the second transitional regime, the crucial involvement of the Senate might be stressed once more. In this regard, the drafters seem to have learnt a lesson by focusing not on winning the next election but ensuring a long transitional stage of future constitutional politics under the leadership of trustworthy forces. Just to win the next elections alone could too easily turn out not to be enough to prevent the eventual come back of the pro-Thaksin forces.

A threatening example are the 2011 elections, the second after the 2006 Coup. These elections led to the government of Prime Minister Yingluck who succeeded the DP-led government of Abhisit Vejjajiva that could be formed without prior elections due to the dissolution of the then governing pro-Thaksin party and the mentioned split-off of a group of the remaining members of parliament which eventually became the Bhumjai Thai Party. Before the 2011 elections, the governing coalition had amended the election law to the assumed disadvantage of the pro-Thaksin party PTP which nevertheless won with a landslide.

If such a scenario would be repeated, it would interrupt the NCPO’s restatement agenda at a critical juncture. This risk has obviously been seen by the drafters who introduced an efficient safeguard to prevent it. Importantly, the legislative period of the House of Representatives and, with it, the term of the first elected government, extends to only four years. The term of the Senate on the other hand last for five years (section 109). Consequently, the ‘transitional Senate’ will be involved not only in the creation of the first but at least also of a second government.
An interesting scenario has been brought up in this respect by Meechai Ruchupan, the Chairman of the Constitution Drafting Commission. He noted that difficulties in operating the first channel in creating a Prime Minister based on the party candidate-list (section 159) would naturally prolong the administration by the NCPO. More important, Meechai clarified that the new government’s term in office would however begin with the election day: “If the new government can be formed two years after the election, they will [anyway] serve for the remaining two years only [of the four years term].”

That would ensure that a delayed formation of the first government after elections would not prevent the Senate from being involved in the formation of at least a second administration as well. Based on this almost authoritative interpretation by the father of the constitutional formula, the different terms of both Houses and the specific design of the ‘transitional Senate’ would fully pay out.

With the involvement of the Senate in the election of the prime minister, the transitional regime appears indeed as the heart-piece of a long-term power projection by the powers-that-be that exceeds five years by far. Even if the Senate will participate in the formation of government only for five years, Thailand will be governed by prime ministers elected with the Senate’s participation for up to more than eight years after the first elections under the new constitution.

This first election until which the NCPO rules backed by the absolute powers of section 44 might be expected for the end of 2017. Under present

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50 The fact that the ‘transitional Senate’ will contribute to the formation of at least two governments has to be seen against the background of Thai constitutional politics since 1946. Since then the average lifespan of elected, parliamentary endorsed Thai administrations has in fact been approximately 1.8 years based on a calculation including the administrations of Pridi Banomyong, Thawan Thamrongnawasawat, Khuang Aphaiwong, Plaek Phibunsongkhram, Thanom Kittikachorn, Seni Pramoj, Kukrit Pramoj, Seni Pramoj, Kriangsak Chomanan, Prem Tinsulanonda, Chatichai Choonhavan, Suchinda Kraprayoon, Chuan Leekpai, Banharn Silpa-archa, Chavalit Yongchaiyudh, Chuan Leekpai, Thaksin Shinawatra, Samak Sundaravej, Somchai Wongsawat, Abhisit Vejjajiva, and Yingluck Shinawatra. Before Thaksin, not one single elected government in modern Thai history has survived a full legislative period. Given this, it would hardly surprise if even more than two governments would be formed during the first five years after the first national elections.

51 *The Nation*, August 10, 2016. It should, however, be kept in mind that “nearly all military seizures of power are accompanied by the statement that the movement is purely temporary” with elections to be expected in due course (Samuel E. Finer, *The Man on Horseback: The Role of the Military in Politics*, New York: Routledge, 2011, p. 36). While there is no reason that the NCPO has the establishment of a long-term military dictatorship in mind, it rules based on a claimed historical mandate whose compelling demands will overrule any other rationale in case of conflict. Given the
circumstances it can be expected that government over these eight years will be dominated by forces somehow attached to the NCPO. As these eight years will add up to the preceding at least three and a half years of direct NCPO rule under the Interim Constitution – if elections are hold in 2017 –, the NCPO and forces attached to the NCPO will have ruled the country for round a dozen years.

After this period has ended, the NCPO will still exert its influence on the polity. Having already dominated so long, the dominating power group emerging in this extended period will have good chances to create the base to form the government also without the help of the Senate. Even in case that it would not dominate parliament and government anymore then, it could still dominate the then differently formed Senate and the independent constitutional organizations. Most importantly, any government would still have to operate in the frame of a constitutional setting that has rigidly been shaped by the NCPO which is hardly open for changes by constitutional amendments, and in particularly bound to a 20-year National Reform and Strategy Plan created under NCPO-rule, it has to observe.

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magnitude of this mandate, it might therefore be justified to expect elections rather later than earlier.
Graph 3: The mechanisms to ensure continuity in constitutional politics
It should be noted that this scenario is not inevitable but still a likely one. As any other future scenario, it is the more uncertain the further it projects in the future. Presumably, it is nevertheless the scenario that has guided constitution drafting. To comprehend it, is therefore instructive to conceive the Constitution’s proposition to rule the country. Additionally, the understanding of such a guiding scenario is, however, also helpful to comprehend nature and spin of the present constitutional momentum and, to a certain degree, also to forecast conditions of the future political process. In this sense, the Bill presents a plausible calculus of the powers-that-be that expresses a noteworthy and often underrated constructive capability on side of the drafters and the determination of the small circle of decision-makers.

Obviously, this Constitution Bill is not supposed to please advocates of western-style democracy but to put the nation’s development back on track to prevent a further transformation of the hegemonic social contract. Above all, this Constitution is supposed to stabilize the status quo ante and the position of those claiming to defend it. This explains the determined will to cast out at all costs what these forces perceive as Thaksin’s evil spell on the masses. The logical consistency of the corresponding calculus to rule the country accordingly is striking.

During the Cold War, those engaged with the business of political warfare have reportedly calculated to need not more than approximately fifteen years to subvert the social fabric of a target country, – roughly the time required to brainwash the relevant generations. From the hegemonic point of view, former Prime Minister Thaksin has started to subvert Thailand’s society from 2001 onwards. With the emergence of the Redshirt movement that partly refused cornerstones of the old order, the challenge quickly amounted to a rampant ‘cultural revolution’ that has already changed the country profoundly. With it, the initial ‘top-down’ challenge in person of Thaksin gained an additional spin. Together, Thaksin and the Redshirts exerted a toxic impact on the established regime that threatened to become eventually lethal.

As reflected by the preamble, the 2014 Coup brought this ever accelerating ‘subversive’ process to a provisional halt. This was achieved yet, only by temporarily freezing the divisional conflict and its transformative impact through consequent repression while an additional challenge emerged. This is

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52 At present, this scenario derived from the Constitution seems to be the politically most likely one as long as the dynamics inhabiting the constitutional frame do not alter too much. Deviations from this scenario could follow from splits within the circle constituting the powers-that-be, a deepening rift within the loyalist camp that previously formed the supportive elite for the coup-group that emerged as NCPO, or developments leading to a rebalancing of the basic structure again.

the transitional challenge surrounding the condition of the King as stated by Professor Bowornsak. According to the hegemonic perception of the era ‘Thaksin’ as one of an ongoing and pervasive subversion, the logic of counter-subversion that had been brought to Thailand during the Cold War, would surely appear as an appealing notion for drafters acting on behalf of military officers who have received their military training during the Cold War. Given such a logic of counter-subversion it would take around the same time to counter the damage done and to somehow return to the ‘good order’ that would be calculated to subvert a society. This would be around 15 years. Short after Coup, the NCPO has indeed started the twin processes of a long-term (re-)education of the Thai people and the eradication of ‘subversive’ elements of thought and practice under the label of ‘anti-corruption’ and ‘national reform’. They are reflected by a more prominent propagation of ‘national values’ and ‘national identity’, the search for a national reform strategy, the purge of the state apparatus from Thaksin-affiliated office holders and practices of ‘attitude adjustment’ towards critics. Whether this process will develop undisturbedly and finally successfully remains to be seen.

In terms of time, the NCPO has very good chances to control the polity according to its time frame towards reform and elections and the different stages of constitutional rule to directly control the country for around 12. This already the time of three election periods. Notably, the present calculation is based on the announcements of the NCPO without taking in account any possible delay.

Given the indicated lingering influence of the NCPO even during the permanent stage of constitutional rule and the possibility that the first elections after the Coup may actually also well come much later than 2017, the 15-year model rule of subversion offers an interesting thought experiment. 54

It cannot be said exactly how explicit, determined and differentiated the drafters thought of a concerted counter-subversion strategy the Constitution needed to enable. In one way or the other, such a strategy make all sense from the perspective of the drafters and fully matches the exceptional design of the Constitution and especially the shaping of its transitional stages. Measured against the assumption of such a hypothetical calculus of counter-subversion, the Constitution has technically to be acknowledged as highly thoughtful and creative response to the constructive objectives and imperatives the drafters have faced. The outcome is anything but a Western-style democracy but another variation of Thai-style democracy, albeit one which is markedly more rigid and less liberal than those having been established by the 1997 and 2007 Constitution.

54 This does not imply at all that such a calculus has actually informed the drafting. Yet it highlights its functional consequence quite impressively.
Concerning the government’s position within the constitutional power structure, the overarching difficulty has already been mentioned. This is the target conflict between the possibility to retain strong executive leadership and the alternative option to weaken or neutralize a government if it is in the ‘wrong’ hands. The consequence is a characteristic ambiguity that inhabits the provisions regulating the executive power and especially the overall shaping of the office of the Prime Minister. Given these preliminary thoughts, it shall be assessed now how the governmental power is shaped.

An important innovation in comparison to the 1997 and 2007 Constitution is the rule that the Prime Minister has to be no longer a member of the House of Representatives. This is a crucial modification that could strengthen a future Prime Minister and will ease the chances of a NCPO affiliated candidate to run for office.

By decoupling the office of the Prime Minister from direct electoral legitimacy, the Constitution goes back to a form of Thai constitutionalism that dominated until the end of the 1980s. Section 171 (2) of the previous 2007 Constitution ordered for example that the “Prime Minister must be a member of the House of Representatives being elected under” the relevant provisions. In contrast, according to the equivalent section 158 (2) of the Constitution Bill, the “Prime Minister must be appointed from the person approved by the House of Representatives pursuant to section 159”. According to section 159, the Prime Minister has to be elected from the list provided by the political parties according to section 88. Moreover, she/he has to have the qualifications stipulated by section 160 in connection with section 89 (1), 2. This comprises negative and positive criteria as well. – Not among the required criteria to be nominated as candidate to become Prime Minister is the need to hold a parliamentary mandate.55

It is therefore possible that a political party nominates a candidate who is neither running for parliament nor a member of that party. Effectively the new arrangement is inclined to favor the current government which claims to be non-political in kind and whose core members are generals. The term ‘political’ as opposite to non-political is understood insofar as being elected and being member of a political party. For military officers, bureaucrats and technocrats as they are forming the current administration, it is indeed preferable to avoid party membership as far and long as possible. This has two reasons.

55 Among the newly introduced criteria – basically the same as for members of the National Assembly – is the requirement to have not seriously violated or failed to comply with the ethical standard (section 160 (1), 5) as to be defined according to section 219 (see above).
First, from the perspective of conservative Thai constitutionalism as it is represented by both the NCPO and the drafters, party politics are considered to form an almost ritually ‘impure’ sphere of public power. To avoid any attachment to it is, in turn, seen as a special condition and potential to acquire legitimacy.

Second, a future party membership of members of the current power circles could make it more difficult to avoid the impression that they have developed a personal interest in the political power game. In the dominating Thai political narratives, selfishness and corruptibility are typically attributed to (party-based) electoral politics. Therefore, even if not necessarily, it could turn out to be advisable for the powers-that-be to demonstratively reproduce the ritual separation of ‘pure’ powers and ‘impure’ powers, those not derived from electoral politics and those derived from elections and rooted in party politics. At the same time, candidates attached to the governing regime retain the possibility to be announced as election candidates by the lists that are supposed to be provided by the political parties without being members. This would allow it to keep the fiction of a ‘non-political’ Prime Minister who is only loosely connected to the ‘lowlands’ of political party politics and nominated merely for the national interest. The arrangement of sections 158 (2), 159, 160, 89 (1), 2 of the Constitution Bill which is strengthening the possibility of an elected ‘outsider’ of the realm of party politics is therefore bolstering especially the powers-that-be.

Another interesting novelty concerning the regulation of the office of the Prime Minister is contained in section 158 (4). It stipulates that no one is entitled to hold the office of the Prime Minister longer than a total period of more than eight years “notwithstanding consecutively or not.” This provision goes at least partly in a different direction than those enabling non-MPs to become Prime Minister. At the first glance, it seems aiming at preventing attempts of political leaders with questionable ambitions from establishing a long-term rule. This is first of all directed against Thaksin. Besides, this provision is also sending a signal to the public that representatives of the powers-that-be will not selfishly cling at power even if they would stand for election as Prime Minister in the first post-Coup elections. Interpreted in this sense, the regulation would convey a message of appeasement especially to those societal forces which have welcomed the Coup but might not have expected that the coup leaders would remain in power for a much longer time than previous coup leaders and initially expected. The limitation of section 158 (4) would thus accommodate potentially upcoming concerns if the NCPO head himself would run for office. Moreover, as a third possible implication, the rule could also help preventing conflicts within the ruling power group as a guarantee of a certain form of power sharing.
Another innovation which is imposing a potential weakening of future governments is related to the ‘collective responsibility’ of each Minister as it is stipulated by section 158. Notably, section 158 is (not only) an organizational principle but stipulating a liability as well. In principle known to previous constitutions, the regulation of ‘collective responsibility’ has been entrenched in this sense in form of a complicated mechanism that could potentially be triggered to tightly discipline future governments.

At its core, the collective responsibility of the ministers in relation to the National Assembly is extended to the determination and implementation of the cabinet’s policies. The potential weight of this new regulation is remarkable. According to section 164 (1), the Cabinet is not only bound to carry out the administration of state affairs in accordance with the Constitution and the laws but in particular also with the policies it has to declare to the National Assembly.

In detail, section 162 orders that a newly appointed Council of Ministers must state its policies to the National Assembly within fifteen days from the date it assumes office. This declaration must be consistent with the duties of State (Chapter V), directive principles of State policies (Chapter VI) and National Strategy (see section 6556). Moreover, the Council of Ministers has to declare how it intends to finance the implementation of the announced policies. According to section 164, the “Council of Ministers shall administer State affairs then in accordance with the […] policies stated to the National Assembly […] for the greatest benefit of the country […]”, strictly observe financial discipline in spending and comply with good governance.

In particular, as to section 164, “Ministers shall be individually responsible to the House of Representatives for matters under their duties and powers and shall also be collectively responsible to the National Assembly for the determination […] and implementation of policies of the Council of Ministers.” This duty could be interpreted in a way that would make the fate of a future government effectively dependent on the compliance of every single Minister with the initially declared policies of the Cabinet.

In light of sections 162, 164 it could be argued that deviations from the initially declared governmental policies would amount to a deliberate exercise of public power “in a manner contrary to the provisions of the Constitution” as to section 234 (1), 1.

In case that there is reasonable ground to suspect that any person holding a political position deliberately performs duties or exercises powers contrary to the Constitution or seriously contravenes or fails to comply with the ethical standards, the National Anti-Corruption Commission shall inquire the case as

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56 Section 65 orders the state to set out a national strategy as a framework for an integrated governance plan to be established in accordance to a related law.
to sections 234 and 235. If the Supreme Court’s Criminal Division for Persons Holding Political Positions eventually accepts the case, the accused has to cease performing duties until a judgment is rendered. In case of a conviction, the convicted vacates office and is barred from politics for ten years.

In other words: A new government would have to declare tightly framed governmental policies with the consequence that the cabinet would be responsible for the compliance with these policies by every minister. Legal consequence of non-compliance could be the removal from office of all members of Cabinet and an issuing of a ten-year long ban from politics. Given the established very low threshold pertaining to the judicial practice of impeachments as established by the Constitutional Court between 2008 and 2014, such an interpretation would be well in line with the actual doctrinal standard.

This liability for the implementation of the Cabinet’s declared policies is especially relevant with respect to the government’s duty to carry out the 20-year national reform plan (sections 257 ff.), which will be implemented by a “Law on National Reform Plan and Strategy” (sections 259 (1) and (2)). This law will prescribe all aspects of national reform related to planning, participation, implementation, evaluation and schedule. Regarding compliance with the National Reform Plan, the government will be tightly responsible to the Senate and National Assembly respectively (section 270). During the (second) ‘transitional period’ the Senate has the duty and power to “follow up, recommend, and accelerate national reform”. In this regard, the Council of Ministers is obliged to inform the National Assembly on the progress of the implementation of the national reform plan every three months.

Section 270 (3) stipulates that the government will have to announce to the National Assembly whether any bill is intended to serve the national reform plan. A joint committee composed of the President of the two Houses, the leader of the opposition, one representative of the Council of Ministers and a chairman of one of the standing committees can be requested to decide if this is actually the case. Consequently, the government will not have much room in defining both, its policies and its strategy to pursue national reform. National reform is, on other words, a serious issue that would make non-compliance dangerous with regard to section 234 already.

More importantly, the government will also have to refer to the National Reform Plan in its initial policy declaration. Even if the government would not be obliged to refer in its initial policy declaration to the National Reform Plan, it will hardly be able to avoid that. This would have two effects. The government’s policies would be determined by the reform plan while reference to the reform plan in the initial policy declaration would reinforce the duty to comply with the national plan.
From here, it seems to be rather possible to argue that a failure to implement the announced policies or comply with the national reform plan would amount to a deliberate exercise of public power “in a manner contrary to the provisions of the Constitution” according to section 234 (1). Correspondingly explosive is the liability of the entire cabinet for each of its ministers.

Functionally, this mechanism resembles the responsibility of party executives for offences attributed to the political party due to misbehavior of single party candidates and executives as it has been stated by section 237 of the 2007 Constitution which is not contained in the Constitution Bill anymore. The new mechanism pertaining to the collective responsibility of the cabinet – be it for compliance with its policy announcement or the national reform plan as part of these announcements – would be significantly less rigid at a critical juncture. While section 237 compellingly requested legal consequences in cases of transgressions, the new mechanism would allow a much broader discretion in determining if and in how far a Minister would have failed to implement the declared policies of the cabinet and in how far this would be actually a deliberate exercise of public power “in a manner contrary to the provisions of the Constitution” in the given case. Even if the mentioned provisions were not configured and interpreted in the rigid form suggested here as a possibility that would match the long-established trend of a judicialization of electoral politics, the collective responsibility for the determination and implementation of the cabinet’s policies and the responsibility to execute the National Reform Plan create clear limits especially for a vulnerable government anyway.

Another innovation compared with the previous two constitutions is the regulation of the vote of no-confidence (section 151). Different to the 1997 and 2007 Constitutions it is not a constructive vote of no-confidence anymore, thus one which would require it to combine the withdrawal of confidence from the incumbent with the election of a new Prime Minister. 57

New is also that the request to hold a vote of no-confidence can only be submitted once in a year (section 154). Moreover, given that the vote of no-confidence is often exclusively directed at the Prime Minister in parliamentary systems – like it is the case in Germany which was one of the models to reshape the parliamentary mechanism in 1997 – it is notable that the new Constitution does not explicitly mention the Prime Minister in this context anymore. This deviates from the corresponding regulation in the 2007 Constitution (section 158). Mentioned instead are now only the individual Ministers or the Council of Ministers. Seen together, there might be a common rationale behind these modifications.

Unlike the rules pertaining to the declaration of governmental policies and the fulfillment of the 20-year reform plan, these changes can be read even as an inclination in the opposite direction, namely to rather strengthen than weaken the office of the Prime Minister. If there is a common denominator of the changes pertaining to the vote of no-confidence in relation to the 2007 Constitution it might, indeed, be seen in a certain reservation of the drafters to connect the office of the Prime Minister too tightly with the confidence of the parliament.

In sum, the shaping of the executive power displays some innovations in comparison to past constitutions. Most notable are concurrent notions to possibly either strengthen or weaken a future government. Normally, such ambiguity in legal drafting might appear as an expression of a lacking craft. In the present context it seems, however, not accidental but a reflection of a deliberate decision in which particular drafting skills have manifested.

**Scrutinizing Agencies: Constitutional Court and Independent Constitutional Organizations**

Pertaining to the courts and the independent constitutional agencies which are supposed to provide oversight and scrutiny, the Bill basically adheres to the established institutional arrangement albeit with some changes.

Most important among the constitutional watchdog bodies is arguably the Constitutional Court whose institutional appearance has changed in several respects. Overall and, defying some expectations to become a kind of constitutional ‘super-body’, the Court figures at least not more prominently than it has before. Rather it might even be said that its actual constitutional standing has been decreased instead of having been enhanced.

A first indicator for such a change is the new ‘location’ of the provisions on the Constitutional Court. They are not anymore contained in the chapter on ‘The Courts’ (Chapter X) but allocated to a newly introduced chapter only dealing with ‘The Constitutional Court’ (Chapter XI). All other courts – the ordinary courts, the administrative courts and the military courts – are still regulated together in the mentioned Chapter X. Moreover, the provisions on the Constitutional Court are not only taken out of this chapter but are also placed behind it. This alone might not appear as significant at the first glance. Yet, it is deviating markedly from the former practice. In all previous constitutions featuring a specialized Constitutional Court, namely the 1997 and the 2007 Constitution, the Constitutional Court was regulated in the chapter on the courts and even ranking at the top of this chapter. This applies also to the 2015 Draft Constitution.
Still, the change could be accidental or insignificant. Yet, there is more to say about it. First of all, changes pertaining to the systematic positioning of an important constitutional body that break with an established practice might generally be put carefully into question in the context of Thai constitutionalism.

Two presumptions are suggested in this respect. First, there is a notion of Thai drafters to basically follow the established architecture of ‘constitution building’ wherever possible. This continuity is, after all, most visibly expressing the identity of Thai constitutionalism vis-à-vis a large number of subsequently abrogated constitutions accompanying its history. Second, Thai constitutionalism is also characterized by a remarkable prominence of symbolism, the meaning of the unsaid and the rhetoric of allusion.58

Taking these caveats into account, any change of the established constitutional architecture raises the question if it might reflect a changing perception in substance as well.

Indeed, by changing the positioning of the Constitutional Court more was implied than just an informal ‘ranking’ of courts by sequence. The ‘outsourcing’ of the Constitutional Court to an independent chapter has, in fact, a more far-reaching significance. By this move, the rules of Chapter X pertaining to ‘the courts’ do not apply to the Constitutional Court anymore.

A first striking consequence is that the justices of the Constitutional Court are not requested by the Constitution to make a solemn declaration before the King (section 191) as they were before. They are secondly also not anymore entitled by the Constitution to adjudicate in the name of the King (section 188). After all, Chapter XI does not contain any equivalent of these provisions on the courts.

This change is profound. Both regulations – section 191 and 188 – have to be understood as expressions of the distinguished authority which the judicial branch enjoys among all state powers and from which the Constitutional Court seems now excluded as to the Constitution Bill.

To conceive the repositioning of the Constitutional Court in this light one has to conceive the dichotomous structure that defines the deep structure of Thai constitutionalism. By it, two essentially differently perceived spheres of constitutional power are principally separated, notwithstanding their interaction in the actual constitutional process. The one of them is conceived as essentially dignified, the other as precarious at best. The ‘precarious powers’ are those arising from elections. They are considered to be inclined to produce dubious if not outright dangerous dynamics for the overall constitutional structure. The ‘dignified’ powers on the other side are either those specially

linked to the King or those which are at least detached from the shady realm of electoral politics.

Institutionally, this dichotomy that separates the electorally constituted from the non-electorally constituted powers looks as follows. On the one hand, there is the legislative and – if derived from elections – the executive power, on the other the judiciary and – with a bit less dignity – the independent constitutional organizations. Particularly important on the side of the non-electorally constituted powers stands also the military.

*Graph 4: Dichotomous Structure of Thai Constitutionalism 1*

To different degrees, all these non-electorally constituted powers fulfill a constitutional guardian function. For some of them, to maintain the integrity of the constitutional structure against the vagaries of electoral politics is at least part of their very raison d'être.

Understanding elections as potentially dangerous, even ‘evil’, this distinction and separation of two sorts of powers in the Constitution’s blueprint lastly implies a dichotomy of ‘pure’ and ‘impure’ powers. Such distinctions along the lines of ‘purity and danger’ have a foundational notion for any social organization in general. In Thai constitutionalism, they constitute a foundational structure since the major revamp initiated by the 1997 Constitution. With the 2006 Coup and the subsequent 2007 Constitution this structure has been further entrenched as lucidly described on the level of political narratives by Thak Chaloemtirana:


60 At this point, it has to be distinguished. In a narrative dimension, ‘good’ and ‘bad’ powers have been distinguished long before the 1997 Constitution. But with this Constitution, inaugurating a new era of constitutionalism in Thailand, the dichotomy became the effective blueprint for the formal institutional structure under this Constitution.
Unfortunately, this [2006] coup reinforces the false dichotomy in Thai politics that elections are always dirty because they can be manipulated by crooked politicians, while on the other hand, the intentions of the professional and disciplined military officers are more noble and more pure.\textsuperscript{61}

Even within the basically ‘impure’, thus the electorally constituted powers, the basic dichotomy is reproduced on another level to build in a corrective mechanism. This is managed by the further differentiation of an ‘impure’ and a ‘pure’ branch of both the legislative and the executive power.\textsuperscript{62} The

\textsuperscript{61} Thak, above fn. 7, p. XVIII (italics by the author); see also Thongchai Winichakul, “Toppling Democracy”, in: Journal of Contemporary Asia Vol. 38 (2008), pp. 11-37.

\textsuperscript{62} One has to understand how broad and deep the pure-impure dichotomy structures Thai constitutionalism (see for an earlier account in Glaser, above fn. 58, pp. 86 f.). It affects not only the formal constitutional structure but also key constitutional concepts and extends even to the perception of voters, political parties and political office holders which all appear likewise ‘doubled’.

This applies for instance to a foundational concept such as the sovereign power. ‘Sovereignty’ refers firstly to the ‘ultimate sovereignty’ of the King which originates beyond constitutional law. Secondly, the sovereign power is also regulated by the constitution. Yet, even on the level of positive constitutional law, the conception of sovereignty remains split or doubled. While the ‘People’ appear as those having the sovereign power under the written constitution, it is exercised by the King. The King is firstly the one who enjoys a position irrespective of written constitutional law, the one who gives the constitution. Accordingly, the King also appears in two essentially different ways: before and beyond the written constitution on the one hand and within the frame of positive law on the other.

Likewise, the ‘people’ take a double-meaning as well. First, in the framework of written constitutional law, they appear at top as the holder of the sovereign power, second, they form the electorate. It has to be remembered here that the sovereign power is exercised by the King, not by the people through elections. The electorate is only constituting the legislative and indirectly the executive power through which the King exercises the sovereign power according to section 3. The people as holding the sovereign power and forming the electorate are thus not identical. As holding the sovereign power, the people form a collective entity, a unit, rather equivalent with the ‘nation’ that is represented by the King. Pertaining to the people not as such a fictive collective, there is even another dichotomy.

Concerning the people as a mass of individuals, there is not only the notion of the people as electorate but also as royal subjects, a quality which is ultimately irrespective of any legal definition. To his subjects, the King maintains a direct personal bond imagined as those between a father and his children. This sense of any Thai subject as a member of a national Thai family headed by the King was an integral part of the hegemonic discourse on national identity. For those abiding the narrative, it was source of pride and identity that counterbalanced the deeply hierarchical nature of the Thai society as it is reinforced by its Theravada Buddhist identity.

This leads to another dichotomy, the dichotomy of power. Originated in a social-cultural
legislative power is thus differentiated in the elected House of Representatives and the Senate which is either fully selected (2016 Bill), partly selected (2007 Constitution) or compulsory non-political (1997 Constitution).

Likewise, – if the executive power is derived from elections –, there is a strong distinction between the cabinet and the senior bureaucracy in Thai constitutionalism. It is the more accentuated the more the executive power is not only indirectly derived from elections but part of the realm of electoral politics, thus if cabinet members are supposed to also have an electoral context, it has developed a highly politicized function with the distinction of a ‘good’ power ultimately referring back to the King and a ‘bad’ power based on sources of influence that are inherently questionable in Buddhist terms. Such influence comes with questionable intentions, implies a notion to ensure compliance with selfish ends and is might be based on questionable sources of power such as the power to persuade, deter and corrupt (see Glaser, above fn. 31, pp. 384-414). This ‘bad power’ is very much identified with power permeating the realm of electoral politics. Power, politics and people and closely related in this context.

While the ‘people’ are dignified as loyal subjects, the electorate is neutral at best. As long as the members of the electorate display no notion to fall out of their role as loyal subjects, the electorate might remain a value-neutral constitutional category. Politics, however, are inherently prone to degenerate and become permeated by ‘bad’ power according to the dominating narrative. Being constantly exposed to ‘bad’ powers, voters and political parties are inclined to degenerate as well. This induces the dichotomy of ‘good’ and ‘bad’ politicians and political parties and, eventually, ‘good’ and ‘bad’ voters.

According to the political theology of Thai constitutionalism bad voters, politicians and parties are considered as ‘impure’ for being corrupted by money politics and selfish ambitions that are superseding the demanded sense of loyalty to ‘good’ power. In the present political party spectrum, the one relatively ‘pure’ party is the DP, while the pro-Thaksin parties represent the extreme margin of the ‘impure’ opposite.

It is this fixed juxtaposition from which reality is perceived and not the other way round. See, for instance, Marc Askew, *Culture and Electoral Politics in Southern Thailand*, Bangkok: King Prajadhipok Institute, 2006, p. 198: “The myth that vote-buying is foreign to the [DP-dominated] South is strongly emphasized by the southern Democrats and is used to fuse the image of a pure honourable party with an image of pure and honourable southern voters.” In this rhetoric, “it is the opposing parties that use money as a principle means of persuading voters, because these parties are temporary and devoid of enduring political principles; they are the antithesis of the Democrats and represent a corruption of pure political values.”

These observations point to a last dichotomy, the hegemonic perception of the country’s ‘political geography’ with certain regions considered to be prone to ‘good governance’ and others prone to a particular corruptability of electoral politics, visible in the juxtaposition of the Northeastern and the Southern region.

Lastly, all notions of power and status in the Thai society are located within an encompassing continuum of finely graduated representations of loyalty and purity if they are not just subjected to the harshly separating dichotomy of ‘purity and danger’. To understand the binary code of Thailand’s ‘dichotomous constitution’ with its doubling of constitutional institutions, concepts of constitutional doctrine and actual political actors is key to understand any important aspect of Thai constitutional politics at all.
mandate. While elected cabinet members are part of the dubious power, the senior bureaucracy is supposed to consist of servants of the King. Since 2006, the Thai civil service law has been increasingly consequently applied in a way that stressed the relative autonomy of the senior bureaucracy. Politically, the integrity of the senior bureaucracy from political infringements has served as a long-standing argument in the context of coup-politics.

The reason for the 2014 impeachment of Prime Minister Yingluk and one of the officially cited reasons for the Coup against Prime Minister Chatichai in 1991 was, for instance, a claimed encroachment of the electorally constituted executive leadership on the senior bureaucracy.

This inherently dichotomous deep structure of Thai constitutionalism whose dominating presence in the 2016 Bill has been indicated at various points of the assessment above has to be kept in mind to conceive the changes of the Constitutional Court’s status. The essential distinction of ‘pure’ and ‘impure’ notions of power implies in fact a finely graduated hierarchy from ‘pure’ to ‘impure’ representations of public power. With respect to the three ‘classical’ branches of power, it is particularly mirrored and reinforced by the oath of office that the members of parliament, the ministers and judges are taking.63

Graph 5: Dichotomous Structure of Thai Constitutionalism 2

63 See for a detailed account Glaser, above fn. 58, pp. 98-104. See for the oath of the judges section 191: “I, [name of the declarer], do solemnly declare that I shall be loyal to His Majesty the King and shall faithfully perform my duties in the name of the King without any partiality, in the interest of justice, of the people and of the public order of the Kingdom. I shall also uphold and observe the Democratic Regime of Government with the King as Head, the Constitution of the Kingdom of Thailand and the law in every respect.”
Significantly, these oaths are very differently formulated. The differences between them reveal a clearly structured matrix of dignity that reflects and reinforces the underlying hierarchy in terms of dignity and authority among them. At top of this hierarchy are the courts, at its bottom the members of parliament.

The fact that the judiciary is the most ‘dignified’ among all branches of state power is especially reflected by its power to adjudicate cases in the name of the King, a dignity to which the judges refer in their oath of office. It would go beyond the scope of this assessment to explain the roots and outlook of the judicial authority in more detail but the power to adjudicate in the name of the King is much more than a mere linguistic formality in this context. It is directly related to the original prestige and authority of the judiciary as the power most closely attached to royalty.

This is leading back to the new design of the constitutional court. To be not anymore regulated as an integral part of this most dignified branch of power despite remaining a downright judicial body (section 211 (4)), carries considerable symbolic weight. Given the general attention paid to matters of protocol and prestige in Thailand, this blatant redefinition and deviation from the established practice can hardly be explained away as an accident and inevitably affects the Court’s standing and authority. Obviously, the Court ranks lower in status than under previous constitutions and according to the 2015 draft. It is hardly imaginable to give a convincing reason for this change other than those of a deliberate decision in favor of a downgrading of the Court’s power and function.

Arguably, it might well be expected that the silent shockwave of the change will eventually be absorbed in technical terms by the Organic Act on the Constitutional Court which still has to be drafted. Most probably, the Constitutional Court will finally be acknowledged as what it actually is, namely a court of justice. Most probably its justices will finally regain the honor to take the same oath of office like other judges and the duty to adjudicate their case like the other courts in the name of the King.

64 In 2006, when the divisional conflict that still lingers on, reached a first climax in form of a sustaining constitutional crisis, the King gave a noteworthy speech by which he reminded the country’s judges of their duties. In it the King referred explicitly to the judge’s oath of office. See the King’s Speech to Administrative Court Judges (unofficial translation), The Nation, 27 April 2007.

65 Especially the reference to the composition of the Court with four of the justices having no background as career judges would not serve as a sufficient explanation. When specialized constitutional review has been introduced to Thai constitutionalism by the 1997 Constitution a deliberate decision in favor of a judicial body has been made which, however, as other judicial bodies too, was not exclusively composed of career judges. The administrative courts for example consist partly of career judges and partly of experienced bureaucrats of the ministerial administration.
Yet, subsequent corrections on the level of the organic laws might mitigate the effects, but the message has been sent and it has been set in the stone of the supreme law of the land. This is what matters as a highly significant symbolic act. For those being literate in the semantics of omission and allusion in Thai culture and being aware of the actual importance of social capital in Thai constitutional politics, the Court’s downgrading remains as a statement notwithstanding a probable later ‘compensation’ on a technical level.

This downgrading of ‘institutional capital’ is tellingly reflected and effectively reinforced by other provisions of the Bill. According to section 234 on the powers of the NCCC for example, judges are treated with a lower degree of scrutiny than other office holders (section 234 (1), 2,3). Among all the judges, only those of the Constitutional Court are not exempted from the normal standard however, only they remain subject to the same scrutiny as the other officeholders.

Furthermore, Constitutional Court justices are subject to inquiry by the NCCC concerning their compliance with the ethical standard according to section 219 which is not foreseen for the judges of the other courts, - the ordinary courts, the administrative courts and the military courts. Likewise, Constitutional Court justices are the only ones now who have to declare their assets and liabilities in the same way as those holding political positions (section 234 (1), 4).

New in all these cases is not the exclusion of judges from a certain standard of inquiry or particular scrutinizing mechanisms but the inclusion particularly of the Constitutional Court judges. These modifications can and will hardly be corrected by the Organic Act and further supports the interpretation that the ‘outsourcing’ of the Constitutional Court from the Chapter on the Courts is part of a deliberate shaping of the Court’s institutional standing.

Taken together, all these changes to the standard set by the 1997 and 2007 Constitution leave barely any doubt that the Constitutional Court suffers a significant loss of prestige in light of the Bill. How this will affect the Court’s performance is another question which cannot be answered yet. Generally, the justices might be expected to have clearly noticed the changes. How this might affect the attitudinal disposition of the court is impossible to say. Basically, it could become relevant in cases in which the court would expect to cause tensions with the powers-that-be. Then the downgrading might either lead to an even more assertive court in response or exert a taming effect instead. This will be much dependent on the future development of the balances of power and other factors influencing the attitude of the judges. After all, such considerations only underline the contingency even of a basically predictable court and highlighting the importance of whom to select to the bench.

This raises the question of how the bench will be composed in the future. Sticking basically to the established design model of the 2007 Constitution,
the selection of the justices, the composition of the bench, and the requirements pertaining to the qualification of the candidates have nevertheless been moderately changed in the Bill.

As under the 2007 Constitution, the bench consists of nine justices among whom five are elected by the judiciary, three by the Supreme Court and two by the Supreme Administrative Court. They are all elected by the general meeting of the Supreme Court and Supreme Administrative Court respectively. The remaining four candidates are selected by a Selection Committee, composed according to section 203. All nine candidates have to be approved by the Senate which then submits their names to the King for appointment (section 204).

The Selection Committee in charge of the four candidates which are not elected from among the judiciary is composed of nine members. These are the President of the Supreme Court of Justice, the President of the Supreme Administrative Court, the President of the House of Representatives and the Leader of the Opposition as well as five persons who are appointed by the five independent constitutional organizations, namely the Election Commission (EC), the National Counter Corruption Commission (NCCC), the Ombudsmen, the State Audit Commission and the National Human Rights Commission (NHRC).

An interesting variation is the fact that the independent commissions have been previously represented by only one member in the Selection Commission only. Now they are all represented. If this change implies anything, this would be a potentially decreased influence of the career judiciary: In the past, the two Court presidents could effectively decide together with the representative of the leading loyalist party, the latter either in his/her capacity as the Speaker of the House or the Leader of the Opposition.

Now, the independent commissions form the majority of Committee members. Previously, that would not have meant much as the court presidents, the representative of the loyalist party (as House speaker or opposition leader) and the one representative of the independent commissions could be supposed to join the same loyalist camp. This camp is, as indicated above, currently slowly reconfiguring.

Even if the changing balances of power might still appear insignificant, there is a manifest inclination of looming change. In the future, it is not at all impossible that the selection of non-career members of the bench could play a significant role for the balances of power in case of intraelite conflicts within the formerly much more cohesive loyalist camp.

In this context, is should be noticed that the new design especially of the EC and NCCC which is vesting them with extraordinary powers will induce a strong inclination to pack these independent organizations with carefully picked regime-loyal candidates anyway. As a side effect, the independent
commissions could form a reliable bridgehead of the narrowed down elite in control. Even if only a slight and not particularly conspicuous change at the first glance, the new composition of the Selection Committee is thus fully in line with the general trend of closing elite with the powers-that-be not relying so easy anymore on every former ally. Similar changes have affected civil society participation and the role of the loyalist political parties.

Stricter than before are the required qualifications which have been generally raised. For candidates from among the career judges this pertains to both rank and professional experience which is measured in time holding this rank. Candidates have to hold the rank not lower than Chief Judge for not less than three years for the candidates of the Supreme Court and not less than five for those of the Supreme Administrative Court.66

Similarly tightened are the required qualifications of the other four candidates who have to be selected by the Constitutional Court Selection Committee. Concerning these candidates, the Bill deviates even a bit more from the corresponding provisions of the previous 2007 Constitution. From the four justices to be selected under the 2007 Constitution two had to be “qualified persons in law with thorough knowledge and expertise of law” and two “in political science, public administration, or other social sciences with thorough knowledge and expertise in administration of State affairs” (section 204 (1), 3, 4).

Now, section 200 (1), 3, 4 requires only one person to be qualified as a lawyer and one as a political scientist, both having to hold the position of a full professor for not less than five years and with an outstanding academic work record. The other two judges have now to be selected from among (former) senior bureaucrats, holding a position not lower than Director-General or its equivalent for not less than five years (section 200 (1), 5); the 2007 Constitution did not explicitly foresee any role for senior bureaucrats. A noteworthy consequence of the tightened qualification criteria for all candidates for the bench is the implied possibility to reset the existing bench after the constitution is promulgated. This would not be compulsory but could well be discussed creating an important lever to adjust the future functional elites with respect to their actual loyalty.

Generally, by raising the qualification of candidates in terms of formal status the new regulations also limit the scope of possible candidates. This matches the conservative trend that generally marks the Bill. After all, many of those who served the NCPO administration since the Coup will be inclined

66 The differently required professional experiences for Supreme Court and Supreme Administrative Court Justices indicate a further ‘soft hierarchy’ between these Courts which adds up to the above mentioned difference between them and the Constitutional Court and generally expresses the careful differentiation in terms of rank and dignity in Thai constitutionalism.
to fulfill the required criteria. The general notion reflected by the modified design might be summarized as an inclination to further close the ranks of those deemed reliable to protect the constitutional order. At the same time, the requirements pertaining to the technical qualifications in terms of particular knowledge in constitutional law have interestingly not been raised as it has been done for instance for the Indonesian Constitutional Court with the 2011 amendment of the Constitutional Court Act.

An inclination of rather weakening than strengthening the Constitutional Court in terms of institutional design is represented by the reduction of the term in office from nine years under the 2007 Constitution (sect. 207 and 208) to seven years now.\footnote{See for the significance of the term in office of the justices Jiunn-rong Yeh, “Politicization of Constitutional Courts in Asia: Institutional Features, Contexts and Legitimacy,” in: Henning Glaser (ed.), Constitutional Jurisprudence: Functions, Impact, and Challenges, Baden-Baden: Nomos 2016, pp. 216 ff.}

Pertaining to its powers, the Constitutional Court retained most, yet not all its competencies while it also got some new ones.\footnote{See for a valuable synopsis of the powers and duties of the Constitutional Court under the 1997 and the 2007 Constitution the recommendable book of Harding and Leyland, above fn. 57, pp. 165 f.} In particular, the Court will remain competent to conduct legal reviews – both ex ante and ex post – (section 210 (1), 1) and also decide on individual complaints against basic right violations. Moreover, it retains the jurisdiction to decide about the powers and duties of constitutional organizations (section 210 (1), 2). It will also have the jurisdiction to decide about the termination of membership in the legislature or the Council of Ministers (see section 82 (2), 170 (3)) and to intervene in acts aimed at overthrowing the ‘democratic regime of government with the King as Head’ (section 49).

A duty of the Court is to convene a meeting of the joint committee according to section 5 – where the president of the Constitutional Court is notably host but not necessarily chairman. Another duty is the Court’s collaboration in defining the compelling ethical standard for office holders in the various constitutional bodies. Here, it is significant that an elapsing of the deadline without effect is leading to unusually harsh consequences, namely that the justices – like their involved colleagues – shall vacate office.

Concerning the jurisdiction of the Court in general it is interesting that its powers and duties seem to be inclined to be rather less pronounced than in the 2007 Constitution. This applies for example to decisions about problems concerning the powers and duties of constitutional organizations. Previously, this jurisdiction was limited to ‘conflicts’ between at least two organizations (see section 214 of the 2007 Constitution). The new formulation resembles
that of the 1997 Constitution (see section 266) which had caused some confusion over the question of the jurisdictions scope.

Questionable was whether the Court would be competent to decide only in adversarial case constellations or also to clarify the content of powers and duties of constitutional organizations in general, thus related to a ‘problem’.

Another interesting formulation pertains to constitutional complaints, thus the right of the citizens to turn to the Court for relief or remedy against right violations. Here the formulation of the relevant section 213 is surprisingly broad and vague – much more than the corresponding section 212 of the 2007 Constitution has been.

While section 212 of the 2007 Constitution was limited to claimed right violations by laws, the new section 213 provides the right to individual complaints against unspecified “act[s] of violation”. In a literal understanding, the modified provision could be interpreted to allow complaints against any act of state power that would violating rights. This would establish a jurisdiction also over administrative acts and even court decisions.

If uncorrected, the effect of this change could trigger a massive constitutionalization by which the scope of rights protection could be significantly expanded throughout the legal system. This, however, seems not likely. While such an interpretation would naturally follow from the provision’s wording, it would strongly deviate from the traditional function and design of constitutional jurisprudence in Thailand. To introduce a constitutional complaint even against administrative acts only would effectively mean a significant change in terms of inter-branch relations. The actual implementation of complaints against court decisions, including those of the Supreme Court of Justice, would amount to something outright unconceivable in contemporary Thai constitutionalism and legal-political thought.

For such a change, there have not been the slightest indications during the drafting process. Insofar, one might expect the regulation as accidently broad. A therefore likely correction could be made by the Organic Act on the Constitutional Court or a restrictive interpretation in the form of a teleological reduction.

New is also the introduction of a more rigid quorum of decision making (section 211) which requires a majority vote of seven out of the nine justices. The change has further to be seen in comparison to section 216 of the 2007 Constitution that established a chamber system with five judges constituting a chamber competent for hearing and decision making by majority vote. While the Constitutional Court under the 2007 Constitution could thus decide by a minimum of only three out of nine Justices if it decided by chambers, a

69 The author has had no access to the records of the current CDC as yet.
minimum of seven out of nine Justices is necessary now. As a result, decision making will be inclined to be more ponderous and predictable. Swift shifts in constitutional court politics are on the other side much more unlikely.

Later changes by the Organic Act on the Constitutional Court notwithstanding, the Court has also lost the power “to demand documents or relevant evidence from any person or summon any person to give statements of fact as well as to request the Courts, inquiry officials, a State agency, State enterprise or local government organization to carry out any act for the purpose of its consideration”. Under both the 1997 Constitution (section 265) and the 2007 Constitution (section 213) the Court had enjoyed this power. If uncorrected on the level of plain law, the change would suggest a more limited rather than enhanced role envisioned for the Court.

Summing up, the Constitutional Court retains the potential to be an important actor and ‘guardian’ of the constitution. The mentioned modifications indicate however that its status and authority are nevertheless inclined to be decreased rather than enhanced. From the perspective of the drafters, the Court might be regarded as a less inevitable guardian of last resort than it appeared to the drafters of the 2007 Constitution.

Concerning its overall function in light of its modified design and the duties entrusted firstly to the Senate during the ‘transitional regime’ and the Joint Committee of section 5 (3) secondly, the new constitutional set-up seems to generally point to an inclination towards a more political rather than predominately legal form of constitutionalism.

Finally, a brief look might be taken at the comparatively large number of independent constitutional organizations. Regulated in Chapter XII of the Constitution Bill, they contribute to the typical design for Thai constitutions since the 1997 Constitution. These are, the Election Commission (EC) according to section 222-227, the Ombudsmen according to section 228-231, the National Counter Corruption Commission (NCCC) according to section 232-237, the State Audit Commission (section 238-245), and the National Human Rights Commission (NHRC) according to section 246 f.

The fundamental structure of the chapter on the independent constitutional organizations remains basically the same even if notable changes have been made with respect to their composition and scope of powers.

New in comparison to the 2007 Constitution is the introduction of a general chapter on these independent constitutional bodies. It stipulates the basic qualifications (section 216), the vacation of office (section 218), the selection of the commissioners (section 217) and the institutional autonomy of the respective commission – with exception of the State Audit Commission – in terms of infrastructure and budget (section 220). Newly introduced and a valuable advancement is also a principle of mutual assistance and collaboration (section 221).
Regarding jurisdiction, some of the independent organizations have considerably gained powers, while others have lost bite. If there is an overarching tendency so far, it might be said that scrutinizing powers with respect of electoral politics have been sharpened while scrutinizing powers regarding rights have been markedly tamed.

At the same time, the required qualification for the Commissioners of the independent institutions are generally higher than before – with the notable exception of the NHRC. The tightened qualification criteria pertain to minimum age, rank and prior professional experience of candidates for office.

Different from the 2007 Constitution, Commissioners have, for instance, no longer to be at least forty but forty-five years old (section 217). Most have not only to hold a specified rank but have to have held it for a specified minimum time.

For instance, bureaucrats have to hold or have held the rank of at least Director-General or equivalent for not less than five years (see section 228 or 232 for instance) and judges that of not lower than Chief Judge for not less than five years (see section 222 or 232) for instance.

Further delineating the independent commissions from the realm of electoral politics, former Ministers are not longer listed as eligible candidates to become Commissioners as it has been the case in the previous 2007 Constitution. Similar, with the exception of the NHRC, representatives of NGOs are also not any more qualified as candidates as they also have been in the 2007 Constitution.

Overall, the new selection criteria reflect the same trend as it has been described for the Constitutional Court, an inclination to favor a greater presence of the senior bureaucracy. While the specific qualification criteria and the number of Commissioners vary for the different commissions, all Commissioners are selected by the same procedure with the exception of the NHRC (section 217). This general procedure follows basically that of Justices of the Constitutional Court according to section 203.

**Rights**

Lastly, some remarks shall be made on the matter of rights as to the new Constitution’s relevant provisions. Insofar, it has to be distinguished between the main chapter dealing with rights, the chapter on “The rights and duties of the Thai people” (Chapter III), rights-related provisions in a new chapter on the “duties of the state” (Chapter V), the powers, duties and design of the institutions supposed to enforce and defend the rights of the people and, lastly, the general spirit inhabiting the constitutional order regarding the understanding of fundamental rights protection.
The underlying trend regarding the last aspect seems to be more conservative and more restrictive compared to both the 2007 Constitution and the 2015 draft constitution as well. The latter had even introduced the concept of universalistic, judicially enforceable human rights for the first time explicitly in Thai constitutionalism. The Constitution Bill has now returned to the established reference to the “rights and duties” – only – “of the Thai people” (Chapter III).

New, however, is the introduction of duties of the state in Chapter V. This structurally new chapter formulates indeed more than only a catalogue of rights-based policy declarations but also grants the subjective right to “follow up and accelerate” the corresponding state performance and even to file complaints (section 51). If and how this right is, however, judicially enforceable has not been clarified yet.

The more important Chapter III on the rights and liberties of the Thai people is technically one of the less convincing ones. This starts already with its inner structure which seems quite arbitrary pertaining to the arrangement and sequence of the regulated liberties. Practically decisive, however, is not so much the number and arrangement of the single liberties rather than their state-imposed limits and – especially – the constitutionally imposed restrictions on such limitations. Pertaining to right-limitations the Constitution Bill combines two techniques. In section 25 (1) and (2) it regulates general limits to the exercise of all rights and liberties. They are complemented by a number of especially regulated limitations for particular rights. According to the general rule, rights are limited by national security, public order, good morals of the people and the rights and liberties of the others. Another general limitation is formulated indirectly by the civic duty under Chapter IV, section 50 (1), 6, to respect and refrain from violating the rights and liberties of other persons and to not commit any act that may cause disharmony or hatred in society.

Based on this broad general regime of rights restrictions virtually almost every possible behavior is subjected to limitations. Yet, much more important than possible limitations of civic rights are the restrictions imposed on the state’s capacity to actually impose them, thus to limit the rights and liberties of its citizens in the concrete case.

Here, section 26 stipulates that limitations imposed by law shall be regulated by a general law, not contravene the rule of law and human dignity,70

70 Human dignity is regulated ambiguously in the rights chapter. While it serves a restriction to right limitations in section 26, it is formulated as a right in section 32. To consider human dignity as a restriction of right limitations is unusual but has for instance been discussed in German scholarly doctrine where a minority opinion holds that the protection of human dignity might be understood as a restriction of the state’s power to limit rights rather than a right in itself. See Philipp Kunig, “Zum Dogma der unantastbaren
be reasonable, and specify the purpose and necessity of the limitation. This somewhat resembles the principle of proportionality even if it does not amount to a complete version of it.\textsuperscript{71} In particularly and like under the 2007 Constitution it is in particular not expressively demanded to balance the involved interests in form of a proportionality test in the narrow sense (see however section 32 of the 2015 draft).

A notable change pertaining to the restrictions on the state’s ability to limit rights and liberties in comparison with section 29 (1) of the 2007 Constitution is the omission of the principle that right-limitations shall not affect the substance core of a right or liberty. This omission implies a reservation that there are no infringements on rights which can be ruled out in principle. While this might be practically less relevant, it is indicating the contours of the underlying spirit.

Beyond the chapter on rights, the dominating notion underlying the understanding of basic rights is most clearly reflected by the regulation of that institution which is most specifically charged with the protection of fundamental rights, the National Human Rights Commission (NHCR).

Among the independent constitutional organizations, it remains the most toothless, the one that has sustained the biggest loss of powers compared with the 2007 Constitution. Its commissioners have to meet the most unspecified qualification criteria of all organizations in Chapter XII and its mandate to protect the rights of the people are rather limited to recommendations (see section 247).

Telling are two newly introduced duties of the NHRC which clearly express a notion to scale back the Commission’s human right related mission and impact. First, this is the duty to “clarify and report accurately with respect to incorrect or unfair reports on the human right situation in Thailand” (section 247 (1), 4).

\footnote{71} The principle of proportionality is understood here as a central limitation of the state’s ability to restrict rights that had become part of what might be called a common constitutional wisdom of our times. See Moshe Cohen-Eliya and Iddo Porat, \textit{Proportionality and Constitutional Culture}, Cambridge: Cambridge University Press, 2013, p. 153, calling it even the “lingua franca” of a universal constitutional culture having migrated immensely successfully from German constitutional law throughout the world. In this sense, there are, however, different forms of the principle of proportionality starting with the standard applied in European human right law for instance. The Thai version, however, deviates from the common denominator as it does not imply a balancing of the interest to infringe in rights against countervailing values and principles to be taken into consideration.
As much as it is obviously important for any government to voice opposition to human right reports that are deemed arbitrary or inaccurate, as much can it weaken an anyway rather weakly designed human rights commission to prominently charge it with this particular task. The presumable effect has to be conceived in practical perspectives. Any human right commission is easily caught between its nature and origin as a state agency and its mandate to help enforcing civil rights against the state. The less human right commissioners are specifically qualified to pursue their mission the more they might lack the proper understanding to draw the line between the conflicting interests of the state and the individual. Receiving the legislative mandate to defend both, the rights of its citizens and the interest of the state against arbitrary reports of violations easily creates a ‘double-bind’ in this general situation that might prove detrimental to properly fulfill the institutional mandate. Moreover, to determinately observe its main task to defend human rights, any human right commission has to cooperate with the civil society and international organizations. In doing so, it will anyway continuously clarify their point of view if it is of the opinion that these partners get things wrong. This is, in other words, an integral part of any human right commission’s ordinary communication routine with its partners. To explicitly charge it with such a duty by the letter of the Constitution, however, singles out and gives weight to a specific aspect of the commission’s performance that might one-sidedly create a notion that the commission has the duty to police its partners. In sum, with respect to the internal and external procedures and relations of the human right commission, the new provisions seem easily inclined to encourage a spirit that could contravene an understanding which would be required to robustly defend human rights. It is thus not the additional duty to “clarify and report accurately with respect to incorrect or unfair reports on the human right situation in Thailand” as such that might be problematic. Rather it is problematic to charge particularly the NRHC with it and this even more if the investigative mandate of such a commission is considerably weakly designed. Similar problematic is the effect of another newly introduced provision. Most notably, section 247 (3) orders the NHRC to perform its duties with due regard to the well-being of the Thai people and the common interest of the country. As much as these overriding goods should be observed by everyone, public and private actors as well, as much it is telling to specifically draw on them for the purpose of creating a reservation for the performance of the human right commission. In human right related discourses, public goods like the ‘well-being of the people’ and the ‘common interest of the country’ are in fact regularly not
meant as expressing the spirit of rights. They rather represent another, competing and supposedly even more important rationale. From this perspective, section 247 (3) appears as an explicit caveat for the protection of rights by the NHCR, made for the sake of the national interest, the reason of state.

The prescribed observance of the national interest might induce a sense of duty in commissioners that the NHCR shall conduct its duties by placing the interest of human rights under the reservation of the reason of state, the priority of the community interests over those of the individual.

Again, to express a general notion in favor of the interest of state over those of the individual is one thing – one by which a constitution would mark its difference to Western constitutionalism already though. It is another thing however to even define the particular duties of a human rights commission by the obligatory ordered reservation to observe the national interest first. In fact, it might be supposed that all non-judicial state agencies put the national interest first while especially the human right commission is supposed to focus on the cause of rights. In light of the described changes and given that the NHCR has never been a particular strong agent of human rights, it appears as not much more than a shell of a robust human right defender.

These observations fit with the observation of a changing climate pertaining to the perception of civil mass movements and the role of the Constitutional Court under the new Constitution.

All in all, it might be said that the most favorable season for the exercise of fundamental rights in Thai constitutional politics has been that from 2006 to 2014. This, however, was not a time of discovery of secular universalistic humanism of western provenance but a period when the exercise of civil rights could be pitted against the vagaries of an ‘unleashed’ electoral democracy as it happened when numerous civic mass movements protested against Thaksin-loyal governments. The Constitution Bill reflects another reality and other priorities in relation of a public space that is supposed to be defined by a constitutional order envisioning stability and the perseverance of an inherently conservative constitutionalism as its overriding rationale.72

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72 The German conservative scholar Ernst Forsthoff, a congenial disciple of Carl Schmitt, has once remarked with reference to Karl Marx that, during the 19th century, rights used to not be mounted in favor of the powerless but the powerful. See Ernst Forsthoff, “Zur heutigen Situation einer Verfasungslehre”, in: Hans Barion, Ernst-Wolfgang Böckenförde, Ernst Forsthoff, Werner Weber (eds.), Epirrhosis: Festgabe für Carl Schmitt, Bd. 1, Berlin: Duncker & Humblot, 1968, p. 187. With the 2016 Bill, the ‘powerful’ are obviously much less in need to make use of basic rights than before. The reason lies in the current state of intra-elite relations. The question remains though in how far ‘the powerful’ are still a cohesive group. That the governing regime turned out to significantly transform the elite segments on which it rests its power – even if rather unobtrusively in style – has been shown in several aspects. Three questions are yet
Final Remarks

Supposed to provide a first and necessarily fairly rough overview of the constitutional order – probably – to come, this article focuses on the ‘being’ not the ‘ought’ of constitutionalism. To adequately access the Constitution Bill’s rationale and functional design as well as its consistency and impact, the point of view taken is “wholly neutral in moral and political terms” as Richard Albert put it.\textsuperscript{73} It therefore pursues an approach that “makes no judgment as to whether a given constitution is good or bad or about whether it is worth commending or condemning” in normative terms.\textsuperscript{74}

Assessed have been the most significant patterns regarding identity and change in Thai constitutionalism as to the Bill, the future balances of power and the question in how far this Constitution’s design consistently mirrors its underlying rationale. As far as prospective developments have been extrapolated to assess the impact of the respective constitutional formulas this merely served as simulation games to explore the consistency of the Bill’s spirit and its functionality rather than claiming to make precise predictions of the actual course of events.\textsuperscript{75}

Concerning the question in how far the Constitution Bill reflects significant pattern of identity and change, the analysis revealed an interesting ambiguity. On the one hand, the Bill retains most features established since the 1997 Constitution and remains particularly shaped by a decisive anti-electoral stance.\textsuperscript{76}

At some critical junctures however, the Bill reacts to the polity’s changing marginal conditions and the transitional challenge posed by them with a great deal of innovation. Here, it strongly deviates from the established pattern. Crucially, this affects nothing less than one of the Constitution’s core looming. The first is how cohesively the currently governing power core is able to reproduce itself given its growing distance to the command of troops. Second, how compliant will the meanwhile less significant elite segments accept their fate and which lever would they have otherwise. Third, will there be another power center in the nearer future and how would it turn out to be positioned with respect to the current regime? Even if the matter of rights is therefore less important for the future constitutional setting as it is constructed, the value of popular expressions of political preference might become valorized as a political currency in this factual setting again. This would go hand in hand with a return to rights-discover how distant their actual cause might ever remain from the universalistic concept of rights in a Western understanding. Alas, to ponder these prospects of the actual constitutional process to unfold within the normative framework of the Constitution Bill goes beyond what it is possible in this essay.\textsuperscript{77}

\textsuperscript{74} Ibid.
provisions. In this sense, a considerable part of Thai constitutional identity is exposed to profound change rather than representing continuity. The gravity of this change results from the fact that it concerns a fundamental principle that is related not only to the basic structure in general but the royal powers. This unprecedented adjustment can only be explained by the extraordinary circumstances of constitution drafting and still represents the greatest uncertainty concerning the Bill’s ultimate approval.

Other changes are less extraordinary but yet significant. The symbolically significant removal of the Constitutional Court from the privileged constitutional regime that governs the judiciary for instance hints at a general trend to less rely on the broad loyalist coalition of the past but to rather narrow down the ‘winning coalition’, namely those elements of the ‘selectorate’ that are considered to be most decisive to maintain regime stability.\(^75\)

In this especially, the 2016 Bill differs markedly from the 2015 draft. Compared to it, the Bill follows the construction plan of established Thai constitutionalism in an even more conservative fashion putting less emphasis also on individual rights and public participation. Altogether, these adjustments express not only distaste for Western-like constitutionalism but also an inclination to narrow down the governing coalition.

At core, the future constitutional regime as to the propositions of the 2016 Bill can be summarized as follows: The constitutional identity formula is retained but markedly restated. Basically, the ‘DNA’ of established Thai constitutionalism consists so far of two strings that are dialectically related to each other. These are the constitutional basic structure under the label ‘democratic regime with the King as head’ and the manifest anti-electoral stance that forms its logical counterpart.

Pertaining to the first string of this ‘constitutional double helix’, thus the basic structure, the Interim Constitution has already altered one of its central pillars, the principle that has formerly been regulated by section 7 of the 1997 and 2007 Constitution. In a modified form, this change continues in the Bill. In effect, what had been part of royal prerogatives is now allocated to a sort of ad-hoc ‘supreme leadership council’ (section 5 (3)). That transforms the former, culturally deeply sated super-constitution that constituted the unwritten dimension of the ‘democratic regime with the king as head’ in a substantial way. This unprecedented restatement of the basic structure has arguably been motivated as a reaction to the initial vacuum that had emerged as one of the central causes for the 2014 Coup. Yet, it poses some questions about its functionality. Arguably, the regulation of the former sect. 7, by acknowledging prerogative powers of the King bound those powers to the

normative implications of kingship in its cultural-historical definition.

The implementation of a supreme ad-hoc committee to rule in times of crisis as a replacement of the former sect. 7 effectively blurs this link to the normative universe of the Cultural Constitution. While this committee’s actual powers are concerning vague, its legitimizing ground remains in a limbo. Rooted only diffusely in the cultural layers of the constitutional order while no substantial legal conditions are set to define it, the powers of the section 5-committee appear more free-floating than the authoritarian claims of corresponding institutions during post-coup interim regimes.

This affects not only an ad-hoc crisis committee that might never convene. Practically, the profound change represented by sect 5 (3) is more important due to what the norm is replacing than with regard to what it is creating. Crucial in a normative sense is the decoupling from the Cultural Constitution. Consequently, the implied change of the basic structure affects the entire constitutional order as such which rests on a much vaguer and potentially shifting bedrock of legitimacy now.

While the ‘positive’ string of the constitutional ‘double helix’, the basic structure, has thus become diffuser, the corresponding ‘negative’ string, the Constitution’s anti-electoral structure, has been sharpened and accentuated. With the current constitutional project, the long-established trend to contain the ‘vagaries’ of electoral politics reaches a new peak indeed. It is expressed by a tightened space for the formulation and execution of governmental policies and a significantly more repressive arsenal to hold individual officeholders responsible. At the same time, the previous ‘shotgun-approach’ towards political parties and their executive members has been given up and replaced by a better calibrated disciplinary regime.

Concerning the designated ‘Guardian(s) of the Constitution’, the identified broader development towards a more political rather than legal mode of constitutionalism manifests in a number of novelties. Significant among them is the rebalancing of the guardianship of last resort from the Constitutional Court to the newly introduced ‘supreme leadership committee’ (section 5 (3)) and the weakening of the Constitutional Court’s authority in symbolic respects. Noteworthy are also the over-expansion of powers of the NCCC and EC and the almost insignificant mandate of the NHRC, which seems moreover rather supposed to protect the national interest than to robustly defend human rights.

This leads to the future balances of power. In this regard, the future Constitution will most probably live up perfectly well to two of its purposes, namely to prevent a return of the Thaksin-camp to power and, at the same, to ensure some form of regime continuity for a considerable time. In this regard, the framers responded technically consistently and with a remarkable craft to the imperatives set out politically. To somehow maintain the influence of the powers-that-be and to ensure that ‘bad leaders’, namely Thaksin-allied forces,
will be prevented from taking over power again, the Bill provides a carefully calibrated sequence of interlocked regimes supposed to ensure the stability of the hegemonic regime.

After the adoption of the Constitution, a first transitional regime running until the formation of a new government will be constituted by the continuation of the section 44-regime that has been introduced by the Interim Constitution. A subsequent second transitional regime will secure the hegemonic interest after the first elections by the involvement of the specially designed Senate in the creation of the government for a period of additional five years following the Senate’s constitution after the elections. This Senate will be able to determine at least two subsequent administrations and thus influence constitutional politics for roughly eight years. After that period, safeguarding the constitutional rationales will have to be ensured by the fallback option to convene the ad-hoc leadership committee according to section 5 if necessary.

While the effects of altering the normative core and therefore constitutional identity can hardly be assessed, two of the drafters’ objectives pertaining to the future ‘physics of power’ seem well to be met. This is the aim of preventing a coming-back of the Thaksin camp and the goal to maximize the chance of the powers-that-be to entrench their rule for a considerable time under the guise of a technical democratic mechanisms. In this very sense, the drafters have crafted a masterpiece in purely functional terms.

In total, the Bill represents an assertive attempt to define tightly the future administration of the country. The proposition made to achieve its aims is a notoriously bold one, worked out with strong, daring strokes. The result will have considerable weight for the reality of future constitutional politics, given that the Bill will actually be promulgated. Created in wake of a military coup in a highly divided society and amid a profound transitional challenge, this 20th Constitution of the Kingdom would fully reflect the factual circumstances of its creation throughout its entire structure.

As a living law and operational frame of efficient normative ordering, it will be dependent on the further development of the political realities that are impacting on the balances of power which the Bill, at the same time, is attempting to (re)shape and fix so resolutely. Whether the future Constitution will actually enable those in power to cope with future political and societal developments and demands is one of the great unknowns with regard of a rather unpredictable future of Thai constitutional politics.

One precondition to implement the hegemonic regime’s governance

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76 Given that the Constitution Bill 2016 has been adopted by referendum, the adoption is probable yet still under royal consideration. After all, according to the established tenets of Thai constitutionalism, the King, in a substantial sense, is the one, who is giving the constitution and who might theoretically not just rubber-stamp the present Bill.
formula with the intended long lasting effect will be the winning coalition’s ability to keep the polity’s semi-authoritarian center of gravity unified in order to rule largely independent from party politics.

Moreover, the Bill’s proposition will require that the Thaksin camp can be prevented from a coming-back already on the entrance level as well as a rather fragmented political party landscape and a basically compliant public. What this Constitution would not offer is an arena to deal constructively with opposing ideas and an efficient political opposition. In search of a sustaining legitimacy, sufficient integration of a still divided society might neither be expected from the poor remnants of an ever-pale electoral Thai democracy, nor the merely instrumental understanding of a rule by law, whose dimensions have even been downsized by the Bill in favor of moral and political forms of ordering. Thus, the constitutional process will likely remain static and rigid, increasing political dynamics rather having disruptive effects than that they might be constructively transformed. In any way, the challenge a future Constitution will face is huge, the outcome uncertain.
Thoughts on the Publication of the Biography of General Ne Win: Four Quotes and Some Comparative Comments

Myint Zan*

On 8 June 2015, the Institute of Southeast Asian Studies in Singapore held a book launch and seminar for Robert H Taylor’s recently published book General Ne Win: A Political Biography. The occasion makes it timely to reflect on the life of one of Asia’s longest ‘serving’ and certainly longest living authoritarian leaders who died in 2002 at the age of 92. The publication of Robert Taylor’s book triggers in me the following thoughts or musings on U Ne Win’s life, his long rule of Burma (as it was officially called throughout his formal rule from 1962 to 1988) based on four quotations.

Initial draft of this article was written in June 2015 before the author of this article obtained a copy of Robert Taylor’s book. This comment is not a review of the book, as it was initially written before I received and read it. Here only a few snippets from the book will be commented upon, a year after I first wrote the article in June 2015. It is not intended to be a review, and if reference is made to particular aspects of the book it is only to update the article and not to transform it into a full review. The blurb mentions that Taylor’s book is the first “scholarly account of the life of General Ne Win … the enigmatic ruler of [Burma] for over 25 years … where Ne Win’s legacy is still being felt today”.¹ The contents of the book cover the period from ‘The Formative Years’

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This article is dedicated to the memory of my late Uncle Dr. Myint Thein, (1927-2006), an anatomist, a former Head of the Department of Anatomy of the Institute of Medicine, Mandalay, a consistent, constant and fierce critic of Ne Win the person and his rule, and to other ‘Uncles’ or elder mentors of mine (not relatives) with whom I have discussed Ne Win occasionally throughout the years. In my conversations with them they have also been critical in their own ways of Ne Win. Hence this article is dedicated as well to the late Uncle U Ba Latt (1916-2005), among others, Commissioner, Mandalay Division (1958-1961), the late Uncle U Thein Maung, (1916-2004) retired Professor of Geography, University of Mandalay, the late Uncle U Tha Hto (1919-2011), retired Professor of Economics, Rangoon Institute of Economics. The brief profiles of U Ba Latt and Professor U Thein Maung appeared in pages 73-74 and pages 97-98 respectively of Who’s Who in Burma (1961, People’s Literature House, Rangoon). A longer profile of Ne Win (as of 1961) appeared in the same book, pp. 202-203. This article is also dedicated to the memory of the late Professor Melford Spiro (1920-2014), retired Professor of Anthropology, University of California, San Diego, among others, an eminent Burma scholar, whom I have not met but with whom throughout the years I have communicated by phone and e-mail, a few of which were on or about Ne Win’s rule. A reference to one of Professor Spiro’s books is made in this article.

Last (but not the least) this article is also dedicated to Mr. Stewart Manley, Lecturer, Faculty of Law, University of Malaya, Kuala Lumpur, Malaysia with whom I have
Myint Zan

(July 1910 to December 1941) to ‘Failure and Farewell’ (March 1988 to December 2002). One of the theses of the book, to quote from Ne Win’s biographer himself, is that ‘Ne Win would have had to admit that his revolution was a failure. Even though it would be a mistake to argue from that perspective’.² Large chunks of Taylor’s book can be said to be an elaboration of the ‘mistake to argue from that perspective’ and can be considered an ‘apologia’ on behalf of Ne Win and his (mis)rule of the country.³

“Wholly Praised” or “Wholly Blamed”

The first quotation (among the four quotations) that comes to mind is from the *Dhammapada*, a Buddhist text: I am referring to parts of a particular ‘verse’ in an English translation which I first read in a letter to the Editor of the English language (Rangoon) *The Guardian* newspaper written by one U Pu around October 1968. U Pu was quoting the *Dhammapada*, in defense of U Thant (22 January 1909 - 25 November 1974), third Secretary-General of the United Nations, when news items appeared in *The Guardian* of a few American Senators criticizing or ‘blaming’ a fellow countryman, in relation to U Thant’s actions and comments during the Vietnam war regarding United States’ policies and practices. The excerpted text reads:

There never was, there never would be, nor does there exist now, a man who is fully praised or fully blamed.⁴

discussed, on quite a few occasions, Ne Win (especially in comparison with Alfredo Stroessner) including during the preparation of this essay.


2 Ibid., p. 3.

3 It is significant that Taylor does not use the word ‘only’ in the above comment. If he had used the word ‘only’ the meaning would have been different: namely it would be a mistake if an argument was made only from that perspective. Then it would have read: “Even though it would be a mistake to argue only (or solely) from that perspective.” Hence at least by implication it would seem that Taylor is ‘arguing’ beyond (almost) perfunctory mentioning of Ne Win’s ‘failure’ such a perspective should not even be seriously considered in an ‘overall’ analysis of Ne Win’s life, his policies and actions as it affects the country where he was a dictator for more than 25 years.

4 That is the quotation as I remember it more than four and half-decades after I came across it. In June 2015, I found at least two different English translations of Verse 228 of *The Dhammapada* on the world wide web. One of which reads, “There never was, will be, nor at present is found, anyone entirely faulted or entirely praised” Thanissaro Bhikkhu, (Geoffrey DeGraff), *Dhammapada A Translation*, Revised edition, 2011 (for free distribution), available at: http://www.accesstoinsight.org/lib/authors/thanissaro/dhammapada.pdf, last accessed on 17 June 2015. Another translation closer to the above
The writer U Pu was defending fellow countryman U Thant from what he considered to be unfair attacks against U Thant from certain Senators from the United States and was, in one sense being ‘philosophical’ by citing that there was no person who has been or would have been wholly blamed or wholly praised.

U Thant, a distinguished Burmese, served as Secretary-General of the United Nations for ten years, from 3 November 1961 to 31 December 1971. When he died in New York on 25 November 1974, U Thant’s body was brought back to Burma for burial. President Ne Win did not authorize that U Thant’s body be cremated in a special mausoleum. Even if he did not order that U Thant be buried in a seedy, or at least ordinary, cemetery in Rangoon, he implicitly authorized it. Students from universities in and around Rangoon, angered at the shoddy treatment by the Ne Win regime of their distinguished countryman, marched in their thousands if not tens of thousands to the Kyaikassan Hall and grounds, where U Thant’s body was displayed, ‘abducted’ U Thant’s body and took it to the Convocation Hall on the campus of Rangoon University, gave anti-Ne Win regime speeches, and finally buried U Thant’s body in a makeshift mausoleum at the Students’ Union building which had been dynamited by the regime on 8 July 1962. In the early morning hours of 11 December 1974 military police raided the Rangoon University campus, shooting, allegedly bayoneting and killing some students guarding the makeshift mausoleum. This later led to riots in other parts of Rangoon, martial law was declared and the inchoate uprising brutally crushed.  

In 1969, the late Dr Maung Maung published, in both Burmese and English, a biography of U Ne Win with the title *Burma and General Ne Win*. It can only be described as hagiographical – if it did not almost wholly praise him then at the very least it was almost entirely complimentary, perhaps even mildly fawning and obsequious. Even before perusing the content pages of his book, I knew that Robert Taylor’s book would not be as hagiographical as Maung Maung’s paean. Still, my curiosity was: would Taylor’s book be indulgent, if not complimentary, overall? After reading the book I can confirm that Taylor’s biography of Ne Win is very indulgent, glossing over many of Ne Win’s misdeeds, from the shootings and killings of Rangoon University

excerpt reads: “There never was, there never will be, nor is there now, a person who is wholly blamed or wholly praised”, translated from the Pali by Acharya Buddhakrakitta, available at http://www.accesstoinsight.org/tipitaka/kn/dhp/dhp.17.budd.html, last accessed on 17 June 2015.


students within four months of his takeover on 7 July 1962 and the dynamiting of the historic Rangoon University Students Union building to his threat 26 years later on 26 July 1988 where he promised in his ‘last speech’ in a nationwide broadcast on 23 July 1988 that: “I would like to let the whole nation know that if the Army shoots, it shoots to hit, it does not shoot into the air to scare and this would not be easy on you” – a ‘promise’ which his troops kept with a vengeance.

Like virtually almost all human beings including heroes, anti-heroes, villains, democratic as well as authoritarian leaders and dictators, U Ne Win cannot, and should not, be fully blamed for all the ills that have befallen Burma since independence though contra Taylor I do believe and assert that he was mainly or at least largely responsible for the economic deterioration and major human rights violations that occurred when he was (at the least and to quote from Time and other foreign magazines’ descriptions of him in the 1960s and 1970s) the ‘strong man’ of Burma. But he certainly cannot even be substantially praised as, among others, his erstwhile biographer Dr. Maung Maung did in 1969 when, recounting how just before Ne Win’s military coup of March 1962 Ne Win visited the ancient Burmese city of Pagan, he stated “Should all this [the glory of Pagan] be allowed to crumble; thus inferring

7 For a contemporaneous report see front page of The Nation, Rangoon: ‘General Ne Win Broadcast Appeal: Give Us time to do work: Obstructionists are warned: Will fight Dah (‘sword’) with Dah and Hlan (‘spear’) with Hlan (‘spear’). In a book of 620 pages Taylor devotes essentially two pages (pp. 266-267) of this very regrettable events if not heinous actions of the Ne Win regime.


9 Taylor again glossed over, justified and excused Ne Win’s threat to shoot straight and his statement (in my translation) ‘it won’t be easy on you’ as ‘was fairly common as the government was facing severe disorder’ (above fn. 1, p. 525.) See also text and notes accompanying foot note 12 and foot note 61 below.

10 For example, the civil wars that had taken place in Burma since independence were not a creation of either Ne Win, the Revolutionary Council or the Burma Socialist Programme Party (BSPP) that he led for 26 years.


12 Maung Maung, Burma and General Ne Win, above fn. 6, second last page of book. It was during Ne Win’s watch, when Dr. Maung Maung was still alive, that Burma, which in the 1950s was one of the largest rice-exporting nations, experienced shortages of rice in 1967. See for e.g. Min Lwin, Democratic Voice of Burma, ‘Burmese Remember 1967 Rice Massacre’ available at: http://www.burmanet.org/news/2011/08/15/democratic-voice-of-burma-burmese-remember-1967-%E2%80%98rice-massacre%E2%80%99-%E2%80%93-min-lwin/, last accessed on 7 August 2016, where troops shot and killed up
that Ne Win was the savior of Burma and Burmese civilization; for the implication is that if General Ne Win had not launched his coup in March 1962, the glories of Burmese civilization would have come to an end. Taylor’s praise, or at least compliment, in the last pages of his book is arguably not as unstinting or effusive as Maung Maung’s but it too takes on historical dimensions. In the second last sentence of his book Taylor writes: “if the country for which he fought [sic] does become a unified, self-governing, and culturally distinctive nation, proud of its history, appreciative and conserving of its traditions, and does not become just another country seduced by the power and glitz of globalization and inane mass culture, then his monument will be Myanmar itself.”

Hence the very complimentary biographies of Ne Win published forty-six years apart (in 1969 and 2015) indicate that even a person like Ne Win, who Taylor acknowledges that ‘many [in Myanmar] still abominate him and his memory’, have those who solidly (and overall) praise him, attesting to the essential correctness of the Dhammapda quote.

13 Above fn. 1, pp. 562-563. As I read Taylor’s musings (or is it tribute?) I was reminded of (former US Secretary of State) Henry Kissinger’s own tribute of the late Egyptian President Anwar el-Sadat who was assassinated on 6 October 1981. Kissinger wrote in Time magazine after Sadat’s assassination ‘Peace will be his pyramid’. But of course the two are quite different leaders, even if Sadat was authoritarian I am of the view that he was more of a statesman or at least a lesser dictator than Ne Win. I have also put the word [sic] after the phrase ‘for the country for which he fought’. For even though Ne Win had, in the colonial past ‘fought’ mainly the British and Japanese since 1962 unless the word ‘fought’ is used in a stretched Ne Win ruled the country rather ‘fighting’ for it. At times as Taylor implicitly admits in the latter part of his book Ne Win at least misruling and certain aspects of his rule rationalized as fighting for the country actually is oppressing its people or his ‘subjects’. And it was definitely not Ne Win alone who “fought for the country though this author does not state that Professor Taylor claims that only Ne Win ‘fought’ for the country. There were and are dozens of what Taylor in his book somewhat condescendingly called ‘politicians from the left and the right’ who in their own ways during the colonial struggle” ‘fought for the country’ some of whom later turned to ‘fight’ Ne Win’s regime albeit they failed recognition of their ‘fight’ against Ne Win regime needs to be mentioned.

14 Ibid., p. 562.
“Ain’t going to no heaven”

The second quote is an excerpt from *The Legal Imagination* by James Boyd White, retired Professor of Law, Professor of English and Adjunct Professor of Classics at the University of Michigan, the first edition of which was published in 1973. It reads:

> You ain’t goin’ to no heaven, ‘cause it ain’t no heaven for you to go to.¹⁵

The quote is a comment made by an African-American teenager “Larry H” who, in the mid-1960s was asked his views about heaven. When asked about “hell” Larry H said (as excerpted in the book)

> Well, let me tell you, it ain’t no hell ‘cause this is hell right here, y’ know. [When asked by the interviewer] ‘This is hell?’, Larry H replied ‘Yeah, this is hell right here.’¹⁶

U Ne Win, in the last few years of his life became very enamored of Buddhism. He was so ‘devout’ that he supposedly taught the late Lee Kuan Yew how to meditate when the elder Singaporean statesman visited him during U Ne Win’s “retirement”.

I also have heard from a reliable source that when the late former Australian Prime Minister Gough Whitlam wrote to U Ne Win requesting him to intercede in the (wrong)doings of the then ruling military junta, virtually all of whom were his underlings, he wrote back to Whitlam saying he was no longer interested in politics and that he was concentrating all efforts for the “next life”.

What does this all mean for U Ne Win, now (July 2016) that it is more than

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¹⁵ Statement of “Larry H” (around the mid-1960s), then a 15 year old African-American and “core [gang] member of the Jets” being interviewed as excerpted and reported in James Boyd White, *The Legal Imagination*, (abridged edition, Chicago: University of Chicago Press, 1985, p. 26). A similar view has been stated by a much more prominent person though not as colorfully as Larry H did. Astrophysicist Stephen Hawking stated in 2011 that “[h]eaven is a fairy story for people afraid of the dark … I regard the brain as a computer which will stop working when its components fail. There is no heaven or afterlife for broken down computers; that is a fairy story for people afraid of the dark”, Reuters news item, May 16, 2011, “Heaven is a fairy tale, says physicist Stephen Hawking”, available at: http://www.reuters.com/article/us-science-stephenhawking-heaven-idUSTRE74F1RZ20110516, last accessed on 23 July 2016. But compare one of Ne Win’s former deputies the late Brigadier Tin Oo in foot note 17 below of how convinced he was of going to a (Buddhist) heaven.

¹⁶ Ibid., p. 27.
13 years since he died in December 2002? Well, to paraphrase Larry H, he ain’t goin’ to no hell for there ain’t no hell for him to go to. And this, I might state, is not due to the “piousness” of the late General but surely as “Larry H” would have pointed out, there [simply] ‘ain’t no hell for’ him ‘to go to’ either. To elaborate and to be more specific, just as Larry H believed (and, should he be still alive roughly 50 years after he first made that statement, believes) ‘You ain’t goin’ to no heaven, ‘cause it ain’t no heaven for you to go to’, this author also believes that General Ne Win ‘ain’t going to no hell, [since] it ain’t no hell for him to go to’ for his apparent misdeeds while he was on Earth.17

A contrary view regarding the after-life vis-à-vis Ne Win’s whereabouts can be narrated here with a personal slant. When the author of this article was held in confinement, *incommunicado* without charge or trial for over ten months from 4 March 1985 to 10 January 1986 in Rangoon’s *Insein Jail* due to a bureaucratic inanity which I would not go through, a fellow detainee (three of us were arrested on the same day at the same hour and were held under the same 1975 *Law Protecting the State from Hostile, Subversive Elements*18 and released on the same day and hour) told me that if U Ne Win’s good *karma* has not been exhausted he could, in the next life become and even more

17 I have stated my personal view is that there is neither heaven nor hell to go to, which as far as the General (Ne Win) not going to the ‘nether realms’ since (personally for me) they do not exist, is a matter of regret. It is small comfort to the author that Ne Win ‘ain’t’ in ‘no heaven’ either. This author cannot cite sources but he remembers reading in a Burmese language magazine that one of Ne Win’s former political protégés and supposed successors (who for a time went by the name of ‘Number One-and-a-Half’ indicating that he was on the cusp of succeeding Ne Win as the most powerful man in the country’ Taylor above note 1, p. 487), former Brigadier Tin U (died 1999) (not the current – July 2016 – patron of the National League for Democracy Thura [Burmese military title] U Tin Oo (born March 1927) said he was thankful to General Ne Win because Ne Win sacked him as Joint-General Secretary of the sole ruling Burma Socialist Programme Party and from other military and government posts, prosecuted and jailed him for bribery and other offences. (Above note 1 at p. 487.) ‘Spectacles Tin U’ who was also for a time Ne Win’s feared (military) intelligence (MI) chief stated that if Ne Win had not jailed him he would not have learned Buddhist meditation practices in jail. Since he had learned meditation practices in jail Tin U said when he died (and apparently the statement was made by Tin U a few weeks before he died around 1999) he would go to (in Burmese) to *Natpyi* the (Buddhist) *Deva* realms. A ‘curial curiosity’ arise as to what the late Tin U (who predeceased his elder mentor and former boss Ne Win by about three years) would have thought about Ne Win’s ‘whereabouts’ after his demise since both of them ‘strong men’ in their own times ‘found’ and resorted to Buddhist meditation practices after their (for Tin U) sudden fall from power and or Ne Win the slow easing out of power during the last years of Ne Win’s life. (Ibid., pp. 536-537).

18 This Law was repealed by the new Legislature (formed after the November 2015 elections) in May 2016 by a law entitled *The Law Repealing the Law Protecting the State from Hostile, Subversive Elements*, in late May 2016. A few dozen of the Legislative Members or Legislators mainly from the National League for Democracy might have been detained under this and other oppressive laws.
powerful general than he was in this (previous) life. Taking great (religious) license and being ‘mischievous’ I might add that if that be the case, the reborn U Ne Win (if he were reborn in the human realm) would be (as of July 2016) 13 ½ years old (since U Ne Win of the previous life died in December 2002). U Ne Win (of the ‘previous life’) took over power in the military coup of March 1962 when he was around the age of 51. The ‘reborn’ U Ne Win, if his good karma is not exhausted, can take over power as a military officer in a military coup when he will be about 25 to 26 years old (instead of the ‘previous’ U Ne Win at the age 51 in his ‘previous life’). And instead of ruling for a mere ‘26 years’ as in his previous life the ‘reborn U Ne Win’ could rule twice as long, for 52 years!

This is the thought that comes to mind when I consider my then fellow detainee’s statement that the reservoir (or is it a deluge?) of U Ne Win’s ‘good karma’ (I would prefer the term sheer undeserved good luck) is such that he could well be reborn as an even more powerful general in the next life. When Ne Win wrote to Whitlam that he is concentrating mainly on the ‘next life’ one supposes U Ne Win did not aspire (or did he?) to such a role for himself in his ‘future life’.

“Certainly Ain’t in no Hell when he was on Earth”: Ne Win was, in Comparison to Virtually All Authoritarian Leaders from Various Parts of the World, Extraordinarily Lucky

U Ne Win was in ‘no hell’ during his actual sojourn on earth (even if he was not fully in ‘heaven’ either) though he did have lots of power and ‘fun’. Taylor’s book need not narrate the ‘fun’ part since, after all, it was merely a ‘political biography’.

Ne Win lived a very, very long and comfortable life. He was, in my view, internally more powerful than other more infamous or perhaps lesser dictators. There are more authoritarian leaders or dictatorial leaders than Ne Win – in Asia, Africa and South America –, but most of them did not rule as long as he did, both in a formal sense and later behind the scenes. It is rare for a person,

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19 Taylor explains why his biography is merely or only (not Taylor’s words but mine) a ‘political biography. Speculation on the part of the author about motives and intents have been avoided as much as possible. This book is not about Ne Win’s personality or private life except as it was seen to impinge on his public activities’. Above note 1 at p. 558.

20 The nature of and space allocated to the article is such that it is not feasible to give detailed comparisons of Ne Win’s rule in comparison with other dictators, strong men or authoritarian leaders though brief comparisons with 11 other authoritarian leaders, three from Europe, two from South America, one from Africa and five from Asia, are briefly compared in this essay. Taylor’s ‘indulgent’ view of Ne Win’s rule is such that Taylor only uses the word ‘dictatorship’ to describe Ne Win’s rule once (p. 463) in his book.
any ordinary person, to live over the age of 90 as U Ne Win did. It is rare for authoritarian leaders or dictators to live beyond the age of ninety even if their formal rule lasted longer than U Ne Win.

The only other authoritarian leader from the same age group as U Ne Win who lived longer than U Ne Win in the post Second World War era which this author was able to find was Alfredo Stoessner (3 November 1912-16 August 2006) of Paraguay, who lived to the age of 93 and (if Ne Win’s date of birth of 6 July 1910 is correct) therefore lived about a year and five months longer than Ne Win.

Stroessner’s formal rule from May 1954 (when he took over power in a coup) to February 1989 (when he was overthrown in a military coup) was longer than Ne Win's tenure (from March 1962 to July 1988 when he nominally resigned). Stroessner though, unlike Ne Win, did not have any say

Taylor does not even use the word ‘strong man’, far less ‘dictator’ to describe Ne Win. Taylor does use, at times, the word ‘regime’ to describe (especially post-1974) Ne Win’s rule. The occasional use of the word ‘regime’ to describe Ne Win’s regime ‘lost the plot’ or at least reduced its significance when Taylor also uses the term ‘regime’ to describe the overthrown—and in comparison to Ne Win—less undemocratic government of Prime Minister U Nu before the first military coup of 1958. For example, among the Asian counterparts Marcos’ ‘undemocratic rule’ after he declared martial law in September 1972 was less than 13 ½ years, just about half of Ne Win’s formal rule of 26 ½ years and unlike Ne Win Marcos did not come to power in a military coup. South Korea’s Chun Doo Hwan did come to power (initially) through a military takeover and his rule (about ten years) was not even half as long as Ne Win. The same goes for Chile’s Pinochet whose rule from September 1973 to March 1990 constitutes about 16 ½ years. And all three either were exiled (Marcos, died in exile), prosecuted and jailed after being eased out of power (Chun Doo Hwan), and efforts to prosecute for various crimes, nationally and internationally, were made against Augusto Pinochet. Indonesia’s Suharto’s, Zaire’s (now Democratic Republic of Congo) Mobutu and Paraguay’s Alfredo Stroessner’s formal rules lasted longer than Ne Win but like in the case of Pinochet efforts to prosecute Suharto were made after he, unlike Ne Win, actually rather than nominally, resigned from office. Likewise, Mobutu was overthrown and died in exile and so was Stroessner. Unlike Ne Win, Suharto, Mobutu and Stroessner did not have any role politically behind the scenes at all after they were overthrown and exiled (Stroessner and Mobutu) and after he was forced to resign (Suharto). Taylor states that Ne Win was involved directly in the 18 September 1988 military coup which crushed a six-month long ‘people’s power uprising’ (much more intense, wide spread against a considerably if not also much less despotic Marcos regime where a three-day uprising in Manila alone led to Marcos’ overthrow) when Ne Win instructed his junior military officers, Aye Ko (last position before resigning with Ne Win – Vice President of the Socialist Republic of Union of Burma) and Kyaw Htin (Defence Minister), to let the military ‘rule the whole country’ instead of imposing military rule only in Yangon and Mandalay (Taylor, General Ne Win, above note 1, p. 533.). Who among all the ‘strong men’ named above had such a direct role after ‘resigning’ and being forced or eased out of power? Hence Ne Win had an easier role and, compared with the difficulties, a ‘fun life’.
or influence in Paraguayan politics after having been overthrown.\textsuperscript{21} Stroessner spent 17½ years in exile in Brazil whereas Ne Win’s slight discomfort was to have been apparently put under house arrest for the last 9 months of his life.

A list of selected, mainly military ‘strong men’ and two other non-military authoritarian leaders who had taken power starting in the 1960s will be briefly mentioned to illustrate this point:

- Park Chung-hee (ruled from 1961-1979)

South Korean General Park Chung-hee (1917-1979) who died at the age of 62, a younger contemporary whom Ne Win outlived by 23 years, took power in May 1961 but was assassinated in October 1979. His rule lasted 18 years and even if he was equally authoritarian as Ne Win (a doubtful proposition)\textsuperscript{22}

\textsuperscript{21} Just a few weeks after I received Taylor’s biography of Ne Win, I have had the chance to read in its entirety, \textit{The Stroessner Era: Authoritarian Rule in Paraguay}, Boulder: Westview Press, 1990, by Carlos R. Miranda. Unlike Taylor’s book it is not a biography of Stroessner though it is a cogent analysis of the mechanics of Stroessner’s rule of Paraguay and analysis of why it lasted as long as it did. The book was published in June 1990 about 15 months after Stroessner’s overthrow in February 1989. The author Carlos Miranda might have started writing sometime before February 1989 and the update on Stroessner’s overthrow and subsequent developments is relatively short. As a person who had lived in Burma under Ne Win’s regime this author asserts that from a careful reading of Miranda’s book he is of the opinion that there was more ‘political space’ in Stroessner’s Paraguay than in Ne Win’s Burma. To give only two brief comparisons: (1) political parties were allowed during all of Stroessner’s rule from 1954 to 1989 which was not the case when, as stated below, Ne Win abolished all political parties and confiscated the assets of all political parties into his own party the sole political party allowed by law (from March 1964) and later the one-party state receiving ‘constitutional imprimatur’ under the 1974 Constitution. (2) Miranda writes that during Stroessner’s rule researchers including foreign researchers were able to openly send survey forms, interview students and residents of Asuncion the capital about their political views including the ruling -but not sole legally allowed political party like in Burma-Colorado political party. None of this has occurred or is it politically, indeed factually, possible in Burma during Ne Win’s rule.

\textsuperscript{22} Among others unlike Ne Win, Park as well as Suharto, Marcos, Alfredo Stroessner, Augusto Pinochet did not turn the political systems into a single Party dictatorial system that Ne Win did to Burma as far back as March 1964 when the Revolutionary Council in a decree signed by its Chairman Ne Win entitled \textit{Law Protecting National Unity} banned all political parties except the Burma Socialist Programme Party (of which Ne Win was the Chairman) and the assets of the political parties were seized and ‘incorporated’ into the BSPP and which at least for 24 years the only legal party by law (since March 1964) and by the 1974 Constitution’s Article 11: ‘The State shall adopt a single party system. The Burma Socialist Programme Party is the sole political part and it shall lead the State’. Also, Burma was the only former British colony in Asia which turned a (generally) Westminster system of Parliamentary democracy into a ‘one party’ (supposedly) socialist State. None of the former British colonies of Asia namely Pakistan, India, Bangladesh, Sri
South Korea’s economy did not deteriorate during his rule. Even Park Chung-hee’s critics would have to acknowledge that the economy of South Korea improved and part of his policies led South Korea in later decades to become one of the ‘Asian tigers’. Ne Win was responsible both for suppression of civil liberties and the great economic deterioration as his biographer has readily acknowledged especially in relation to Ne Win’s socialism and its ‘Burmese way’ to it.\textsuperscript{23}

\begin{footnote}
Lanka, Singapore, Malaysia have adopted a single-party political system by law and by Constitution.
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The Greek colonels and the Greek Military Junta (ruled from April 1967 to July 1974)

The Greek colonels ruled Greece in a short-lived dictatorship from April 1967 to July 1974. The first head of the then Greek junta was George Papadopoulos (1919-1999) who died at the age of 80. His actual rule, overthrown or eased out in an internal coup in November 1973, was just over six and a half years. Papadopoulos spent 24 years in a Greek prison. Another Greek military officer who overthrew Papadopoulos, Dimitrios Ioannidis (1923-2010) who died at the age of 87, spent more than 35 years in a Greek prison after the restoration of democracy in Greece. Ioannidis’ rule, behind the scenes, of Greece lasted only eight months from November 1973 to July 1974 and for this he spent 35 years in a Greek jail and died there.

The reviewer of my initial article has asked to elaborate on the rules of Greek junta and others and how it was ‘comparable’ (and I would add ‘contrastable’ with the rule of Ne Win). Without ‘bloating’ the article into a long list of ‘compare and contrasts’ of Ne Win’s and other authoritarian leaders’ rules, this can be done only briefly.

The author is writing this update or revision on 8 July 2016, an unhappy 54th anniversary of the dynamiting of the Rangoon University Student Union building on 8 July 1962 in the early morning hours, and less than 24 hours earlier in the afternoon of 7 July 1962 Burmese troops mowed down with sub-machine guns peacefully demonstrating students at Rangoon University.24

24 For a contemporaneous report see “General Ne Win Broadcasts Appeal ‘Give Us a Chance to Do Work’; Obstructionists are Warned: Ready to Meet ‘Dah’ (‘sword’) with Dah”, The Nation, Rangoon, 9 July 1962, front page. On the same front page there was a photo of the destroyed Rangoon University Student Union [RUSU] Building with the caption under the photo: “RUSU Building Demolished: The patch of white walling is all that remained of the RUSU building, scene of many students activities, after it was entirely demolished in a blast that rocked the neighbourhood.” On 13 July 1962 less than a week after the shootings and the dynamiting of the Student Union building Ne Win, his then wife Khin May Than and his entourage left Burma for a few months abroad for ‘medical check-up’ in Austria, Switzerland, United Kingdom and elsewhere. (Above note 1, pp. 268-270.) For another contemporaneous report see ‘Burma The Way to Socialism’, Time, Friday, July 20, 1962. An excerpt reads: “... General Ne Win could reflect that similar demonstrations had signaled trouble for other strongmen: Syngman Rhee in South Korea, Adnan Menderes in Turkey.” Alas, (and this is the point of this section) the ‘similar and subsequent demonstrations’ against Ne Win’s regime from 1962 to 1988 did not ‘signal’ that much trouble for him. For a brief (for a 620 page biography) of the shooting of students and apologetics of Ne Win’s (or at least his regime’s heinous action) see Taylor, ibid., pp. 266-267.
Eleven years later in Greece during the Colonel’s rule, a student-led uprising eventually called the 17 November 1973 movement occurred. From reports, apparently no Athens polytechnic students died during the uprising though some high school students and civilians died and a total of 24 civilians died during that event.

The person ostensibly responsible for it, Brigadier General Dimitrios Ioannidis was charged after the overthrow of the Greek military junta for high treason, rebellion, accessory to the slaughter during the Athens polytechnic uprising, initially sentenced to death, later commuted to life imprisonment. Even though he requested, in 2007, to be discharged for health reasons it was denied and he died in prison on 16 August 2010 spending more than 35 years behind bars.

A brief comparison, or rather contrast, can be made between Ne Win and Ioannidis:

(1) Both were military officers who took power in military coups.

(2) Ne Win took over in March 1962 and, as mentioned earlier, within four months of his takeover the 7 July 1962 and 8 July 1962 shootings and dynamiting of the Rangoon University Student’s Union Building took place. This was followed by the June 1974 workers’ strikes and their crushing and shootings.

(3) March 1988 to September 1988: sporadic uprisings in various towns and cities in Burma in which the Ne Win regime as stated in his last

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28 See for e.g. Bertil Lintner, Burma in Revolt: Opium and Insurgency since 1948, 2nd edition, Chiang Mai: Silk Worm books 1999, p. 455. At the time of the worker’s strike this author was a student staying at Ava Hall of Rangoon University. On about 4 am in the morning of 7 June 1974 he was woken up by sounds of gun shots coming from Sinmalaik dockyard where dockyard occupied by striking workers was attacked from sea side by naval boats using flares and from the opposite wharf side by what a late Uncle of the author described as ‘Army, Navy combined attack’ against unarmed workers. In the afternoon and evening of 6 June 1974 shootings also took place in other factories around Rangoon.
speech ‘shot straight to hit’ the demonstrators, where hundreds if not thousands died and where (for events of March and June 1988) troops not only ‘shot straight to hit’ but also beat some students to death and for which Ne Win also in his last speech to the nation took ‘indirect responsibility’. 29

(4) Ioannidis took over power from his fellow military officers on 25 November 1973. He ruled Greece for about 8 months until the overthrow of the Greek military junta on 23 July 1974. He spent from 1975 to 2010, a total of 35 years, in jail for among other things violently crushing the Athens Polytechnic uprising.

Even if Ne Win’s actions, only a few of which have been summarized above, were arguably not as bad as those of Ioannidis, he spent the last 35 years of his life in prison for the crimes that he committed in the eight months of his rule and George Papadoupoulos also died in prison, in 1999, having been detained and jailed for about 25 years since 1974. 30 As for Ne Win’s last 35 years, he was from 1962 to 1988 Chairman of the sole Burma Socialist Programme Party, the sole legal political party, Chairman of the Revolutionary Council (to 2 March 1974) and after the ‘transfer of power of 1974’ he took the position of President of the Socialist Republic of the Union of Burma (from 4 March 1974 to 9 November 1981). For the last 35 years of his life, Ioannidis was incarcerated in Korydallos prison, west of Athens which according to the Independent newspaper’s obituary of him was ‘built by the [Greek colonels] to detain opponents’. 31

Hence even if Ne Win (compared to Ioannidis) is not in ‘heaven on earth’ (metaphorically) he certainly was not in jail and had a very comfortable and long life, most of the time in positions of power even after his supposed ‘retirement’.

29 For a translation of Ne Win’s ‘last speech’ to the nation which among others he expressed ‘indirect responsibility’ for the ‘sad events of March and June 1988’ but soon thereafter threatened to ‘shoot straight to hit’ see “Party Chairman Calls for Earlies Possible National Referendum, Reveals Truth About Destruction of Student Union Building, Announces Intention to Retire From Politics”, The Working People’s Daily, 24 July 1972. p. 1.

30 See for e.g Robert Shannan, “Obituary: George Papadopoulos”, The Independent, 28 June 1999, available at http://www.independent.co.uk/arts-entertainment/obituary-george-papadopoulos-1102966.html, last accessed on 4 August 2016. The last sentence of the obituary was “In dictatorial regimes the beginning may seem easy, yet tragedy waits at the end inescapably.” Alas, that was not the case with either Ne Win or succession of military regimes in Burma and even though in the current (July 2016) power-sharing National League for Democracy government the military is ‘inescapably still dominant’ though admittedly its power has (only) moderately lessened.

31 ‘Obituary of Ioannidis’, The Independent, above note 27.
Nicolae Ceausescu (ruled from 1965 to 1989)

Romania’s Nicolae Ceausescu (1918-1989) who died at the age of 71 ruled Romania for 24 years and, after his overthrow and a brief trial, was executed. Unlike the Greek colonels whom Ne Win apparently never met, Ne Win met Ceausescu twice: first in Rumania in June 1966, Ne Win met “General Secretary of the Rumanian Communist Party, Nicolae Ceausescu”; 32 and again, in March 1987, when Romanian President Nicolae Ceausescu and wife Elena met Ne Win at the state guest house in Yangon.33 Taylor briefly adds that the meeting in March or April 1987 between Ne Win and the Ceausescus took place “less than two years” before the “couple was executed by firing squad with the downfall of the Communist regime in Romania on 25 December 1989”.34

A brief check from the Amazon.com book web site indicates that there are more books about Ceausescu(s) than about Ne Win.35 As can be seen from the titles, all of them are very negative and critical of their subject. Granted that Nicolae Ceausescu’s rule was arguably more disastrous for Rumania/Romania than that of Ne Win, his fate at a ‘trial’ which lasted an hour and he and his wife’s execution by firing squad was probably a fate which at least a few former Ceausescu opponents might not have wished on him.

A ‘mischievous’ and entirely counter-factual hypothetical arises: what if Ceausescu was not executed but like Ne Win ‘resigned’; a new military regime initially doing Ceausescu’s bidding came to power in Romania which later (as in the case of Than Shwe against Ne Win) turned against him, and Ceausescu, like Ne Win, died in his sleep and ‘peacefully’. Assume further that Robert Taylor is also a Romanian expert (instead of or in addition to being a political scientist and Myanmar expert): would his biography of Ceausescu be as indulgent or even sympathetic as his (real) one was of Ne Win?

At least one observation among a few others of what Taylor writes apparently in ‘understanding’ Ne Win could have been written *mutatis mutandis* and arguably of Ceausescu as well. Taylor writes that his “very long book … raised many questions and issues in the complex politics of twentieth-

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32 Above note 1, p. 341.
33 Ibid., p. 504.
34 Ibid., In fact the meeting in Yangon took place in March 1987 between Ne Win and Ceausescu (since it was reported in *Forward* magazine in April 1987 according to Taylor’s references at above note 1, p. 516) the execution of Ceausescu took place over 2 years and 10 months after their meeting not ‘less than two years’ as Taylor states.
35 Taylor’s book turned up when I typed ‘Ne Win’ at www.amazon.com but when Nicolae Ceausescu’s name was typed the first four books that are mentioned have these titles (1) *Red Horizons: The True Story of Nicolae and Elena Ceausescu’ Crimes, Lifestyle, and Corruption*, (2) *Nicolae Ceausescu: The Last Romanian Dictator?* (Volumes 1 and 2), (3) *The Life and Evil Times of Nicolae Ceausescu*. 

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century Myanmar. The length and detail is justified by the need to detail the record not only of Ne Win’s political thought as expressed in his speeches, but also his long standing and closer relations with many other leaders during the Cold War.”

Ceausescu too gave lots of speeches and he too had close relations or at least some relations among others, with Cold War leaders like Richard Nixon and also like Ne Win, the Queen of the United Kingdom.

Hence Ne Win during his sojourn on Earth was in (to quote Larry H’s words) “no heaven” but in a certain sense he was in great comfort and safety.

• Mobutu Sese Seko (ruled from 1965 to 1997)

Mobutu (1930-1997) who died at the age of 66 ruled Zaire, which has now been renamed as Democratic Republic of Congo, from 1965 to 1997, apparently longer than Ne Win’s former rule of Burma, but unlike him Mobutu was overthrown and he died in exile at the age of 67. Mobutu visited Burma in January 1973. Taylor’s narration of Mobutu’s two-day visit to Burma was like his narration of Ceausescu’s visit in April 1987: brief, with the observation that Mobutu “shocked his Burmese hosts by pouring the champagne given to him for a toast on the ground. Apparently such was Congolese custom.”

From the perusal of Mobutu’s rule and biography the author readily acknowledges that Ne Win was not as corrupt as Mobutu and Burma had no personality cult of Ne Win which approaches that of Mobutu.

36 Above fn. 1, p. 5.
38 Above fn. 1, p. 431.
39 For Mobutu Sese Seko being one of the most corrupt leaders in modern Africa see for example: Michela Wrong, In the Footsteps of Mr. Kruz: Living on the Brink of Disaster in Mobutu’s Congo, New York: Harper Perennial, 2002. For a retrospective look at Mobutu’s rule 12 years after his death see ‘Influential Africans: Mobutu Sese Seko’ “Voice of America”, 31 October 2009, available at http://www.voanews.com/content/a-13-2006-09-15-voa8/323431.html, last accessed on 9 July 2016. On the kleptocracy of Mobutu and other leaders see Daron Acemoglu, James A. Robinson, Thierry, “Kleptocracy and Divide and Rule: A Model of Personal Rule”, in: Journal of the European Economic Association, Vol. 2 (2004). Mobutu’s regime and that of Marcos was included among the kleptocratic regimes; Ne Win’s regime was not but neither was Romania under Ceausescu nor Indonesia under Suharto was listed as ‘kleptocracy’. Even though there was no personality cult of Ne Win in the mode and to the extent of Ceausescu, Mobutu and Alfredo Stroessner most of Ne Win’s underlings including this author’s relatives with military connections called him Aphaygyi, ‘Big Daddy’, and two of this author’s elderly relatives and friends have described their personal encounters with Ne Win: that he was treated like a ‘king’
Mobutu ruled what was then called Zaire for 35 years, apparently longer than Ne Win’s formal rule of more than 26 years. Still, when Mobutu was overthrown he was really overthrown and spent the last months of his life in exile. Mobutu died at the age of 67. At the same age Ne Win was at the peak of his power and he lived about 25 years longer than Mobutu. Ne Win did not live as luxuriously and lavishly as Mobutu and he was not arguably as bad a dictator as Mobutu\(^{40}\) though Ne Win certainly was a much luckier one.

- Augusto Pinochet (ruled from 1973 to 1990)

Augusto Pinochet of Chile (1915-2006) who died at the age of 91 approached U Ne Win’s longevity but did not match and certainly did not exceed it. Pinochet ruled Chile for 17 years as military dictator – again a shorter period than that of Ne Win, and even if Pinochet’s rule was more brutal and (to quote Robert Taylor’s words in the Introduction to his book describing Ne Win’s rule) more ‘costly’ (an arguable point) than that of Ne Win, his rule did not last as long as the Ne Win years.

Taylor acknowledges that “the Ne Win era was cost free. Many lives were not only lost but stunted and opportunities for development and enrichment destroyed. The cosmopolitan life of the privileged few that colonialism had created and Ne Win had enjoyed himself, and continued to enjoy when abroad, was obliterated.”\(^{41}\)

and another said people were ‘afraid’ of him to the extent that their bodies would shake perhaps almost literally when they were in his presence.

\(^{40}\) A New York Times obituary of Mobutu states that “[c]hallengers, [of Mobutu’s power] both imagined and real, often paid with their lives, like the four former Cabinet ministers whom Mobutu had publicly hanged before 50,000 spectators six months after he took office”. Howard W. French, ‘Anatomy of an Autocracy: Mobutu’s 32-Year Reign’ New York Times, 17 May 1997, available at: http://partners.nytimes.com/library/world/africa/051797zaire-mobutu.html, last accessed on 9 July 2016. Neither Ne Win nor his predecessor and successor governments and regimes have displayed such barbarism and in this regard Ne Win was a lesser dictator.

\(^{41}\) Above fn. 1, p. 5. Emphasis added. It is submitted that Taylor underestimates or passes over the fact that while Ne Win was on his numerous visits abroad some of them for ‘fun’, leisure or ‘medical check up’ he hypocritically closed off the country granting foreigners a visa for only 24 hours or 3 days, later extended to seven days. Moreover while Ne Win, – unlike Mao Ze Dong or the King of Thailand who do not travel abroad as extensively as Ne Win did, at the same time made it very difficult for Burmese to travel abroad while he and his family members travelled abroad almost at a whim and spent long stretches there. Where did all the money come from during Ne Win’s extensive travels and long stays abroad? Ne Win hypocritically talked about uplifting the welfare of workers and peasants to which Taylor gives full endorsement, but in more than forty years after 1962 Ne Win must have spent at least several million if not a few dozen million dollars abroad out of the state’s coffers for the ‘socialist’ leader’s bourgeois trips and enjoyment abroad.
In terms of lives lost, the brief comparative costs of Pinochet’s and Ne Win’s rules can be stated. Pinochet took over power from a democratically-elected (and arguably the first democratically-elected Marxist government). Ne Win’s coup of 2 March 1962 was almost bloodless, with one casualty. But within 4 months of the coup Ne Win’s troops had shot and killed around one hundred students and have dynamited the historic Rangoon University Student Union Building. In the next 26 years and restricted only to mainly urban areas, shootings and killings of workers and longshoremen occurred on 5-6 June 1974, shootings and killings occurred on a few days after 11 December 1974 in relation to the ‘U Thant’s crisis’, at least 41 persons were suffocated to death in March 1988, and also students were beaten to death in what is later called the ‘Red Bridge’ killings, and at least several hundred if not a few thousands were massacred in the period of 8 August to the aftermath of the 18 September 1988 coup, which Taylor himself states was at least at the instruction of then ‘retired’ Ne Win.

Significantly after the easing out of complete power of Pinochet, Chile’s National Commission for Truth and Reconciliation published a lengthy indictment of Pinochet’s dictatorship, officially counting 2270 deaths (later revised to 3172) in political violence.

Regardless of whether Pinochet’s dictatorship (from September 1973 to March 1990) was worse, better or roughly the same as Ne Win’s it is a fact that Chile was able to form a National Commission for Truth and Reconciliation even in a period when Pinochet continued to hold the position of Head of the Army. In the case of Burma/Myanmar, to resort to the colloquial, such a prospect is, if not a fairy tale, a ‘pipe dream’ and to paraphrase Barack Obama’s book (The Audacity of Hope) it would be futile (The Futility of Hope) to hope that such a Commission can be formed even in the (partly) new power-sharing (with the military) government, or that the government would venture or even ‘tout’ or moot such a proposal to form a genuine truth and reconciliation commission.

It was in the 1970s when most foreigners (excluding of course diplomats or foreign embassies and personnel of the United Nations and other organizations) had only limited visas that Dr. Robert Taylor was able to stay in Burma for months and do his study and research.

42 See for e.g. “Chile Under Pinochet: A Chronology”, The Guardian, 15 January 1999, available at: https://www.theguardian.com/world/1999/jan/15/pinochet.chile1, last accessed on 8 August 2016, where it is stated that in a violent coup, the presidential palace was bombed. Allende was among the first of 1,213 people who died or disappeared between September 11 and the end of 1973.

The casualties of ‘political violence’ in Chile, according to the National Commission for Truth and Reconciliation in the sixteen years of Pinochet’s rule, is over 3000. This author – and for that matter relatively few people or groups of people short of forming an actual commission – would not be able to prove the figures but a fair guess would be that if the results or deaths of political violence during Ne Win’s rule is less than that it could not be significantly less.

After Pinochet was eased out of power he was ‘pursued’ both internationally and locally for crimes that he allegedly had committed. Three cases involving Pinochet decided by the then United Kingdom House of Lords\(^a\) can be found in international law and human rights law text books. In the last five years of his life Pinochet was also ‘pursued’ by various Chilean prosecutors and judges. U Ne Win never faced such troubles in any aspect of his long political life.

Hence unlike in the case of Mobutu this author would suspend ‘judgment’ or would not expressed his views as to whether Pinochet’s ‘political violence’ during his rule or Ne Win’s which did occur and for which, it bears repeating, he himself took ‘indirect responsibility’ is worse or ‘better’. In that, in the last years of Pinochet’s life, he was embroiled in legal battles both internationally and domestically, Ne Win’s luck was better than that of Pinochet.

- **Suharto (ruled from 1965-1998)**

One person who was closest to and perhaps a ‘mate’ of U Ne Win was Suharto (1921-2008) who died at the aged of 86 and ruled Indonesia from October 1965 to May 1998, but unlike Ne Win Suharto did not play a political role after his resignation. More importantly whereas Ne Win, in his last public speech, threatened that “if the Army shoots, it shoots straight to hit”,\(^b\) Suharto in his resignation speech apologized to the nation for any wrongdoings he

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\(^a\) R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte 3 WLR 1, 456 (H.L. 1998 (Pinochet I Case); R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (Pinochet II); R. v. Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet [1999] UKHL 17 (Pinochet III).

might have done.\textsuperscript{46} Indeed in the last years of his rule Indonesian prosecutors lodged a civil suit to recover Suharto’s alleged misuse of state funds.\textsuperscript{47} Ne Win and Suharto (alternative name Soeharto as spelt in Taylor’s book) had met at least three times. Suharto visited Burma (as President) in November 1972. Taylor’s description of Suharto and Ne Win was brief. Taylor writes that Suharto was “another general in power pursuing very different policies from Ne Win, other than staunch anti-communism”.\textsuperscript{48} Again, Taylor briefly mentioned that “Indonesian President Soeharto made a state visit to Yangon in early September 1974”.\textsuperscript{49} Apparently the last time Ne Win and Suharto met was in late September 1997 when “Ne Win, accompanied by his daughter Sanda, his son-in-law and one grandson visited Indonesia’s President Soeharto … Soeharto hosted a dinner for the party and Ne Win visited the grave of Suharto’s late wife.”\textsuperscript{50}

Robert Taylor mentions in effect (though of course not specifically) that the Burmese and the world should be grateful for (or at least should appreciate) Ne Win because “Myanmar despite its avowal of revolutionary socialism, also avoided the excesses of Maoist revolution in China or the Stalinist era of the

\textsuperscript{46} The author of this article watched live on television on 21 May 1998 Suharto’s resignation speech – with simultaneous English translation – where Suharto thanked the Indonesian people and sought “forgiveness if there were any mistakes and short-comings”. The full English translation of Suharto’s speech can be read at the New York Times archives, available at: http://partners.nytimes.com/library/world/asia/052198indonesia-suharto-text.html, last accessed on 16 June 2015.


\textsuperscript{48} Above fn. 1, p. 418.

\textsuperscript{49} Ibid., p. 431.

\textsuperscript{50} Ibid., p. 535. At the time of the last meeting between Suharto and Ne Win, Suharto was in power for roughly 32 years (since October 1965) and would be forced to reign in less than eight months in May 1998 and has no more role in Indonesian politics. By the time of Ne Win’s being treated to dinner by Suharto, Ne Win had ‘resigned’ all official positions for more than nine years. A hypothetical or a query arises: if Suharto had wanted to visit say, Singapore’s Prime Minister or Presidents after his forced resignation would they have received him as President Suharto (as he then was in September 1997) received Ne Win? After Paraguay’s Stroessner was overthrown he spent 17½ hours of his exile in Brazil. Did the President of Brazil or for that matter any other neighboring country visit Stroessner or did Stroessner visit any of his neighboring countries’ Heads of States and was he feted to dinner by them as Ne Win was by Suharto? The obituary of Stroessner in The Guardian, United Kingdom, 17 August 2006 “General Alfredo Stroessner” states that “Stroessner and his family were allowed to leave for exile in Brasilia, where Lecayá (the Old Man - his nickname in the Guarani language) lived out his days in almost total isolation, … neither the former dictator nor his surviving son, Gustavo, both wanted men in Paraguay, ever returned home, despite attempts by supporters to pass an amnesty law”, available at: https://www.theguardian.com/news/2006/aug/17/guardianobituaries.world, last accessed on 10 July 2016.
Soviet Union or the bloodbath in Indonesia of 1965”.

Hence the fact that Indonesian-style massacres of 1965 to 1967 did not occur in Burma is only one reason among others which deserves, Professor Taylor seems to aver, Ne Win’s role to be viewed positively. In addition, writes Taylor, Ne Win deserves further credit since he “created a nation which had the resilience from its own resources to withstand more than twenty years of post-Cold War economic sanctions applied by his some times collaborator at the height of the Cold War.” Needless to say only snippets can be provided from Taylor’s praise or indulgent views of Ne Win.

A biographer of Suharto R. E. Elson (whose work Taylor has mentioned in his book in the Bibliography) also wrote Suharto [:] A Political Biography and has this to say of his subject in the opening Preface of his book.

[Suharto] had created a closed and feared system of institutionalised state authoritarianism, he who had clothed his people in the immobilizing ideological topor of Pancasila, he who had fleeced the country for the sake of his horrible children and his cronies and flunkies. He indeed was why Indonesia needed reformasi total and a new and more humane beginning. His going presented the long-awaited opportunity to cast off and forever commit to oblivion a shameful chapter in modern Indonesian history.

Even though Elson immediately adds that “such a view is unfortunate” it is for this author significant that the view from the other side, so to speak, is stated at the outset of the book even if Suharto’s biographer was to (partly) counter such ‘othersidedness’, so to speak. This fact in turn makes Elson’s biography of Suharto, less indulgent than that of Robert Taylor’s Ne Win.

When Suharto died in January 2008 he was given a state military funeral with full honors with the then incumbent Indonesian president Susilio Bambang Yudhoyono, vice-President, government ministers and armed forces chiefs of staff. In contrast Ne Win’s funeral and cremation was attended only by a dozen or so relatives. So did Suharto ‘outshine’ Ne Win in death? Taylor states that Ne Win has “no interest in what others said about him”.

51 Ibid., p. 5.
52 Ibid.
54 Ibid.
56 Above note 1, p. 537.
57 Ibid., p. 1.
Would he have cared that more than five years after his death in December 2002 his former friend and another autocrat General’s funeral was a State sponsored one? Taylor modestly (or putting it another way) almost facetiously writes: Ne Win “does not have the chance to rebut and refute what I have written about him”. Still, this author is of the view that among the two biographies, one of which (Ne Win) I have read in full, Elson’s biography is less indulgent than Taylor’s. Hence the ‘ghost’ of General Ne Win (to revert briefly to Larry H since this section starts with his comment) and Ne Win ‘ain’t in no heaven’ but let’s assume that the less exalted ‘ghost’ of Ne Win rather than the ‘heavenly being Ne Win’ were to read Taylor’s account of this earthly life it (the ghost) would not have strong reasons to rebut or refute his biographer’s indulgent view or significant praise. It is left to us ‘poor’ (former) subjects of Ne Win’s rule to rebut only a few of Taylor’s analyses of his own subject.

There are two other Asian dictators or authoritarian leaders whom Ne Win had met and whose rules did not last as long as Ne Win’s. Unlike Ne Win, they have had to ‘pay’ more for their (arguably) lesser (mis)rules. They are the late Ferdinand Marcos of the Philippines and the disgraced Chun Doo-hwan of South Korea.

- **Ferdinand Marcos (authoritarian rule, 1972-1986)**

Ferdinand Marcos of the Philippines came to power – unlike General *Ne Win* in a military coup in March 1962 - through a multiparty election in 1965 and only became authoritarian leader in September 1972 when he declared martial law.

On 25 February 1986 after a 3-day people’s power uprising mainly restricted to Manila and with very few casualties Marcos had to almost literally run away (was flown away) from the Philippines post-haste and died in exile in Hawaii in September 1989. In contrast, Ne Win formally ruled for more than 26 years in much more authoritarian ways than *Marcos* did. To substantiate my point of view that Marcos’ rule (at least in some respects) is not as harsh (definitely not as long) as Ne Win I would proffer the following historical account and comparisons:

- **Ne Win took over power in a military coup on 2 March 1962 from a democratically elected (if inefficient) government. Within 4 months of his takeover, on 7 and 8 July 1962, his troops (he was the Revolutionary Council Chairman, Chairman of the Revolutionary government of the Union of Burma and Chief of staff of all the Armed Forces and therefore it is appropriate to use the phrase ‘his troops’) shot and killed students, and**
dynamited the Rangoon University Student Union Building. In contrast, Marcos first came to power in 1965 through a democratic election where 11 candidates stood for the position of president and Marcos received 51.94% of the popular votes, defeating then incumbent president, Diosdado Macapagal who received 42.88% of the vote.\(^58\) As Burma’s most powerful ‘strong man’, Ne Win unlike Marcos, did not have any democratic pedigree.

- Imagine what any biographer of Ferdinand Marcos would write if 4 months after Marcos became (unlike Ne Win) the democratically elected president, Marcos’ troops (so to speak) shot and killed students demonstrating at the University of the Philippines and also dynamited the Student Union building. Taylor devoted less than two pages of his 620 page book to the killings and dynamiting of the Rangoon University Student Union building and the strongest comment (not even mild critique) of Ne Win’s speech to the nation on the night of 8 July 1962 after (his) troops shot unarmed students and dynamited the Rangoon University Student Union building that he will fight “sword with sword and spear with spear” was that Ne Win’s speech was “strong”\(^59\) This author submits that Marcos’ biographers (or most of them)\(^60\) would have devoted more than 2 pages (out of a 620

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\(^{59}\) See Taylor, General Ne Win above note 1, p. 266. Taylor also wrote that the phrase Ne Win used ‘fighting sword with sword and spear with spear’ became part of student and leftist ‘lore’. This irony (intended or otherwise) of (indirectly) blaming or at least being ironic about the persons who made Ne Win’s offensive and insulting comments into a ‘lore’ instead of even mildly critiquing the actions (shootings and dynamiting the Student Union Building) is both unseemly and inappropriate, if not worse.

\(^{60}\) Unlike Ne Win’s there are quite a few biographies of Marcos as can be found in the amazon.com web site. https://www.amazon.com/s/ref=nb_sb_ss_i_1_19?url=search-alias%3Dstripbooks&field-keywords=ferdinand+marcos+biography&sprefix=undefined%2Caps%2C421, last accessed on 13 July 2016. In the first page of the web site alone there are seven books that can be said to be biographies or at least narrations of aspects of Marcos’ life and rule ranging from The Marcos Dynasty by Sterling Seagrove, London: Macmillan 1989, to America’s Boy: The Marcoses and the Philippines by James Hamilton-PatersonManila: Anvil Publishing, 1998. From the title and a brief description of the books it is clear that they are much more critical indeed condemnatory of Marcos than that of Taylor on Ne Win and in the counter-factual hypothetical (but a legitimate and reasonable counter-factual) IF the events of 7 and 8 July 1962 had happened in Rangoon University had occurred in the University of the Philippines and IF Marcos had given a speech over the radio then most of the biographers would have used stronger adjectives than Taylor’s bland description and disappointing understatement that Ne Win’s speech was ‘strong’. Not only in terms of longevity of misrule and oppression but also in biographical coverage of his misdeeds Ne Win has had much more indulgent biographers.
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page book) on the topic and would probably be at least mildly critical and would have described (the hypothetical) Marcos’ speech in much more critical even condemnatory terms than the word ‘strong’.

- The 3-day Filipino ‘People’s Power’ (successful) uprising of 22-25 February 1986 can be contrasted with the failed Burmese ‘people’s power’ uprising starting on 13 March 1988 with the death of Phone Maw, a student at the Rangoon Institute of Technology shot and killed by riot police to the crushing of the six-month long failed uprising (and unlike the Filipino People’s Power uprising limited to Manila only and only for 3 days) that spread to about 40 towns throughout Burma in August-September 1988.

- In his last speech to the nation on 23 July 1988 echoing the harsh, insolent and arrogant statement 26 years earlier on 8 July 1962 (‘fighting sword with sword and spear with spear’) Ne Win threatened that

  If the Army shoots, it shoots to hit, it does not shoot into the air to scare. It shoots to hit. It won’t be easy on you.61

- Though it is true that Marcos’ manipulated the Philippines’ judiciary especially after he declared martial law in September 1972 at the very least there was one reported case where a single Filipino person was able to challenge before the Filipino Supreme Court (albeit the result was not in

(Maung Maung, 1969, Taylor, 2015) than that of Marcos attesting yet again ‘the advantages’ Ne Win had over Marcos.

61 The author is not aware how the official government translation of the Burmese phrase Ma Thet Thar Boo Hmat is translated into English but his own English translation is either ‘it won’t be easy [on you]’ or ‘you won’t be spared’. Taylor’s (own translation or otherwise but he did not attribute the source) reads “…if the Army is used let it be known that those creating disturbances will not get off lightly” (above note 1, p. 525). And ‘uneasy’ it was for the people shot and killed not only ‘unsparingly’ but wantonly and savagely. Again, by now not unexpectedly, Taylor’s apologetics of his ‘subject’ is that “it was fairly common place where the government was facing severe disorder.” (Ibid). Who, in the name of heaven or hell (to paraphrase Larry H) started the disorder? Whose troops shot and killed students demonstrating by blocking both roads near the Inya lake at Rangoon University and beating, pushing, killing male and female students in March 1988? For both the massacres of Rangoon University students in March 1962 and then the killings that took place from March to July 1988 at the times of the supposed resignation and his brushing aside of Ne Win’s ‘threat’ as ‘fairly common place’ is worse than being callous it also amounts to whitewashing his subject’s arrogant, insulting, threatening speech and actions. Compare also if not more humane but much less savage attitude expressed towards those who were trying to overthrow him by the (at least in comparison with at worst ‘velvet glove’ treatment given to Ne Win by his biographer) much more maligned and much less unlucky Marcos’ order ‘not to shoot’ in text and notes accompanying foot note 65 below.
the petitioner’s favor) that the Marcos government was “without power to approve proposed constitution; without power to proclaim the ratification by the Filipino people of the proposed constitution; and the election held to ratify the proposed constitution was not a free election, hence null and void”\footnote{62}

- Ne Win and his Burma Socialist Programme Party (BSPP) regime also rammed through a one-Party Constitution which legalized, constitutionalized one-Party rule where the Revolutionary Council Chairman General (later U) Ne Win ‘transferred’ power to President of the Socialist Republic of the Union of Burma U Ne Win who also continued to be the Chairman of the Burma Socialist Programme Party which was the sole legal party by decree since March 1964. This one-Party dictatorship was ‘validated’ or ‘strengthened’ through Article 11 of the 1974 Constitution making BSPP not only the ‘sole legal party’ but also that ‘it shall lead the State’.

- Even if Marcos exploited the judiciary, at the very least and in at least one case the legality of the new Constitution was able to be challenged by a “single Filipino citizen and a qualified and registered voter for himself and on behalf of all citizens and voters similarly situated”.\footnote{63} Such a challenge that the Ne Win regime’s decrees, laws and (almost perish the thought) the 1974 Constitution itself were illegal, improper etc. has not only not been made, it is structurally therefore factually, politically therefore legally not possible in Burma. The judiciary was absolutely and totally emasculated under Ne Win’s and his one-Party regime.\footnote{64}

\footnote{62} Javellana v Executive Secretary, G.R. No.L. 36142, March 31, 1973, 50 SCRA 33.
Coming back to Ne Win’s troops, they did implement Ne Win’s ‘promise’ in his last speech to the nation that “if the Army shoots, it does not shoot into the air, it shoots to hit” and his troops assiduously helped kept his ‘promise’ or threat. The (at least based on the critical and condemnatory biographies of Marcos) much more maligned Marcos reveals his (in comparison to Ne Win) less inhumane side in the transcripts of taped conversation. Although Ne Win did threaten to shoot, Marcos in a personal, private phone conversation with then Armed Forces of the Philippines Chief of Staff General Fabian Ver said:

Fabian Ver: The ambush there is aiming to mount there in the top. Very quickly, you must immediately leave to conquer them, immediately, Mr. President.

Ferdinand Marcos: Just wait, come here.

Ver: Please, Your Honor, so we can immediately strike them. We have to immobilize the helicopters that they’ve got. We have two fighter planes flying now to strike at any time, sir.

Marcos: My order is not to attack. No, no, no! Hold on. My order is not to attack.

Ver: They are massing civilians near our troops and we cannot keep on withdrawing. You asked me to withdraw yesterday-

Marcos (interrupting): Uh yes, but ah... My order is to disperse without shooting them.

Ver: We cannot withdraw all the time...65

Within two days of Marcos telling his Chief of Staff twice ‘my order is not to attack’, Marcos had to flee the Philippines. In stark and (at least to this author) painful contrast not only did Ne Win and his (at least at the time in 1988) then

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underlings at his instruction\(^66\) crush the uprising at the costs of hundreds if not thousands of lives, but also after six months (in contrast to three days of the Filipino’s people’s power) the Burmese uprising failed. I recall seeing and hearing on television from Mandalay, Burma in February 1986 that entering the Marcos palace grounds the protesters could not believe that Marcos was gone. To repeat, following the Burmese uprising in August and September 1988 spreading to over 40 towns and cities and costing hundreds if not a few thousand civilian lives,\(^67\) military rule in Burma was not only not ‘gone’ but came back with a vengeance, stayed and would stay there for a long, long time.\(^68\)

\(^{66}\) See above fn. 1, p. 531 (on Ne Win instructing (after his ‘retirement’) that ‘[i]f the military were to rule, they should rule the whole country’. Also, around 1992 more than three years after his resignation from all official posts Ne Win was also involved in the removal of Saw Maung who had once said in an interview with Asiaweek magazine that ‘Ne Win was like a parent to me’, Saw Maung. ‘I Saved Burma’, Asiaweek, January 12, 1989, (Taylor, above fn. 1, p. 534.).

\(^{67}\) “Saw Maung: I Saved Burma”, Asiaweek, 17 January 1989. In the interview with Saw Maung through an interpreter the then General (he later promoted himself to ‘Senior General’) stated in English that only ‘one-five’ (fifteen) persons died during the 18 September 1988 Army takeover which was ‘recommended’ by Ne Win (after his ‘retirement’) (Above note 1, p. 531). A Burma scholar Mary Callaghan in her article “When Soldiers Shoot Civilians: Burma’s Crackdown in 1998 in Comparative Perspective”, in: James T. Siegel and Audrey R. Kahin (eds.), Southeast Asia Over Three Generations, New York: Cornell University Press, 2003, pp. 331-346, claims that “several thousand”, “at least ten thousand and at least three thousand died in Rangoon alone, and hundreds and may be thousands died in other cities”, pp. 332, fn. 4 and 333, fn 5. Very few people perhaps not even ‘one-five’ (fifteen) died during the ‘People’s Power’ uprising in the Philippines which did topple- this author would assert again and the preceding and following account of the tragically, indeed outrageously different outcomes of the 1986 successful people’s power in the Philippines and the 1988 six-month long failed and much more costly ‘people’s power’ Burmese uprising to overthrow a much more oppressive – in any case longer-ruled regime – in Burma, one hopes, is ‘proof’ enough to state why, in this author’s opinion it is hurtful and grossly unfair for the Burmese people as well as (in the most negative sense of the words) ‘the astonishing’ nature of the Burmese military regimes’ durability or ‘staying power’ led or behind the scenes controlled by Ne Win for about thirty years. For a 30th anniversary of the Philippines People’s Power uprising, see Aurea Calica, “1986 people power: Philippines’s gift to the world”, The Philippine Star, 25 February 2016, available at: http://www.philstar.com/headlines/2016/02/25/1556601/1986-people-power-philippines-s-gif-t-world, last accessed on 7 August 2016. Calica writes that the Philippines people power movement “paved the way for the peaceful dismantling of the Berlin Wall and the return of democracy in South Korea and Romania,” as well as “other parts of the world”. Calica did not include Burma’s failed uprisings which took place two years after the successful Philippines people’ power which unlike Philippines, South Korea and the fall of the Berlin Wall, and the overthrow of Romania dictators which followed it, failed.

\(^{68}\) A year after the overthrow of the Greek military junta in July 1974 the then columnist of Newsweek Magazine Theo Sommer wrote that for the inhabitants of the Greek island of
The searing differences in the ‘unbelievability’ of Marcos’ quick departure and the ‘unbelievability’ of Ne Win’s and his military staying power is astonishing and, at least to this writer, hurtful and grossly unfair (for the Burmese people). The ‘astonishing’ nature of the Burmese Army’s staying power may be complex, and sheer luck (rather than good \textit{Karma}) might one of the reasons definitely of Ne Win’s staying power, if not his personal rule. Moreover in the Filipino People’s Power of February 1986 the Philippines Army or at least large segments of it defected, so to speak, to the ‘peoples’ side’. Defense Minister Juan Ponce Enrile and Chief of Staff Fidel Ramos defected to the then opposition.\(^{69}\)

In contrast, the Burmese people were facing not a single corrupt dictator as the Filipinos, whose former military colleagues or subordinates – for whatever reasons - found it fit to abandon their former superiors as the Philippines Army did in February 1986.

The Burmese people were facing a cunning and (it is worth emphasizing) lucky despot whose underlings and those who nominally succeeded him were, to put it mildly, fiercely loyal to him. Reference has also being made to Saw Maung (who at the instruction of Ne Win formed a military Council, took over power and crushed the six-month long Burmese uprising) stating that Ne Win was “like a parent”\(^{70}\) to him, and Ne Win’s immediate successor (former Brigadier-General) Sein Lwin, as Taylor reports, also stated that “if Ne Win ordered him to dig a grave and bury himself alive, he would do so.”\(^{71}\)

But who says life or politics is fair? And even Taylor acknowledges or at least states that Ne Win at the least exercised some influence behind the scenes for at least three years after his supposed ‘retirement’\(^{72}\). None of the


\(^{71}\) Above fn. 1, p. 529.

\(^{72}\) See text and notes accompanying above note 65. Taylor writes that in the early 1990s “Ne Win was beginning to fade from public memory as he had faded from the public stage”, ibid., p. 534. Even if his ‘fading away’ is true he ‘faded away’ much slower than say, his old friend Suharto. Taylor states that Ne Win after his supposed resignation was if not instrumental, then at least played a role in the removals and replacements of his successors as Party Chairman and Presidents (former General Sein Lwin and Dr. Maung Maung.
abovementioned leaders have had such influence post-overthrow, post-exile and post-resignation as Ne Win. Ne Win and Marcos met, once in November 1970 when General Ne Win visited the Philippines and again in 1976 when Marcos gave a return visit to Burma. They are the usual meetings, that is the usual state and official visits of Heads of States and heads of governments. The purpose of mentioning the meetings is that some of the leaders (for that matter, authoritarian leaders) mentioned above (Chile’s Pinochet, Paraguay’s Stroessner, and Greece’s Ionnaidis – all like Ne Win were former military men and like Ne Win they came to power in military coups) are persons whom Ne Win did not meet.

As for Ceausescu, Mobutu, Suharto and Marcos, Ne Win did meet them. Of course, Ne Win had also met with other international statesmen (and so had some of the other authoritarian leaders), say, United States president Lyndon Johnson (in an official visit by Ne Win in September 1966) and also Queen Elizabeth II of the United Kingdom. Since these two personages are not authoritarian leaders the author does not feel it necessary to mention these meetings between Ne Win and them and to comment on their (non)significance.

Taking only a little license I submit that Marcos, who was younger than Ne Win and who pre-deceased him by 13 years in September 1989 in exile in Hawaii, would have envied Ne Win’s longevity of life, longevity of rule and political career. The reasons for this ‘claim’ are clear and have already been discussed above. Marcos would have preferred not to be exiled and to have left the Philippines in ignominy. Ne Win did not have to leave Burma and he did not live and die in exile which was the fate not only of Marcos but also of Mobutu and Stroessner. Marcos was overthrown, Ne Win was not. Marcos would have preferred not to be overthrown in a people’s power uprising which lasted only three days. Six months of uprisings in various cities and towns across Burma with thousands of deaths (in contrast to almost bloodless people’s power in the Philippines) had at best led to a nominal (and only nominal resignation) of Ne Win.

As stated above, it is abundantly clear that Marcos, in stark contrast, to Ne Win did not, could not have any role in who his successors would be. In fact, the late Corazon Aquino who did succeed him was obviously not the person

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(Taylor, above note 1, pp. 529-534). Did Suharto, for instance, have any role say in the appointments and removals of three of his successors Habibie, Abdul Rahman Wahid and Megawati Sukarno Putri? As Taylor narrates Ne Win did play significant part in the appointments and removals of three of his successors, Sein Lwin (above fn. 12, pp. 528, 529) Maung Maung (above fn. 6, pp. 529, 531) and Saw Maung (above fn. 66, pp. 533-534).

73 Ibid., pp. 346-349.
74 Ibid., p. 269.
whom Marcos wanted to be his successor. Still, Marcos, unlike Ne Win, who had threatened to ‘shoot straight’ in his last speech to the nation of which his threat was ‘fulfilled’ within days, specifically asked his then Chief of Staff Fabian Ver ‘not to shoot’ of which there are audio records in English.\(^75\)

Even if Marcos did not wish not to be overthrown (a self-contradicting or at least a statement which defies common sense) the author of this article strongly, indeed absolutely, prefers a ‘dictator’ like Marcos and the relative (if not almost absolute) easy overthrow of him makes this author bitter and greatly disappointed at how hard, how desperately hard, was the Burmese people’s plight to have undergone through such oppression and how long it had to take to reduce (by no means end or even marginalize) the praetorian rule that had started with Ne Win’s coup of March 1962.\(^76\)

As explained above Marcos, to this author, was a lesser dictator (or at the very least a dictator whose politically pedigree was less undemocratic). In any case Marcos’ rule was definitely considerably much shorter rule than that of Ne Win.

And unlike Ceausescu, Mobutu, Marcos and Suharto, who after their deaths were the subject of quite a few negative if not condemnatory biographies, Robert Taylor treats his subject with much indulgence and even if (as stated earlier) Ne Win was not as bad a dictator or strongmen as some or even all of

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\(^75\) See text and note accompanying above note 65. A video excerpt of Ne Win’s speech in Burmese to the nation threatening to shoot straight those who create (literal translation) ‘noise’ and disturbances and then if Army is called to shoot straight ‘you make note that it won’t be easy’ on you can be seen in https://www.youtube.com/watch?v=TDRK4z5JZxc, last accessed on 15 July 2016.

\(^76\) Only in early April 2016 more than 54 years after Ne Win’s military coup a government which has had to share power with the military was formed. It is a ‘power-sharing’ government since (a) there are 25% military appointees in all levels of the Legislature (b) the Ministers of Defense, Home and Border affairs, by 2008 Constitution’s constitutional fiat, has to be and is held by military men (c) one of the two Vice-Presidents is a retired military man (d) seven out of eleven members of the National Defense and Security Council which, among others, can declare national emergency and has the right (by majority vote to transfer power – albeit for a year initially – to the Commander in Chief of the Armed Forces) are military officers and (e) as of July 2016, four out of seven judges in the Supreme Court including the Chief Justice Tun Tun Oo and the Attorney-General Tun Tun Oo (different persons with the same name) are ex-military officers. Perhaps even the latter part of the Marcos regime after Marcos declared martial law in September 1972 and certainly after the overthrow of Marcos in February 1986, the ‘role’ and dominance of the Philippines military in politics, governmental structures and constitutional provisions is less than that of Myanmar now in July 2016 and what the Filipino people achieved in three days in February 1986 it has taken more than 27 years for the Burmese to only partially achieve. The domination of the military in politics in Myanmar after March 2016 (after the power-sharing took place) is still more than that of the Philippines armed forces in Philippines politics has exercised for the past 30 years since the end of February 1986.
the above (a point which is only stated \textit{ex hypothesi} and a point this author categorically rejects: at the very least in comparison with the Greek colonels, Marcos and Chun Doo-hwan Ne Win was a worse dictator) he had during his long sojourn on earth and also his long rule of Burma (to quote and paraphrase Larry H, again) ‘might be in no heaven’ but he certainly was in ‘no hell’ and have had ‘got it made’ for a comfortable life throughout and the subject of a laudatory or at least very complimentary biography after his death.

- Chun Doo-hwan (ruled from 1979-1988)

The only person still alive who can be considered a (lesser) authoritarian leader than U Ne Win (definitely a shorter rule) but who could also ‘envy’ Ne Win would be former South Korean President Chun Doo-hwan. In October 1983 Chun Doo-hwan escaped an assassination attempt against him when he and his government officials visited Burma. Quite a few of his cabinet members as well as Burmese officials were killed as a result of North Korean agents bombing the Martyr’s mausoleum in Rangoon. Chun Doo-hwan (born 1931) is about 21 years younger than U Ne Win and in April 1997 Chun was charged among others with corruption, convicted and sentenced to life imprisonment (though he was released from prison in December 1997). In 2015 Chun was still pursued by South Korean prosecutors to recover funds that he had allegedly stolen from the public coffers while he was South Korea’s president. Unlike Ne Win who never formally apologized to the people in his resignation speech Chun, though after he was no longer president and out of power – like Suharto during his resignation speech – apologized to the South Korean people for any wrongdoing that he might have committed during his rule.

Again, I would suggest that Chun also would have probably envied the old man who accompanied him all the way from the tarmac to the air plane at Rangoon airport back in October 1983 after Chun escaped from being assassinated in Rangoon, apparently assuring him that the (North Korean) culprits who did not manage to assassinate him but who did kill quite a few members of Chun’s cabinet would be punished. The North Koreans who were sent to kill Chun were both caught dead and alive and Chun himself could not have known then that he too would be punished for his misrule of South Korea (in 1997). In contrast, Ne Win would be free from such hassles except (it bears repetition) the slight discomfort of arguably being put under house arrest together with his daughter in his 91st and 92nd years of his life.
Put it another way: U Ne Win should or would have grounds to be grateful for his immense good fortune that he did not experience any of the hassles to say the least troubles and discomforts which all of the other (as the case may be) ‘bigger’ or ‘lesser’ authoritarian leaders had to encounter as summarized above.

The rule of the two Greek junta members George Papadopoulos and Dimitrios Ioannidis who were jailed on average for about 25 years did not last even half as long as that of Ne Win. Even if *arguendo* the Greek military junta was ‘five times’ worse than Ne Win’s and subsequent Myanmar military regimes (in fact exaggerated and untrue statement since military and thinly guised military regimes ruled Burma for about 54 years more than seven times the Greek military junta’s rule of 7 years and 3 months as stated above) neither Ne Win nor any of his underlings had to go through such hardship as the two Greek military junta leaders did.

The above references to other Asian as well as non-Asian leaders would indicate that, to again revert to the colloquial, even if U Ne Win was in ‘no heaven’ he had ‘had it so good’ (or at least not as bad as any of the above). So to paraphrase Larry H (all best to you brother if you are reading this for your perceptive comments), he shouldn’t go to no heaven (even if such heaven exists) because he already had it so good on Earth, he ain’t need go to no heaven after he died.

It might well be asked what were the ‘structural reasons’ that Ne Win had not only *not* received the ‘punishment’ he perhaps deserved but that he has had the easiest life among all the ‘strong men’ that had been mentioned.

The tentative and incomplete ‘explanation’ or rationale apart from the reasons discussed above would be the perception of how the doctrine of *Karma* or *Kamma* works in the context of Burmese political culture and milieu. Based on anthropological field work done in Burma in the early 1960s the late Professor Melford Spiro, a Burma specialist and anthropologist, with whom I have corresponded through emails a few of which deals with Ne Win’s rule, argues:

> It is no accident that the traditional attitudes towards Buddhist monarchs was – and is - one of overwhelming reverence and awe. This does not mean, it should be emphasized that he is liked or respected… even when his rule is despotic, oppressive or unjust, because his status is karmic reward for behavior not in this but in former existences. Although he will, of course have to suffer for his present evil behavior in a future existence … [*t*]o this karma derived argument is added still another. Just as we say the people get the government they deserve, in a
different sense many Burmese say that people get the
government their karma requires. I have heard even bitter
opponents of the present oppressive military regime in
Burma interpret its accession to power as the fruit of
karmic seeds which the Burmese people themselves have
sown in the past.\textsuperscript{77}

Another biographer of a much greater despot Pol Pot\textsuperscript{78} (of ‘Democratic
Kampuchea’) took a somewhat different take from that of Melford Spiro (or

\textsuperscript{77} Melford Spiro, \textit{Buddhism and Society: A Great Tradition and its Burmese Vicissitudes},

\textsuperscript{78} I have not included the name of Pol Pot in the comparative study of Ne Win’s rule with
other dictators. It is readily acknowledged that ‘Ne Win was no Pol Pot’ and perhaps
almost all the ‘other dictators’ named above from Alfredo Stroessner through the Greek
colonels to Chun Du-wan were also ‘not Pol Pot(s)’. All of the dictators’ misrule did not
lead to so many deaths (if not in absolute numbers then by proportion to the country’s
population) and the suffering wreaked on the populaces of these dictators as did Pol Pot’s
and the Khmer Rouge’s rule.

It needs to be pointed out though that Ne Win was the first head of State of any country to
visit ‘Democratic Kampuchea’ under the Khmer Rouge regime. (Taylor, above note 1, p.
450). Although Taylor has described Ne Win like Suharto as a ‘staunch anti-communist’
(Ibid., p. 418) it is worth noting Ne Win did use ‘Communistic’ methods (such as one-
Party only by law and constitutional provision, the rhetoric and indeed deceptive
propaganda of working in the peasants and workers’ interests about which in various parts
of his book Taylor almost ‘waxed eloquent’ or at least gives great credit) in his dictatorial
rule. The Burma Army under Ne Win had allegedly fought communists starting from the
late 1940s. In addition since 1950s the Burmese Army had produced many propaganda
books and booklets. The Burma Socialist Programme Party (BSPP) regime published
books with the help of ex or surrendered Burmese Communists as to how ruthless and how
evil the Burmese Communists rebels were in the internal purge in the hinter land in the
Pegu Yomas 1960s and 1970s in the Pegu Yomas where killings of ‘renegade’ members
of the outlawed Communist Party of Burma (CPB) were. Bad as the purges and massacres
of the Burmese Communists were in the 1960s in terms of the deaths caused, the suffering
wreaked on the Cambodian people by the Khmer Rouge regime led ‘in the shadows’ by
Pol Pot with President Khieu Samphan (who in 2014 was convicted by the mixed United
Nations and Cambodian tribunal of crimes against humanity and sentenced to life
imprisonment, see http://edition.cnn.com/2014/08/07/world/asia/khmer-rouge-trial-
verdict/, last accessed on 9 August 2016) was much, much worse. President Ne Win had
officially met President Khieu Samphan in his visit to Democratic Kampuchea in November
1977. Worse as they were the Burmese communist actions of purges and killings among
their own ranks in the 1960s (mainly in the years 1967 and 1968) which Ne Win’s regime
had condemned (which this author by no means defend or intends to diminish the gravity
of) were, in comparison with the Khmer Rouge’s regimes monstrosities (and taking some
poetic license), like the activities of a ‘boy scout’. Yet Ne Win had no hesitation praising
the Khmer Rouge, one of the worst regimes which violated fundamental rights since the
end of the Second World War during his visit to Democratic Kampuchea. Bertil Lintner
writes that “In a speech in the capital [Phnom Penh] on November 26 [1977], Ne Win
stated that ‘April 17’ [1975 when Phnom Penh fell to the Khmer Rouge] was a historic
day for the people of Kampuchea. We are very happy that the Kampuchean people on that day won a decisive victory in their struggle for independence.” Bertil Lintner, “Broadening the Breach”, *The Irrawaddy*, 8 July 2000, available at: http://www2.irrawaddy.com/article.php?art_id=1896, last accessed on 6 August 2016. At the same time Ne Win had cordial relations with the staunchly anti-Communist Suharto regime which had committed pogroms (in the words of Taylor ‘blood bath’. Taylor, above note., p. 5) in Indonesia during the years 1965 to 1967. Ne Win was the only apparently ‘non-Communist’ leader who had visited both Indonesia under Suharto and Cambodia under the Khmer Rouge regime. Ne Win had very good relations with Suharto whose regime has (in Taylor’s words) “massacre[d] ... thousands [sic for hundreds of thousands] members of the Indonesian Communist Party” (Ibid., p. 340). Ne Win had also praised the Communist Khmer Rouge regime’s whose atrocious record (where in Cambodia, the killings were done by supposed Communists as in contrast to Indonesia the killings were done against alleged Communists) by praising the start of ‘Year Zero’ as a ‘historic day’ and ‘decisive victory in their struggle for independence. Did Ne Win mean that the ‘Kampucheans’ (Cambodians) obtained ‘independence’ only on 17 April 1975 which can be said to be the start of ‘Year Zero’ in Cambodia (see Francois Ponchaud, *Year Zero*, London: Penguin Books, 1978) and not on 9 November 1953 the actual date Cambodia obtained independence from the French?

The praises of Taylor’s book on its back cover ‘emanate’ from four persons one of them being Michael Aung-Thwin who wrote among others that “[t]his book returns Ne Win to the period he belonged” a theme which Taylor has made time and again in the book.

Should Ne Win – and for that matter his contemporaries who were also dictators Stroessner and Suharto – among others be judged mainly or even only from the period that they passed through politically that is mainly the 1930s, 1940s and (by latest 1950s). Both Burma and Indonesia (though not Paraguay) were, in the 1930s and 1940s, colonies. Not only Ne Win and Suharto but other Burmese and Indonesians and politicians in the same age group also passed through the colonial era. Were their actions and ‘dictatorships’ – as stated above Taylor does use the word at least once to describe Ne Win’s rule as a ‘dictatorship’ (at p. 463) and we former subjects of Ne Win have to be grateful for ‘small mercies’ – to be – at least partially – excused, ‘understood’, indulged in because they spent the first one-third of their lives and only about a fourth of their political career under colonialism? Though I have not read the biography of Suharto by R.E Elson in full one gets the impression that Elson is not as indulgent of his subject as Taylor is to Ne Win. A ‘biography’ of sorts of Alfredo Stroessner was also published in December 1980 by the late Paul H. Lewis, *Paraguay under Stroessner*, The University of North Carolina Press. From the summary and comments of the book, available at https://www.amazon.com/Paraguay-Under-Stroessner-Paul-Lewis/dp/0807814377, last ac-cessed on 6 August 2016, it can be stated that Lewis was not as ‘sympathetic’, ‘indulgent’ or understanding of Stroessner as Taylor – and for that matter Aung-Thwin – is to Ne Win.

A counter-factual hypothetical arises: If Taylor were to be a ‘Paraguayan specialist or expert’ instead of a Myanmar one and if Taylor were to write a ‘biography’ of Stroessner (with historical documents and facts available of Stroessner’s life and rule as Taylor has had concerning Ne Win) would he be as indulgent of Stroessner as he is with Ne Win? On the other hand if Paul Lewis were to write a biography of Ne Win (with the documents available to Taylor being made available to him) would he be more critical or almost mirabile dictu be even more indulgent, sympathetic and understanding of Ne Win than Taylor? Michael Aung-Thwin’s name has been mentioned since he was the person who launched the book or at least one of the persons who spoke at the seminar cum book launch
is it really not that incompatible?) for the tragedy, mayhem and the massive violations of basic human rights in Democratic Kampuchea that occurred during Pol Pot’s and the Khmer Rouge’s rule from April 1975 to January 1979. A biographer of Pol Pot, Philip Short writes:

The harshness of Pol Pot’s regime can be described in part to the sheer weight of Cambodian history … A multitude of other factors are also at work. In Cambodia institutions against wrongdoing are weak. Law was and remains, whatever the power holders say it is. The impersonal fatalism of Theravada Buddhism erects fewer barriers


In the acknowledgments Professor Taylor, among others, thanks or at least states that the publisher ‘selected four nearly anonymous readers’. (Taylor, Ibid, p. xi). Two curiosities arise: (1) can there be ‘nearly anonymous readers’? Is nearly ‘anonymous readers’ comparable with the cliché or expression ‘being a little pregnant’? To paraphrase the ‘little pregnant’ (I suppose this does not extend to the ‘term’ or the stage of the pregnancy.) the reviewers are either anonymous or they are not. Were they initially anonymous, then? (2) Was Michael Aung-Thwin who also launched the book one of its reviewers?

‘Reverting’ briefly back to Ne Win’s speech given in Phnom Penh on 26 November 1977 did Cambodia obtain independence only on ‘17 April 1975’? This query can be juxtaposed with Michael Aung-Thwin’s outrageous claim that it was not in 1948 that Burma obtained independence but only in March 1962 with Ne Win’s military coup. See Michael Aung-Thwin, “1948 and Burma’s Myth of Independence”, in Josef Silverstein (ed.), Independent Burma at Forty Years: Six Assessments, Ithaca, N.Y.: Southeast Asian Program, 1989, pp. 19-34. This is a claim or an assertion even Ne Win and his regime and for that matter subsequent regimes did not – at least explicitly made though in some of his speeches as reported by Taylor Ne Win seemed to ‘drift’ towards such a claim albeit only weakly and inferentially and never explicitly. To revert again to the colloquial Aung-Thwin is more ‘white than the whites’ ‘more Malay than the Malays’ in that he would enthuse and claim more than the protagonists themselves (that is Ne Win and his former underlings) would claim not only about their achievements but in denigrating others (the achievement of independence after the freedom struggles contributed to not only by Ne Win and his ilk-but by many others Burmese). To repeat albeit it was made in an article published in the year 1989, Aung-Thwin claimed what no other post-1948 government and regimes officially has claimed: Burma only gained ‘real’ independence in March 1962 with Ne Win’s takeover. This claim is obsequious (vis-à-vis Ne Win’ rule), offensive and outrageous.

This author would not accept that canonical (or in Professor Spiro’s phrase ‘nibbanic Buddhism’) (Ibid., pp. 31-65) is ‘fatalistic’ in the general sense of the word as claimed by Philip Short. A similar misconception equating or at least implying that ‘karma’ is equivalent to ‘fatalism’ was articulated when, around 1992 in a seminar in Malaysia regarding Burma in discussing the longevity of the then Burmese regime, a Malay woman academic stated to the effect that ‘Burmese Buddhists’ believe, and I quote almost verbatim, “that people have to suffer to go to heaven’ (sic). The author tried to correct or
against evil than the anthropomorphic God of Christianity and Islam who sits in judgement and threatens sinners with hell-fire. The attraction of power played its part too. Pol was seduced by the power of making Cambodia and reforging the mind of its people in accordance with a vision all its own.80

Philip Short apparently postulates that if not the concepts then at least the interpretation and of and attitudes derived from religious/cultural mores or norms (‘impersonal fatalism’) of Theravada Buddhism can be seen as in a small part (?) contributing to Pol Pot and the Khmer Rouge regime’s abominable acts. It is to be noted though that Pol Pot’s regime (thank God, Buddha or fatalism, so to speak) lasted less than four years - at least as far as their rule of the whole of Cambodia is concerned.

Ne Win’s long rule and the, if not unique, then peculiar feature of his continued influence after he ‘retired’ from politics can perhaps in part (and in perhaps small part) be attributable to what Spiro has described as “the doctrine of karma … proscribing structural change.”81 As Philip Short (almost)

‘disabuse” that academic’s misunderstanding during the seminar. More than a decade earlier in 1979 a Bangladeshi female (then) Ph.D. candidate at Monash University, Australia, rhetorically asked me and whether the Burmese were only doing ‘meditation’ and if Ne Win were to ‘rule’ Bangladesh he would not last more than ‘several weeks’. Canonical Buddhist doctrine is not fatalistic in the sense that God, Creator or an unseen force ‘determines’ or ‘pre-determines’ people’s lives and ‘fate’, which is, for this author, not the Buddhist kamma or ‘karmatic’ concept but is more akin to the Augustinian (St. Augustine, 354-430 Current Era) and Spinozistic (Spinoza, 1632-1677) theological and metaphysical views. On the different outcomes of the John. F Kennedy assassination in November 1963 and the assassination attempt against Ronald Reagan in March 1981 from what is considered to be Augustinian and Spinozist perspectives see Myint Zan, ‘God’s Magic Bullet of Fate’, available at: http://www.atimes.com/atimes/World/WOR-01-231213.html, last accessed on 18 July 2016.

81 Spiro, above fn. 74, p. 441. The use of the word ‘structural’ is notable in that the reviewer of the author’s initial article wrote that if the author’s ‘point is Ne Win did not receive the punishment he deserved’ I ‘might want to analyze what were the (structural) reasons for this’. I should state that Spiro immediately adds (after the phrase ‘the doctrine of karma’) while proscribing structural change, does not proscribe and may even be said to encourage positional change (Ibid.). Hence as far as ‘position’ of power ‘behind the scenes’ was concerned even Taylor acknowledges that until about 1992 to 1993 at least as regards the appointment of his successors (Taylor, above fn. 1, p. 534) Ne Win did instruct or ‘guide’ his subordinates. It takes at least about thirty years – or more – for Ne Win’s position as the ‘strong man’ of Burma’s life to ‘become entirely private and personal’ (Taylor, above fn. 1, p. 535). As for the (slight) positional change of the dominant role of the institution of Burmese military in politics it has lasted more than 54 years and only in its 54th year of various military and military-dominated regimes some reduction in the positional dominance of the military can be said to have taken place.
equivocates in the above quote a ‘multitude of other factors’ are also at work for the Khmer Rouge’s regimes’ atrocities of which the ‘impersonal fatalism’ if not of canonical Buddhism then of the interpretation of it in the Khmer or Cambodian psyche may be one of the causes.

Similarly, Ne Win’s regime’s longevity and the fact that Ne Win has had it so good in relation to other strong men of the region (Suharto, Marcos) and elsewhere (and to quote the reviewer’s comments to this article) ‘the fact that he did not receive the punishment he deserved’ (or to be less explicit) did not receive his just deserts has been explained earlier. To reiterate unlike Marcos virtually all the top Burmese military officers, even after he supposedly resigned, at least in the initial years as stated by Taylor remained fiercely, blindly loyal to him.

The apparently metaphysical reasons and explanations arguably based on theodicy and (mis)application of Theravada Buddhist concepts in two different contexts (Burma and Cambodia) has also been stated.

The subject of enquiry in regard to Burma is the fact that Ne Win’s rule was so long and unlike almost all the other authoritarian leaders discussed above some of whom Ne Win had met did not get his ‘just deserts’. But Philip Short’s explanation was not on the issue of why Pol Pot did not go ‘unpunished’ but why and how the Khmer Rouge’s regime came to power and in Philip Short’s understated phrase to explain the “harshness of the regime”. In both cases and to use Short’s phrase again just as there are a “multitude of factors at work” leading to the “harshness of the Khmer Rouge’s regime” there are also a multitude of factors at work regarding not only the longevity of Ne Win’s but also the successor Burmese military regimes’ rule.

“Scoundrels Succeeding Illustrious Tyrants”

The third quotation is from Albert Einstein (1879-1955). I first read it in the work of the late Burmese author Bhamo Tin Aung (9 June 1920 - 23 October 1978). His Burmese language book on Einstein and his Relativity Theory was first published in 1975. Each chapter of his book opens with a quote or two in English (without them being translated into Burmese). In one chapter a quotation attributed to Albert Einstein appeared. It reads

Time has proven that illustrious tyrants are succeeded by scoundrels.

I have mentioned where I first read the above quotes to contextualize or
‘foreground’ my comments. Since many quotes are sometimes incorrectly attributed to Einstein I took the step of ‘googling’ it and have found corroborating sources on the world wide web.

My thought on the quote in relation to the political events of the past more than five decades in Burma/Myanmar is: how (so) true was Einstein’s statement.

U Ne Win’s successor, with the interlude of the late General Saw Maung from 1988 to 1992, was (and perhaps still is) Senior General Than Shwe (born 1933?). Than Shwe has been both ‘reverentially’ and mockingly referred to, among others, by some, as ‘Aba’ (roughly ‘grand uncle’). In March 2002, ‘Aba’ managed to put ‘Aphaygyi’ (‘Big Daddy’, a term used by some of U Ne Win’s underlings and benefactors) under house arrest where Aphaygyi spent his last days.

Burma (unlike U Ne Win) has been and is quite unlucky. With the exception perhaps of only initially South Korea after Park Chung-hee’s assassination in 1979 and Zaire, or the Democratic Republic of the Congo, after Mobutu’s overthrow in 1997, all the countries after the overthrow or resignation of their authoritarian leaders might have made significant (or at least) some movements away from dictatorship or authoritarian rule. Those who succeeded the Greek colonels, Alfredo Stroessner of Paraguay, Nicolae Ceausescu of Romania, Augusto Pinochet of Chile, Ferdinand Marcos of the Philippines, Suharto of Indonesia and Chun Doo-hwan of South Korea were not worse than their immediate predecessors. Indeed, they may well be better than their immediate predecessors.

And the peoples of those countries generally were not worse off after the departures from power of their erstwhile ‘strong men’. In terms of respect for human rights almost all of the countries after the departure of their ‘illustrious tyrants’ or ‘scoundrel like leaders’ did not become ‘worse off’ – even if they did not become better off. (With the exception of Ferdinand Marcos and Nicolae Ceausescu all of the above dictators or authoritarian leaders were military officers when they came into power. All came to power through military coups; hence at least in that sense there is a common ground for comparison.)

Alas in Burma/Myanmar that was not the case between 1988 till about 2011. Even post-2011 ‘reforms’ are made at least under the shadow of ‘Aba’ (a role none of the authoritarian leaders apparently had after their overthrow, exile or resignation, except of course his former boss U Ne Win.) had played The above paragraph was written in June 2015. On 8 November 2015 elections were held where again (like in May 1990) the National League for Democracy (NLD) won an overwhelmingly majority of the votes and the seats in the new
two-House Legislature.\textsuperscript{82}

It took nearly five months after the holding of the elections in November 2015 for a new and a partially democratically elected Legislature and government to take power and responsibility for the first time in 54 years since Ne Win’s coup of March 1962. The phrase ‘partially democratically’ needs a brief elaboration in historical context.

In February 1960 multiparty elections were held and then ‘care-taker’ Prime Minister General Ne Win handed over power to U Nu who was sworn in as Prime Minister on 4 April 1960. Less than two years later on 2 March 1962 Ne Win took over power virtually ‘for good’. After the one-Party Constitution was adopted through a fake referendum, single-party elections were held in January-February 1974, January 1978, November 1981 and October 1985 where only one candidate from the ruling Burma Socialist Programme Party (BSPP) of which Ne Win was the Chairman from July 1962 to July 1988, could ‘participate’ in it, took place.

After the military (at Ne Win’s instruction) performed a coup and crushed the uprising in September 1988 the military junta held ‘elections’ in May 1990 only to renege on the promise. Through another fake referendum\textsuperscript{83} to adopt what would become the praetorian constitution of 2008, the SPDC regime held elections which the NLD boycotted because of its unfair practices.

The Legislature and the government ‘elected’ in the November 2010 elections should not substantively be called even ‘semi-democratic’, and this is so only partly because the legitimate political party the NLD boycotted but also due to the fact that there were significant cheatings in the 2010 November elections. Only the Legislature which came into existence after the November 2015 elections can be considered semi-democratic, if one is to be fastidious ‘three-quarters’ democratically elected, since not only in the Union (main) Legislature but also in all the State and Divisional Legislatures 25\% of the

\textsuperscript{82} For the author’s contemporaneous commentary after the elections and before the NLD began to share power with the military in a new government starting from 1 April 2016 see Myint Zan, “Could Aung San Suu Kyi be Above Myanmar President?”, \textit{East Asia Forum} 25 November 2015, available at: http://www.eastasiaforum.org/2015/11/25/could-aung-san-suu-kyi-be-above-myanmars-next-president/, last accessed on 23 July 2016; Myint Zan, “Myanmar: partial transfer of power just around the corner?”, \textit{Asian Currents}, available at: http://asaa.asn.au/myanmar-partial-transfer-power-just-around-corner/, last accessed on 23 July 2016. The phrase ‘sharing of power’ with the military used above is elaborated in the article.

\textsuperscript{83} See for e.g. Banyan, “What is Wrong with Myanmar’s Constitution”, in \textit{The Economist}, 14 March 2014, available at: http://www.economist.com/blogs/economist-explains/2014/03/economist-explains-3, last accessed on 23 July 2016, where it is stated that “Drafted by a convention boycotted by Miss Suu Kyi’s National League for Democracy (NLD), it was foisted on the country in a farcical referendum in 2008 (a 92.48 \% ‘yes’ vote on a turnout of 98.12 \% in a poll held just after the devastation and chaos of Cyclone Nargis). It is hardly a charter for democracy.”
members of the Legislature are directly appointed by the Commander in Chief.

Also, in the cabinet as well the Ministers of three important Ministries, those of Defence, Home Affairs and Border affairs, have to be and are military officers. Hence the use of the statement that the new Legislature which was convened in February 2016 was the first (comparatively) independently elected Legislature in about 56 years (the Legislature elected in February 1960). Unlike the cabinet sworn in on 4 April 1960, the Cabinet formed and sworn in on 1 April 2016 has had to share power with the military because three important Ministries – Defence, Home and Border Affairs – are held by military men.

The election of the new President U Htin Kyaw may indicate a break from the past since with only one partial exception all the Heads of States, whether formally called ‘President’ or not, have been military men and ex-military men since March 1962.

General Ne Win, as Chairman of the Revolutionary Council from 2 March 1962 to 2 March 1974 and President of the Socialist Republic of the Union of Burma from 4 March 1974 to 9 November 1981, was succeeded as President by the late U (former General) San Yu (from 9 November 1981 to 26 July 1988). U San Yu was succeed by yet another military man by the late U (former General) Sein Lwin who was president from 26 July 1988 to 12 August 1988.

The person who succeed Sein Lwin (at as was stated earlier the ‘instruction’ of ‘retired’ Party Chairman and President U Ne Win) was a civilian but he too during the Second World War had been in the Burma Army. Robert Taylor’s biography of Ne Win (published 2015) was preceded by Maung Maung’s hagiography of Ne Win (published both in Burmese and English languages in 1969).

Hence Maung Maung though not a military officer or even – unlike his three predecessors – not a retired military officer did belong to the inner circle of Ne Win and his regime(s) ‘clique’. Maung Maung was followed in the Head of State position by the late General (later self-promoted to ‘Senior General’) Saw Maung (Head of State as Chairman of the ruling State Law and Order Restoration Council, SLORC) from 18 September 1988 to 23 April 1992. After Saw Maung’s removal (a word used by Taylor himself) partly ‘guided’ by Ne Win84 was General (later self-promoted to Senior General) Than Shwe.

Than Shwe finally marginalized (so to speak) Ne Win in that at least Ne Win’s son-in-law and grandsons (Taylor avers that Ne Win was not involved)85 were arrested, charged and jailed for “plotting a coup … and put in place a government which recognized the authority of Ne Win”.86 Ne Win’s

84 Taylor, above fn. 1, p. 534.
85 Ibid., p. 537.
86 Ibid., p. 336.
daughter Dr Khin Sanda Win was put under house arrest.

When Than Shwe ‘retired’ on 30 March 2011 the person who was the Prime Minister in the military Council just abolished (the State Peace and Development Council), U Thein Sein, became the first President of the Republic of the Union of Myanmar. U Thein Sein like most of his predecessors since 1962 is also a former General. President U Thein Sein’s immediate transformation from Prime Minister to President has only one precedent. On 2 March 1974 just after 11am Ne Win announced (and his speech was broadcast live on radio) that the Revolutionary Council was abolished. On 4 March 1974 U Ne Win was ‘elected’ by the one-party unicameral Legislature as the first President of the ‘Socialist Republic of the Union of Burma’.

U Thein Sein was ‘elected’ by the Legislature dominated by the then ruling Union Solidarity Development Party (USDP) on 4 February 2011 but he was formally sworn in and formally became President when he, and his cabinet, were ‘sworn in’ as the first President of the Socialist Republic of the Union of Myanmar’ on 30 March 2011. Hence U Ne Win and U Thein Sein were the only persons in post-independence Burmese history to become successively Prime Minister and President.

In contrast, U Htin Kyaw with the marginal exception of Dr. Maung Maung is the first civilian and also certainly without exception the first democratically-elected President of Burma since Ne Win’s military coup of 1962.

In the ‘blurb’ or back cover of Taylor’s book, Andrew Selth, adjunct Associate Professor of the Griffith Asia Institute writes that Taylor’s book “will be of interest to … anyone who wants to learn more about this troubled Southeast Asian country, where Ne Win’s legacy is still being felt today”. Definitely Selth and perhaps Taylor would not disagree that the long succession of military rule, where Presidents (Heads of State), Prime Ministers (heads of government) and heads of ruling parties (whether single or multiparty) from 1962 to 2015 were military men or from the ruling clique of military men, is at least part of Ne Win’s legacy and to quote Taylor’s words – though they are made in another context - where “surely he [Ne Win] carries the largest responsibility.”

From March 2011 to March 2016 many of the ‘previous’ military regime members were top-ranking officials in the ‘new administration’ formed in March 2011. As stated earlier U Thein Sein is the only person after Ne Win who became both Prime Minister and President. Before his assumption of power by force and becoming Head of State in March 1962 as well as Head of Government (‘Chairman of the Revolutionary government’ or ‘Prime Minister’ from March 1962 to 1974) as well as head of the sole legal political party (from July 1962 to July 1988). Ne Win was caretaker Prime Minister from October 1958 to April 1960. No person in post-independence Burmese history
Myint Zan

had ‘served’, and in the future is unlikely to serve, in so many positons – Deputy Prime Minister (1949-1950), Caretaker Prime Minister (1958 October to 1960 April) and Commander in Chief of the Armed Forces (1949 to 1972) among others – as did Ne Win. U Thein Sein was Prime Minister from October 2007 to March 2011 and President from 30 March 2011 to 30 March 2016.

A brief comparison can now be made by reference to Einstein’s quotation why, at least in comparison to his successor dictator Than Shwe, Ne Win was an ‘illustrious tyrant’.

• U Ne Win was educated at Rangoon University during British colonial rule. He once boasted in a speech that he did not have any University degrees and did not have ‘any tails behind his back’ (meaning that putting the names of degrees beside or after the names of persons is tantamount to or, if only for analogy purposes, having ‘tails behind backs’). Still, he had had the intelligence and tenacity to at least reach University and studied there though he did not graduate from it. 87 Than Shwe on the other hand definitely did not have ‘any tails’ but also perhaps did not complete high school. 88

• The formal education of leaders need not be a criteria for leadership positions, but even if Than Shwe were not as bad a dictator a ‘tyrant’ in the words of the sub-title of Rogers book (and shared by many as well), in terms of personality Than Shwe is more uncouth. From his assumption of power on 23 April 1992 for which Ne Win might have had a role to his ‘retirement’ on 30 March 2011, for nearly 19 years he had not met or mingled, in the same way as Ne Win did in his first 19 years in power, with Heads of State including but not limited to Queen Elizabeth II of UK and the late President Lyndon Johnson of the United States. Largely because of the appalling record of Than Shwe’s regime most (though not all) Western leaders shunned it though the same could not be said of Ne Win’s regime in the early years. In Taylor’s 620 page book I can only discern the noun ‘dictatorship’ 89 once. In Benedict Rogers’ book the title itself (rightly)

87 Ibid., p. 15. Taylor writes: “Shu Maung [before Ne Win took the nom de plume ‘Ne Win’ in 1941 his name was Shu Maung] took three years to complete the intermediate degrees having failed his examinations in the second year the first time. This was attributed not to intellectual incompetence but to an excess of youthful enthusiasm for entertainment and an active night life.”


89 Taylor, above fn. 1, p. 463. Since the ‘soft copy’ of the book is not available word check cannot be made and it may be that Professor Taylor does use the word ‘dictatorship’ perhaps more than one time to describe Ne Win’s ‘regime’ (a word which he uses less infrequently).
mentions the word ‘tyrant’. The very rare, almost unique, employment of the word ‘dictatorship’ in Taylor’s book and the unqualified condemnation or at least criticism of Than Shwe in Rogers’ book is not necessarily or conclusively indicative that Than Shwe was a worse dictator than Ne Win – a term that Taylor eschews in all but (perhaps) one place in the book. Still, Ne Win could ‘hobnob’, so to speak, with world leaders and in some cases almost ‘charm’ them, Than Shwe because, among others, of his lack of English language skills could not, he is not as ‘illustrious’ a tyrant as Ne Win (with the emphasis being on the ‘illustriousness’ rather than on the ‘tyranny’). If both are dictators, then Ne Win was the more illustrious one and if Ne Win be illustrious in comparison to his successor then the quote from Albert Einstein is apt to describe the political leader’s style and substance which ‘scourged’ the country for more than four decades as ‘scoundrels succeeding tyrants’.

- Ne Win did not display hypocritical ‘religiosity’ and how ‘devout’ he was when he was in power. In his 26 years of formal rule to the best of my knowledge there never was published a photograph of Ne Win in the State newspapers bowing before a Buddha image or before monks. Such hypocritical displays of religiousness are amply shown not only of Than Shwe bowing before Buddha images and monks as well as his underlings doing the same during the State Law and Order Restoration Council (18 September 1988 to 15 November 1977), State Peace and Development Council (15 November 1997 to 30 March 2011) regimes and there are jokes that most of the State-run television shows persons with ‘green’ (military uniforms) and ‘saffron’ (monks), ‘pagodas and soldiers’.90 Yet this ‘pious dictator’ (or is it non-illustrious tyrant?) had no hesitation and compunction in ordering the massacre of Buddhist monks during the Saffron Revolution of late September-early October 2007.91

- When Ne Win’s son-in-law and grandsons were arrested in connection with the alleged coup plot the government newspapers mentioned (from the author’s firm memory and written in English even in the Burmese language even in the Burmese language

90 Taylor writes: “The ostentatious displays of religiosity on the part of senior government ministers who were shown paying elaborate homage to senior Buddhist monks almost daily in the media would have looked impious and inappropriate to Ne Win.” (Ibid., p. 555).

newspapers) that they acted like a ‘royal family’.

The wedding of Than Shwe’s daughter where at least the wedding gifts alone amounted to US 50 million dollars is worse than ostentatious; it is obscene. For all his ‘excesses’, Ne Win’s ‘royal family’ during his years in power had not, indulged in such vulgarities.

- Another legacy of Than Shwe is the building of the new capital ‘Naypyitaw’ or Naypyidaw starting in secret from around 2002 and at a cost of US 5 billion dollars. In addition to the stated above the new capital was built at least in part due to Than Shwe’s enormous ego (it can be called an ‘ego-trip or ‘ego capital’) and his trying to emulate the Burmese kings of old who shifted capitals to ‘distinguish’ themselves from their predecessors. When a king founded a new capital, if not a new dynasty then a new ‘lineage’ can arguably be created and in part Than Shwe was emulating the Burmese kings of old.

Powerful as well as feared during his decades in power, U Ne Win did not engage in such a grandiose undertaking of building a new capital as Aba ordered to build the ‘abode of kings’. Among all the dictators mentioned above only Alfredo Stroessner of Paraguay had a city named after him, ‘Puerto Presidente Stroessner’ which was renamed after his overthrow. And even Stroessner did not build a new capital from

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92 “… [the Ne Win’s son-in-law and grandsons] dubious practices … as well as paraphernalia designed by one of the grandsons [it was alleged by the regime] the existence of a Ne Win royal family.” (Taylor, above fn. 1, p. 536.)

93 For only one among many others contemporaneous reports see Grant Peck. “Video Shows Pricey Myanmar Wedding”, in The Washington Post, 2 November 2006, available at: http://www.washingtonpost.com/wp-dyn/content/article/2006/11/02/AR20061102005_pf.html, last accessed on 24 July 2016. See also Jonathan Watts, “Burmese outraged at lavish junta wedding”, The Guardian, 2 November 2006, https://www.theguardian.com/world/2006/nov/02/burma.jonathanwatts, last accessed on 24 July 2016 where it is stated that the money spent “on the couple’s [Than Shwe’s daughter’s] marriage … was more than three times the state health budget.” For one among the youtube videos showing Than Shwe’s daughter’s wedding, see: https://www.youtube.com/watch?v=JsbZnW5h3So&list=PL702F92E5494AA162, last accessed on 9 August 2016.


‘scratch’ as *Aba* did, spending more than 5 billion US dollars in order to (1) emulate the Burmese kings of old as explained above, and (2) with the advice from astrologers to boost up his fortune by moving capitals.

- Talking about astrologers and (for want of a better phrase) reliance on successful witchcraft is a characteristic shared by both Ne Win and Than Shwe. They both believe, or so it can be strongly presumed, in ‘astrology’ and a form of ‘numerology’. *The Myanmar-English Dictionary* explains the Burmese word (phonetically transliterated into English as *jadaja* as ‘n [noun] sth [something] done in keeping with an astrologers advice to avert impending misfortune or to realize what one wishes and *jadaja chei* as ‘v [verb] to ‘follow an astrologer’s advice on what one must do to avoid an impending event or to bring about what one desires’. Almost certainly unique in the world, Ne Win and his regime in 1987 as an act of *jadaja chei* issued Burmese currency kyats in denominations of 45 kyats and 90 kyats. The figures 45 (4+5=9) and (9+0=9) because at that time the 77 year old Ne Win wanted to live until the age of 90 years old (90 is both ‘90’ and 9+0 =9). And it worked! Ne Win lived to the age of 92 (if 6 July 1910 as stated by Taylor and others is indeed the real birthday of Ne Win). As stated, very few people lived past the age of 90 including Statesmen and despots. The only other ‘strong man’ who lived longer than Ne Win (but it bears repetition who was overthrown and spent in exile for the last 17½ years of his life) was Alfredo Stroessner. Robert Taylor somewhat inconclusively and defensively (in defense of his subject) writes that the “choice of different denominations, [by Ne Win] of course, could be explained as ensuring the old currency did not remain in circulation, thus fleecing the illiterate.” Than Shwe too is no second man to his erstwhile boss when it comes to astrological and other superstition. The shift to Naypyidaw was made because the first move to Naypydiaw on November 6, 2006 at 6:37 am (6+3+7=16, then 1+6=7): this time the lucky number of Than Shwe – not Ne Win – may be ‘7’ rather than ‘9’.

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97 Taylor, above fn. 1, p. 562. During Ne Win’s rule demonetization (declaring currency in circulation to be invalid with limited or no offer of partial refund for the demonitized currencies) took place three times on 17 May 1964, November 1985 and 5 September 1987 which were announced on radio (and in 1985 and 1987) without any prior notice. Assuming but not necessarily agreeing that the new currency is necessary to prevent the ‘illiterate from being fleeced’ why were the peculiar denominations of 45 kyats and 90 kyats chosen? For illiterate peasants, wouldn’t it be more difficult to do the ‘math’ to add and subtract when complicated figures like 45 kyats and 90 kyats are used?
98 See for e.g. Paddock, ‘Abrupt Location of Burma’s Capital Linked to Astrology; *Los Angeles Times*, 1 January 2006 as cited in Rogers, *Than Shwe*, above note 87 at p. 233.
Although arguably anecdotal (in that the nature of the claim is such that it cannot be independently identified) there is a claim by a Burmese writer Than Win Hlaing in a book in Burmese, which in translation reads The End (End Game) of Dictator Bo [Commander] Ne Win, that Ne Win as stated earlier indulged in ‘witchcraft’ by issuing forty five and ninety kyats notes on 22 September 1987 so that he Ne Win might live up to the age of ninety. Than Win Hlaing also states that Ne Win rode a wooden horse on an air plane which circled Ne Win’s birth village of Chaung Kaung 9 times. When his wish was fulfilled and Ne Win actually did reach the age of ninety he engaged in another ‘witchcraft’-like activity according to Than Win Hlaing. On 21 March 2001 (the date adds as 2+1+3+2+0+0+1= 9) at the Sedona Hotel in Rangoon, Ne Win and his family invited 99 Buddhist monks (9+9=18=1+8=9) and invited 504 guests (5+4=9) so that he would live to 99 years! This time though the ‘wish’ or ‘ritual’ of the old dictator was not fulfilled and he died at the age of ‘only’ 92 years. Hence the illustrious tyrant and his successor, though they differ as explained above in their misrule and the successor is arguably worse than the person who has groomed him, did share the characteristics of being both superstitious and successful in their jadaja chei or witchcraft-

This illustrates how Than Shwe spent US billions of dollars building a new capital as an act of jadaja chei.

100 Ibid., p. 242.
101 Ibid., p. 243. A March 2001 video of Ne Win’s supposed birthday party where a few dozen people paying homage and obeisance to the old dictator as though he were a Buddha image or a revered monk can be seen in https://www.youtube.com/watch?v=DfwlgNGQVBe, last accessed on 7 August 2016. One would not want to ‘revert’ to either Ferdinand Marcos or Alfredo Stroessner (who were Catholics) and Suharto (who was a Muslim) whether they received such obeisances from their underlings and underlings’ wives after their overthrow and exile (Marcos and Stroessner) and forced resignation (Suharto) since they were not Buddhists. But perhaps another dictator who happened to be a Buddhist Thanom Kittikachorn of Thailand (1911-2004) who was Ne Win’s contemporary in age might or might not receive such ‘obeisances’ after his retirement. Even if Kittikachorn did he (unlike Ne Win) was really overthrown, ruling Thailand only from 1963 to 1973.
102 Though Ne Win groomed Than Shwe and others only in the general sense of putting loyal persons and establishing military dominance. There is a Burmese saying that ‘a monkey which a person has groomed turned and threatened the same person (trainer)’. Than Shwe was in a sense, an indirect creation, of Ne Win, just as it has been said the Taliban was the creation of the United States Central Intelligence Agency (CIA) when it supported the Afghanistan ‘Mujahedin’ after the Soviet invasion and occupation of Afghanistan in 1979.
103 A reviewer of the author’s article queried to discuss the ‘structural’ reasons that Ne Win and – one could add – Than Shwe did not get the ‘punishment’ they deserved. This author
like activities to prolong their lives and their rules. An even more bizarre, indeed macabre and disgusting act of *jadaja chei* involving a pig and a dog being leashed to a chain and walked by Than Shwe’s wife on the grounds of the sacred Shwedagon pagoda is reported by Emma Larkin. The alleged act of *jadaja chei* by Than Shwe’s wife makes Ne Win riding a wooden horse on a plane that circles his native or birth village nine times seem, in comparison, ‘innocuous’. If true (the likelihood of being false is negligible since at least some acts like choosing the awkward time of ‘6:37 am’ is certainly a *jadaja*) the offensive nature of the acts done in great secrecy in the precincts of Burma’s most sacred pagoda should be obvious to both orthodox and liberal Buddhists and secularist alike. Only certain segments of Emma Larkin’s reportage (of about 700 words in two pages) would be reproduced here:

At the top of the stairs the pagoda is rigged with a battalion of soldiers standing as motionless as statues … Here, before the has tried to explain what he considers to be the structural reasons for such good fortune of the first ‘illustrious’ tyrant, and he has emphasized that sheer good fortune (rather than good karma) may be the reason. Certainly the longevity of Ne Win (died only at the age of 92 which very few statesmen far less strong men, illustrious tyrant or scoundrel can exceed or even match) cannot be explained structurally. Or is it that Ne Win’s ‘witchcraft’ to ward off feared or even possible actual disasters work? It needs to be stated that a much less tyrannical or scoundrel-like leader (compared to Ne Win and Than Shwe) independent Burma’s first Prime Minister U Nu also indulged in what can be called ‘apotropaic’ practices in the early 1960s when U Nu directed that 60,000 sand pagodas be built in order to lessen the plight the country was facing in the country. (See for e.g. ‘Burma: The Way to Socialism’. *Time magazine*, 20 July 1962, available at: http://www.time.com/time/magazine/article/0,9171,896367,00.html#ixzz1RP9NSUE1, last accessed on 27 July 2016, on U Nu’s ‘eccentricity’ as *Time* magazine put it. The building of sand pagodas was done in order to lessen (howsoever misconceived or superstitious it might be) publicly and for the sake of the country. It did not work personally for U Nu since he was overthrown in March 1962 and it also did not work for the country since the scourge of military rule was to follow for a few decades. Ne Win’s and Than Shwe’s ‘apotropaic’ practices were done for their own benefit, longevity of their own lives and their own despotic misrule even if like the issuance of 45 kyats and 90 kyats notes were done publicly. And unlike U Nu’s public practice of 60,000 pagodas of sand [to be] built in a single day, it seems to have work for both Ne Win and Than Shwe - at least most of the time. Even though the current NLD and military power-sharing government’s moves away from authoritarian rule, Than Shwe (because his apotropaic or *jadaja chei* rituals work?!) will not face even the minor discomfort of the NLD power-sharing government forming a truth commission far less the prosecution and attempted prosecution which the other authoritarian leaders discussed above (Ioannidis, Chun Doo-Hwan, Pinochet, Suharto) who after their overthrow were not executed (Ceausescu) or exiled (Marcos, Stroessner, Mobutu), had had to face. Whatever structural reasons, metaphysical reasons might be behind their luckiness, both the ‘illustrious tyrant’ and the ‘scoundrel’ were and are extraordinarily lucky dictators.
pagoda, the two cages are uncovered and opened. A handsome white dog bounds out of one cage and is sharply restrained by a soldier. More grunts ensue from the other cage, and it takes some time for the soldier to drag out a very large, very reluctant pig. A gold cord is tied around each animal’s neck and handed to the woman [wife of Than Shwe doing the ‘witchcraft’]

Leading the dog by one hand and the pig by the other, the woman begins to walk counter clockwise around the Shwedagon pagoda … the old woman walks unsteadily. Spotlit in the floodlights that illuminate the great, golden pagoda, her thickly powered face looks pale and worn. She appears to be mumbling to herself … The night is almost impossibly still, and the only other audible sound is the rhythmic click-clack of the pig’s trotters on the marble of the pagoda platform.104

And this witchcraft conducted by the successor (scoundrel) to the illustrious tyrant has, so far, worked and notwithstanding the fact that one should not predict the future it might well continue to work. Like his former boss who avoided the fates that befall most of the greater or lesser dictators mentioned above the successor to the illustrious tyrant like the illustrious tyrant himself might well spend his remaining years not only in luxury but in great comfort, safety and security.

A Brief Quotation from the Protagonist Himself: Paraphrasing the Expression of ‘Larry’: ‘Ain’t Salving No Wounds with No Nostalgia’

Three quotations, one from the Dhammapada, one from ‘Larry H’ and one from Albert Einstein have been quoted to illustrate some of the thoughts on the life, rule and biography of General Ne Win. Perhaps, now, it may be appropriate to quote the protagonist himself who is the subject of Taylor’s biography.

In Burma’s freedom struggle from British colonial rule, the Rangoon University Students’ boycott in December 1920 against the British colonial and educational authorities was one of the major landmarks. In late November or early December 1970 General Ne Win, as Chairman of the Revolutionary Council and Chairman the Revolutionary Government (Prime Minister) of the Union of Burma gave a luncheon to some of the surviving University student

‘strikers’ of fifty years ago. At the luncheon General Ne Win gave a speech which this author clearly remembers. He stated in effect the strike leaders during their lives must have gone through (quite) a few disappointments, ‘hurts’ or wounds (perhaps both personally and politically).

In one of the few philosophical (to this author almost ‘touching’) uses of an expression and sentiment rarely found in his speeches the late General said to his elders in age who were at least ten to fifteen years older than him and were then in their early to late seventies that ‘if you had hurts from the past, please try to salve them and alleviate the hurts or comfort yourselves with nostalgia [about the good things that had occurred in the past]’. Thus ‘comfort or ‘salve’ the hurts you have gone through ‘with nostalgia’ said Ne Win.

It might be commented in response and to paraphrase the vivid phrase containing the insights of ‘Larry H’ (‘You ain’t going to no heaven for it ain’t no heaven for you to go to’) ‘there ain’t no nostalgia for you, man, since it ain’t no salving of wounds [caused by your rule]’.

The long and, at least in some if not in many places, indulgent biography by Robert Taylor ends with an equivocal observation. After stating that “Ne Win’s monument could be Myanmar itself” Taylor nevertheless writes: “[l]ike the socialist dream of his generation, that is probably impossible and his place in Myanmar and Cold War history thus will remain unmarked.”

At least for a significant minority of the Burmese, Ne Win’s rule (paraphrasing in translation from Ne Win’s speech of December 1970) did cause some hurts and did leave some wounds. Needless to say not only his immediate family but also former underlings, colleagues and their descendants would be and perhaps still are ‘nostalgic’ if not of Ne Win’s rule then of Ne Win the person. But for at least a significant minority of Burmese, and

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105 Taylor reproduces sometimes fairly long excerpts in translation from Ne Win’s speeches, apart from briefly mentioning that in December 1970 Ne Win ‘hosted a dinner [sic for luncheon] for Golden Jubilee celebrations of National Day in Yangon [The 1920 Rangoon University strike day is celebrated as ‘National Day’ since colonial times], above fn. 1, p. 392, he does not mention this particular speech of Ne Win.
106 Ibid., p. 563.
107 Compare Taylor’s observation just a few sentences before he writes that “Ne Win’s monument could be Myanmar itself’ he equivocates or acknowledges that “in Myanmar many still abominate him and his memory.” (Ibid., p. 562.)
108 A cousin of the author one of Ne Win’s former beneficiaries called Ne Win Aphaygyi (Big Daddy) when referring to Ne Win. I recall that my cousin once said ‘May Aphaygyi be healthy, may you live long’ when Ne Win was shown on Burmese state television, in 1987. So, Ne Win was more than ‘Big Brother’ (of George Orwell’s Nineteen Eight-Four fame) to a few of his ‘beneficiaries’. He was the ‘Big Daddy’. In stark and striking contrast, an Uncle of mine, a constant, consistent and fierce critic of Ne Win, used words to describe Ne Win and what he wanted to do to Ne Win’s face in terms which are so unprintable that the author has mentioned my Uncle’s comments only to a few close (male) friends of mine. About seven years after Ne Win’s death in December 2002 the
wife of a high school class mate of the author told me that she ‘missed’ U Ne Win especially, so she stated, since she sometimes cooked and sent food to U Ne Win’s house in Ne Win’s last years. Her husband, my class mate told me that he offered food to monks for Ne Win when he learned that Ne Win had died even though during his late father’s funeral in 2005, which I attended, my class mate did not once give obeisance to the Buddhist monks though his wife and children did so.

And just as I was in the concluding stages of my article through the social media (Facebook) I chanced to see an article written in Burmese language by the Australian based writer Myint Than entitled in translation “The Pitable State of the Burmese Language” in Hninhse Phyu (‘White Rose’) Journal, Vol. 50, 2016, in effect stating that he felt ‘nostalgic’ (the Burmese word used in English transliteration is lwan: (lun:) and the Myanmar-English Dictionary translates it as ‘long for, yearn for, pine for, miss’ (p. 462)) for the ‘great Chairman’ U Ne Win. The word lwan: (lun:) used in Myint Than’s article of July 2016 was exactly the same word Ne Win used, 45½ years earlier in his speech of December 1970 to the 1920 Rangoon University student boy-cotters. Myint Than’s reason for ‘missing’ or feeling nostalgic about ‘the great Chairman’ U Ne Win is that during his rule Ne Win ostensibly encouraged the use and refinement of Burmese language unlike during the successor regimes where, according to Myint Than, the Burmese language skills of students and writings in magazine articles deteriorated. From the tone and tenor of the article I can discern that Myint Than’s ‘nostalgia’ of Ne Win is partly written tongue-in-cheek.

Taylor too had mentioned Ne Win’s interest in Burmese language (above note 1, pp. 395-396). The author recalls listening to a speech on radio given by Ne Win in his closing address to the first Congress of the sole ruling Burma Socialist Programme Party reproduced in full on radio on the night of 11 July 1971. In his speech Ne Win categorized Burmese language lecturers as ‘half-baked bread(s)’. One of the unnamed ‘half-baked’ Burmese language professors was apparently the poet Minthuwun (Min Thu Wun) (10 February 1909-15 August 2004) a contemporary in age of Ne Win and one of the very few contemporaries of Ne Win who outlasted him in terms of personal longevity. Minthuwun was also the father of President (since 30 March 2016) U Htin Kyaw. Taylor writes that ‘[t]he three elderly men [which Taylor named in his book, including Minthuwun who Ne Win initially assigned to work on, among others, a Burmese spelling manual and dictionary] were very disappointed that Ne Win had rejected their work and one felt suicidal’ (Ibid.).

In 2004, a nephew of Minthuwun told me that his Uncle apparently said he ‘wanted to jump in front of a car’ apparently after hearing Ne Win used the terms ‘half-baked bread’ in describing Burmese language lecturers. Earlier before calling them half-baked Ne Win also said ‘I am not too pleased with them’. See Myint Zan. “Minthuwun: A Tribute to a Gentle Burmese Poet”, Westerly Vol. 50 (2005), pp. 179-183.

Coming back to the ‘nostalgia’ issue I have provided three examples of those who arguably ‘miss’ General Ne Win among those who are personally known to me albeit in the case of Myint Than, in a certain sense, he was ‘missing’ or being nostalgic about Ne Win’s rule in an ironic manner. From my conversations throughout the years of quite a few of my elders, contemporaries and even juniors who was born up to three decades after Ne Win ‘seized power’ (a term Taylor himself used, see above note 1, p. 309) and started his long rule, did not feel nostalgic about him, to say the least. Even a few younger persons who were born nearly two decades after his seizure of power and with whom I have had the chance to talk or discuss about Ne Win’s rule strongly criticized if not condemned him. Perhaps some among the younger generations who did not go through
due to the legacy that he has left behind, while salving the wounds might (just) be possible they would not be inclined to indulge in nostalgia about Ne Win and his rule.

Ne Win’s rule might be (sort of) indifferent to him or a few may even admire him. Still, taking the verse in the *Dhammapada* that there weren’t, there aren’t and there would not be in the future persons who were/are/would be wholly praised or wholly blamed I have deemed it suitable to provide three examples of persons arguably if not ‘missing’ Ne Win’s rule then at least missing or ‘feeling nostalgic’ for Ne Win. Still, for those who had lived through and learned about Ne Win’s era at least a significant minority of them would not feel nostalgic about him and his rule. Even Taylor (to repeat) acknowledges that “…in Myanmar, *many still abominate him and his memory*” (ibid., p. 562, emphasis added). Hence my contention that at least for a significant minority of his former subjects even if the wounds and the hurts emanating from or cascading to them, so to speak, from Ne Win’s rule are ‘salved’ they would not be nostalgic of him is perhaps more than appropriate: it is indeed a modest claim almost amounting to an understatement.
The Rule-of-Law Challenge to Environmental Conservation in Myanmar

Jonathan Liljeblad

Introduction

The illicit trade in flora and fauna is recognized as a major international issue, with an estimated value ranging between $7-23 billion annually.\(^1\) At both regional and global levels of the flora and fauna trade, Myanmar is deemed significant since the country functions as both a source and transit point for the Asia-Pacific and the larger international flow of illegal plant and animal products.\(^2\) In an effort to mitigate these issues international efforts have sought to help Myanmar increase its role in halting illicit flora and fauna trade. In particular, organizations like the United Nations Office on Drugs and Crime (UNODC) and the Wildlife Conservation Society (WCS) have tried to improve the capacity of Myanmar’s environmental law institutions to better control the movement of plant and animal products through the country.\(^3\)

This paper aims to provide commentary cautioning aspirations to aid Myanmar’s environmental institutions. Specifically, this paper calls for a need to exercise a holistic approach cognizant of contextual issues affecting environmental conservation efforts in Myanmar. This paper argues that the issues challenging Myanmar’s environmental law regime are reflections of endemic issues in the country itself, and that hence hopes of addressing problems in Myanmar’s environmental legal system are better served by undertaking a wider approach encompassing the broader issues of the country’s ongoing transition. The problems impeding the flora and fauna trade regime, in essence, are reflections of an underlying rule-of-law problem and


so substantive solutions to illegal flora and fauna trade require more attention to improving the rule-of-law.

Methodologically, this comment relies on primary sources in the form of available Myanmar government documents and interviews with actors in the Myanmar legal system. Due to the uncertain political climate within some institutions and regions within Myanmar, the interviews are kept anonymous and information that might be used to attribute specific people are withheld. These are supported with secondary sources in terms of research documents published by various international institutions, non-governmental organizations (NGOs), and scholarly journals.

**Flora and fauna trade in Myanmar’s legal system**

Institutionally, the flora and fauna trade in Myanmar is subject to the jurisdictions of several government entities: the Customs Department, the Forestry Department, the Myanmar police, the Attorney General, the Anti-Corruption Commission, and the courts. Ostensibly, they coordinate their activities, with courts hearing cases prosecuted by the Attorney General, who receives cases arising from the investigations, referrals, searches, and seizures made by Customs, the Forestry Department, the Myanmar Police, and the Anti-Corruption Commission. This pattern exists at both national and local levels, with the courts and prosecutors at local levels maintaining connections with local representatives of Customs, Forestry, and Police. The organization of the system formed by these institutions is summarized in a chart generated by the UNODC, given in Figure 1 below.
Figure 1: Criminal Justice Response to Wildlife and Forest Crime in Myanmar. United Nations
The above institutions work with a legal framework comprised of a series of domestic laws and rules and international treaties. In terms of domestic legislation, the body of laws addressing the illicit trade in flora and fauna can be summarized in chronological order as follows:

- Marine Fisheries Law 1990 – law setting forth licensing system for inshore fishing
- Freshwater Fisheries Law 1991 – law addressing licensing system for freshwater fishing
- Forest Law 1992 – law directed at conservation of forests for commercial use
- Animal Health and Development Law 1993 – law dealing with the treatment of domestic or captured animals
- Protection of Wildlife and Conservation of Natural Areas Law 1994 – primary wildlife trade act intended to fulfil Myanmar’s obligations under the World Heritage Convention and the Convention on Biological Diversity
- Forest Department Notification No 583/94 – declaration listing species of wildlife protected from trade
- Rules Relating to the Protection of Wildlife and Conservation of Natural Areas 2002 – supports PWCNAL by providing further details for implementation of the PWCNAL
- Environmental Conservation Law 2012 – constitutes the Ministry of Environmental Conservation and Forestry (MoECAF) with monitoring and enforcement powers

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Environment Conservation Rules 2014 – supports the Environmental Conservation Law with additional regulations regarding Environmental Impact Assessment (EIA) procedures, environmental standards, clarification of the powers of MoECAF, and establishment of an environmental management fund.\footnote{10}

In relation to flora and fauna trade, Myanmar is involved with a number of international instruments and institutions. With respect to instruments, Myanmar is party the Convention on the International Trade in Endangered Species (CITES) and the Convention on Biological Diversity (CBD). The government is also engaged with Trade Record Analysis of Fauna and Flora in Commerce (TRAFFIC) and the ASEAN Centre for Biodiversity (ACB).

The status of Myanmar’s legal regime is mixed. Data from the Myanmar Supreme Court and the UNODC indicate a general increase in cases brought against illegal timber and wildlife trade.\footnote{11} Despite this, international observers continue to see issues – as exemplified by the CITES Secretariat in its National Legislation Project reviewing the endangered species laws of CITES parties, which deemed Myanmar’s laws to only rise to a Category 3 out of 4, denoting legislation that falls short of CITES requirements. CITES demands that treaty parties enact sufficient national legislation specifying 1) a management authority and scientific authority, 2) a prohibition on trade in specimens in violation of CITES, 3) the penalization of such trade, and 4) the confiscation of illegally traded or possessed specimens.\footnote{12} Myanmar’s current legal framework suffers with respect to definition of offences related to CITES, penalization, and treatment of confiscated specimens.\footnote{13}

For its part, Myanmar is working with the CITES Secretariat to analyse and revise endangered species laws related to its CITES obligations.\footnote{14} In addition,
Myanmar has also sought to proactively work with international institutions to help it improve its environmental system, with the government engaging the ASEAN Centre for Biodiversity (ACB), ASEAN Wildlife Enforcement Network (ASEAN-WEN) and the Wildlife Conservation Society (WCS) to provide technical assistance and capacity development.\(^\text{15}\) There is also the UNODC, which has placed the illegal flora and fauna trade alongside narcotics smuggling, human trafficking, and illicit mining as tools for transnational organized crime. For its part, the UNODC is engaged in long-term projects to help the Myanmar government reform its environmental laws, improve policies, increase institutional capacity in terms of knows and skills, promote greater coordination and cooperation between Myanmar government agencies, and strengthen partnerships with regional and international actors.\(^\text{16}\)

The larger context of Myanmar

While the efforts of the Myanmar’s government and its international supporters are laudable, their efforts should be viewed in relation to the larger context of Myanmar’s ongoing transition. Aspirations to improve the effectiveness of Myanmar’s flora and fauna legal regime are tied to endemic issues that affect the prospects of more general institutional capacity to implement laws. Specifically, the effectiveness of Myanmar’s environmental laws is dependent for their enforcement upon Myanmar’s legal institutions, and the capabilities of Myanmar’s legal institutions are circumscribed by issues of underdevelopment, an uncertain political environment, and a persistent military influence afflicting the government and country as a whole. These issues represent various aspects of a rule-of-law problem in Myanmar, and so suggest that the prospects of efforts to improve Myanmar’s flora and fauna legal regime are better served by connecting to broader efforts at rule-of-law reform. Each of these issues are summarized below.

Underdevelopment

Among the primary challenges to environmental conservation efforts is the country’s underdevelopment. The country began its independence as among the most prosperous countries in Southeast Asia, but in the intervening decades has declined to become one of the poorest.\(^\text{17}\) While the UN and World
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Bank find that Myanmar’s gross domestic product (“GDP”) in 2012 was $59 billion with an annual growth of 8.5%\(^\text{18}\), they also find persistent issues of poverty with an annual GDP per capita of US$1,126\(^\text{19}\) and a Human Development Index rank of 150\(^\text{th}\) out of 187 measured countries.\(^\text{20}\) In addition, in 2014 Transparency International’s Corruptions Perceptions Index lists Myanmar 156\(^\text{th}\) out of 175 countries.\(^\text{21}\) Similarly, the World Justice Project’s Open Government Index ranked Myanmar 100\(^\text{th}\) out of 102 measured countries in measuring the extent of publicized government data, right to information, civic participation, and complaint mechanisms.\(^\text{22}\) In its Rule of Law Index, the World Justice Project ranked Myanmar 92 out of 102 countries across variables covering constraints on government powers, absence of corruption, security, observance of rights, and enforcement.\(^\text{23}\) Against such issues lies a Myanmar government consistently recognized by both academics and aid agencies as lacking capacity in all areas and at all levels, with weak institutions, opaque leadership, dysfunctional civil service, poor infrastructure, inadequate resources, and insufficient skills.\(^\text{24}\) While development and technical aid from the international community increased in the wake of the country’s 2011 elections and initiation of political reforms, it continues to struggle against the scale of development problems.\(^\text{25}\)

These problems are manifest within Myanmar’s flora and fauna legal regime. Studies by UNODC and DLA Piper observe that the institutions


\(^\text{19}\) Above fn. 18.


\(^\text{23}\) Above fn. 22.


\(^\text{25}\) Above fn. 17; above fn. 24.
involved in the enforcement of Myanmar’s flora and fauna trade laws exhibit capacity constraints arising from corruption, shortages in staff, scarcity of skills, and insufficient funding.\textsuperscript{26} This is affirmed by interviews in the course of field research, which found that the staff involved in the local prosecution of endangered species crimes around Taunggyi, Shan State viewed their major problems as being inadequate staff numbers and funding but also added inadequate training in identifying endangered species, a lack of technology to conduct investigations, and a scarcity of material resources spread across a broad range of priorities such as narcotics, human trafficking, weapons smuggling, land use disputes, and sectarian tensions.\textsuperscript{27}

The extent of underdevelopment makes environmental concerns only one of multiple issues that include an anaemic economy, poor human development, misallocated government spending, and extensive corruption. The state of conditions in Myanmar gives each of these issues an urgency that vies with the environment for priority in the government agenda, and hence threatens to distract government attention and resources away environmental conservation. In addition, whatever attention the government may be able to provide will be frustrated by the lack of government capacity to respond to any of the problems afflicting the country. Whatever capacities it may muster must be parsed out to meet its demands, and hence pose the possibility of assistance that is short of the aspirations or needs of environmental conservation efforts.

\textbf{Uncertain political environment}

Myanmar hosts a diverse array of interests that form a complex, pluralist political landscape that goes beyond a simple military-versus-civilian dichotomy, with a spectrum of factions whose motives and actions converge or diverge at various times in a transition discourse that Larry Diamond characterizes as involving questions about the path “from authoritarianism to democracy, from military to civilian rule, from a closed and monopolistic to an open and competitive economy, and from an ethnically fractured and fissiparous state to a more viable and coherent union”.\textsuperscript{28} Compounding such


\textsuperscript{27} Interviews, Shan State Supreme Court 2016; Interviews, Myanmar Police in Shan State 2016; Interviews, Shan State Attorney General’s Office 2016.

complexity is the involvement of international efforts that seek to explore “third views” between the military and pro-democracy forces. Such factors create a terrain of diverse political actors that may be unified in a desire for transition but which differ in the manner in which it is to be done and the ultimate result it is supposed to produce. These complexities are not always benign, and have at times generated tensions significant enough to threaten the country’s stability. In particular, Myanmar has sustained a civil war fomented since its independence in 1948 by nationalist movements tied to an array of at least 135 ethnic nationalities seeking varying degrees of sovereignty and fuelled by a lucrative drugs trade. There have been multiple attempts at cease-fires and peace talks, with the most recent iteration commencing after the 2011 elections, but there continue to be regions of the country subject to violence between armed groups struggling for power. Prominent among these have been the conflicts near the country’s borders with China and India, including the Kokang and Rhakine regions. Hence, the fractures in Myanmar’s politics pose a fluid context with diverse interacting interests whose differences frustrate efforts to focus efforts at resolving the country’s challenges – including environmental conservation.

Compounding these complex divisions is the uncertainty arising from Myanmar’s reforms. Such uncertainty is extensive because it involves not only democratic transition but also institutional change. Scholars like Barbara Geddes, Arend Lijphart, Adam Przeworski, and Carl Saxer observe that democratic transition and institutional change are invariably tied together because a democratic transition transforms power relations to create new political spaces and institutional change sets the rules of those political spaces. Applied to Myanmar, this suggests that the process of political

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34 Ibid.
reform is unsettling historical power relations to fashion a form of parliamentary democracy, with the various government components – such as the institutions associated with the country’s flora and fauna legal regime – working with each other to set the operations of Myanmar’s version of parliamentary democracy.

Such issues carry consequences: Josep Colomer, Guillermo O’Donnell, and Philippe Schmitter observe that in the early stages of transition actors are unsure of their strength relative to each other and hence are unsure about possible outcomes from their actions.36 Such confusion forces actors to make decisions based on perceived expectations, apparent promises, and calculated threats.37 This means the sense of risk is continually changing, and hence actors are left in a state of constant adaptation.38 Under such conditions, the overriding concern becomes survival.39 As a result, any work done to fortify institutions is undertaken with an underlying focus on gaining the most advantageous positions in government possible.40 This suggests that the institutions in Myanmar’s flora and fauna legal regime currently have to work to reposition their authority in Myanmar’s changing political system. Hence, the Customs Department, the Forestry Department, the Attorney General, the Anti-Corruption Commission, and the courts must deal with the diversion of working in a context of uncertainties regarding their strengths – and hence authority – relative to other government agencies. This detracts from a mission of endangered species conservation.

Some indications of this were manifest during field research for endangered species crime in Shan State, with representatives of the courts, prosecution, and law enforcement consistently noting a period of uncertainty in the wake of the country’s November 2015 election won by Daw Aung San Suu Kyi’s National League for Democracy (NLD) party. This uncertainty was tied to the potential replacement of civil servants, both from the NLD party as it sought

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37 Ibid.


to install its own appointees within government and from the military as it sought to consolidate its control over the ministries of Home Affairs, Military, and the Police. Such conditions raised concerns about shifts in leadership and authority. Such concerns are substantive, with interview subjects indicating that they affected the direction of their policies and their legal powers to implement such policies.  

**Persistent military influence**

The growing uncertainties and lingering conflicts arising from Myanmar’s transition have been used by the military to justify its continued presence in Myanmar’s politics. Specifically, in a January 2015 interview with Channel News Asia, military leader General Min Aung Hlaing stated that the military is reluctant to reduce its role in government so long as it continues to perceive threats to a nascent democracy. In the interview, he asserted stability as being necessary to allow democracy to develop and did not rule out the resumption of military control over the country. In reference to the political terrain of the country’s democratic transition, he stated a disinclination to reform the country’s laws and argued that too much change threatens the stability that the military seeks to impose on the country. His comments reflect an intention to maintain a dominant role for the military in the process of Myanmar’s democratization, with the military exercising the seats in the legislative and executive branches set under the 2008 Constitution to control the pace and direction of reform.

Scholars like Guillermo O’Donnell and Phillippe Schmitter see such a situation as marking a democratic transition, in that it represents an interval between pure authoritarianism and functional democracy. In cases like Myanmar where a democratic transition is led by a pre-existing regime, Sujian

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43 Ibid.
44 Ibid.
45 Above note 36.
Guo and Gary Stradiotto observe that reforms tend to be made in ways that favor the interests of the incumbents. As a result, Myanmar’s path to democracy is what scholars like Larry Diamond and Francis Fukuyama describe as a negotiated transition to transfer power to civilian control in a way acceptable to incumbent military elites. It should be noted, however, that Myanmar’s form of democratization is one held not purely by the military but also seems to be shared among its people, with Brian Joseph finding that it is the preferred strategy among various factions within Myanmar’s political system when they are given a choice between negotiated transition, regression to military rule, “Singapore” style economic reform at the expense of authoritarian government, or fragmentation into polarized conflicts. As a result, the pursuit of a negotiated transition to democracy seems to be one desired by the both Myanmar’s military-led state and its society, suggesting conditions disposed toward a gradual process of reform dictated by a military. This implies a situation skewed towards the continued dominance of a military that has been regularly criticized by the UN for its environmental failings.

In addition, scholars like Francis Fukuyama and Larry Diamond warn that a negotiated transition may be effective in bringing civilian government in a gradual, deliberate manner but it comes at a potential cost: it is at risk of incurring a bargained exchange of conditions in which power is transferred to civilian authority in return for an enshrinement of corruption and dysfunction that benefits the departing military elite. This means that Myanmar is vulnerable to the fate of other negotiated transitions that have encountered a “democratic regression” in which democratic regimes slide into dysfunction and increased limitations on freedom as a result of continued, ingrained corruption within their political systems. For the elements of Myanmar’s flora and fauna legal regime that are under military control – particularly the

48 Above note 28.
50 Above note 47; above note 28.
police – this raises the possibility that its ability to operate will be conditioned on its utility as an instrument to further the corrupt practices of the dominant military elite.

Going further, scholars like Gerald Easter, Guillermo O’Donnell, Sujian Gu, Gary Stradiotto, and Philippe Schmitter see democratic transitions as involving imbalances in power that determine divergent outcomes for institutions: when a transition is led by incumbents, institutions tend to have exclusionary tendencies; when a transition is led by opposition forces, institutions tend to have inclusionary tendencies.\(^5\) Exclusion involves a continuation of the dysfunctional behavior of authoritarian regimes in terms suppressing dissent, while inclusion means the engagement of both incumbent and opposition voices.\(^5\) Guo argues that emergent regimes, and by extension their attendant institutions, are more likely to succeed if transitions are inclusive.\(^5\) This suggests that the growth of Myanmar’s flora and fauna legal regime would be more assured if Myanmar’s democratization was an inclusive process. However, the nature of Myanmar’s democratization as a negotiated transition dominated by the military makes Myanmar a case of an incumbent-led transition, and so implies an exclusionary environment with institutions less likely to tolerate dissent. This conflicts with elements in the flora and fauna trade regime, in that the motive behind institutions like the Anti-Corruption Commission imply an independent, and hence dissenting, perspective on government activities. This makes such institution a target of exclusion, and so raises the risk of their marginalization within Myanmar’s transition.

Conclusion

The issues of underdevelopment, an uncertain political environment, and a persistent military influence pose a rule-of-law problem in that they limit the capacity and authority of Myanmar’s government agencies to reduce corruption and pursue enforcement on a comprehensive universal basis across the country. As a result, while the Myanmar government may be active in the promulgation of laws, it is confronted by an ongoing challenge in ensuring

53 Above note 46.
54 Ibid.
compliance to those laws. The legal institutions in Myanmar’s flora and fauna trade regime, as components of the Myanmar government, are thus faced with a more general rule-of-law problem underlying the country’s struggles with transition. To the extent that the broader issues tied to the rule-of-law are left unaddressed, it weakens the base of power and hence the extent of authority that can be exercised by legal institutions to halt the illicit flow of plant and animal products through the country.

Such a situation directs attention to the question of rule-of-law as an element in environmental conservation. Specifically, it highlights a need for supporters of environmental conservation in Myanmar to expand their focus to the deeper issues in the country that affect the capabilities of the country’s environmental law regime to fulfil its mission. This carries two implications: 1) aspirations to improve the capacities of environmental law institutions must also address the impact of the rule-of-law problem upon those institutions, and 2) efforts to aid such institutions must also help to promote the rule-of-law. This calls for greater coordination between aid efforts directed at flora and fauna trade with aid efforts directed at improving the rule-of-law, such that the two align and function in a mutually supportive manner to address phenomenon that are fundamentally related on deeper levels. The basis of flora and fauna trade law is environmental law and the foundation of environmental law is the legal system, and hence hopes for long-term substantive improvement in mitigating illicit flows of flora and fauna are tied to efforts to gain long-term substantive improvements in the legal system.
Politicization of Constitutional Courts in Asia: Institutional Features, Contexts and Legitimacy

Jiunn-rong Yeh

Introduction

The global spread of judicial review has become a research focus among constitutional scholars.1 While institutional arrangements for judicial review vary, some Asian states have adopted the constitutional court model. Examples of the trend toward this model in Asia include the Constitutional Court of Taiwan (1947), the Constitutional Court of South Korea (1988), the Constitutional Tset of Mongolia (1992), the Constitutional Council of Cambodia (1993), the Constitutional Courts of Thailand (1997 and 2007), and the Constitutional Court of Indonesia (2003). These constitutional courts are often perceived as political courts or often politicized.

This paper will explore the degree of their politicization, the reasons for their politicization, and the legitimacy of the tendency for their politicization. It begins with an analysis of their politicization within their respective institutional designs finding that institutional designs do move these constitutional courts toward politicization with the expansion of their power and more dynamic power sharing in the appointment and review processes. It then investigates the contexts in which these constitutional courts were established and examines the contextual roots in the politicization of these courts. Finally, this paper analyzes the legitimacy of the politicization from the expectation of the society as well as the dialogue-advancing judicial strategies.

In this paper, politicization of the courts or political courts is analyzed from the following three perspectives. First, it indicates that the design of the courts reflects power allocation.2 Second, it means that the jurisdiction of the courts is expanded to include “matters of outright and outmost political significance”.3 Third, it dictates that judges, instead of being neutral and

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independent, tend to base on political interests or ideologies in making decisions.4

Institutional Designs

In the case of institutional designs, four aspects manifest the politicized inclinations of the constitutional courts in Asia, namely, the length of judicial terms, procedures for judicial appointments, expansion of judicial functions, and processes for judicial review that are more dynamic.

Term Length

All the constitutional courts in Asia adopt a termed system in contrast to a tenured one despite their variable term lengths. Length of the term however, is often seen as an important factor to both judicial independence and politicization of the judiciary. Usually a longer and non-renewable term length is perceived to allow the justices to avoid the political winds, and therefore, remain more independent and less politicized.5 The term lengths of constitutional justices in Asia are divided into three categories: (1) short and renewable terms, (2) long and non-renewable terms and (3) long and non-renewable but staggered terms.6

Short and Renewable Terms

The constitutional courts in South Korea (established in 1989), Indonesia (established in 2003) and Mongolia (established in 1992) are all composed of nine justices7 that serve a short term of five or six years in comparison to other similar jurisdictions in Asia. The constitutional justices sit for six years in

5 Ginsburg, above note 1, pp. 42-46. Whether life tenure or long, fixed and non-renewable term improves judicial independence more is controversial. Some scholars argue that life tenure system causes problems such as strategic retirements, incentives for young nominees and random distribution of appointments. See e.g., James E Ditullio and John B. Schochet, “Saving this Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms”, in Virginia Law Review Vol. 90, No. 4 (2004), pp. 1093-1149.
6 It should be noticed that long and short terms here are used in a comparative sense.
South Korea, eight five years in Indonesia, nine and six years in Mongolia. While these countries impose term limits, they do allow constitutional justices to be reappointed with restrictions. For example, Indonesia allows the judicial reappointment once, while South Korea and Mongolia have no term limits. As Tom Ginsburg pointed out, "Other things being equal, the possibility of reappointment has the potential to reduce judicial independence, as judges in their later term who seek to remain in office must be quite sensitive to the political interests of those bodies who will reappoint them." Thus, it is reasonable to infer that constitutional justices in these three countries may have incentives to render decisions in line with political needs.

Long and Non-Renewable Terms

The other three countries, Taiwan, Thailand, and Cambodia, utilize the long and non-renewable term arrangement. Taiwan's 1947 Constitution did not address the number of justices or their length of term. In the Organization Act of the Judicial Yuan, Taiwan prescribed its court size (17 justices) and term length (9 years and renewable). In the 1997 Constitutional Amendments, however, the Constitution directly specifies that the Judicial Yuan shall have 15 Grand Justices, and each Grand Justice shall serve a single non-renewable term of 8 years.

Unlike Taiwan, Thailand set its constitutional court composition through its Constitution. In the 1997 Constitution of Thailand, drafters set the composition at 15 judges. It then reduced this number to 9 judges in the 2007 Constitution of Thailand. Both Constitutions, however, retained limitations on the length of terms served by the judges to a single 9 year term. Like Thailand, Cambodia also set the number of its Constitutional Council at 9 and limited them to a 9 year term.

The primary advantage of adopting a long and non-renewable term scheme for constitutional court judges in these countries is its ability to insulate judges from the pressure of reappointment, and hence, they face less politicization. While it appears these schemes can reduce the impact of politicization, it remains uncertain whether constitutional courts in Asia are politicized more or less by the choice of a given term arrangement since there is an even split between the two arrangements. That is – three countries adopted a short and renewable term arrangement and three selected a long and non-renewable

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9 The Law on Constitutional Court, No.24/2003, Article 22.
11 Ginsburg, above fn. 1, p. 47.
12 The Organization Act of the Judicial Yuan, art. 3 & 5.
14 The Constitution of the Kingdom of Cambodia, art 137, para. 1.
15 Ditullio and Schochet, above fn. 5.
arrangement. Nevertheless, two observations are apparent from above-mentioned institutional arrangements. One is the original design for Taiwan was a scheme based on renewable terms that shifted to non-renewable terms after it experienced a democratic transition and the growth of an opposition party. The second one is at least half of the constitutional courts in Asia retain some form of term limitation arrangement that tends to respond to political influences. It seems that institutional measures in the term length of these Asian constitutional courts have been taken in responding to possible problem of politicization. Its function, however, remains to be seen.

Appointment Procedures

Among the six constitutional courts court in Asia, the appointment procedures may be classified into four models: (1) cooperation, (2) representation, (3) staggered terms, and (4) dynamic power sharing. The cooperation and representation are two traditional models that are more widely discussed among constitutional scholars. The other two models, staggered terms and the more dynamic power sharing, are recent paradigms that have received scant attention. Each of these models can affect the degree of politicization experience by judges in a constitution court system.

Cooperation Model

In the case of the cooperation model, it requires two governmental bodies to complete the appointment of constitutional justices. Usually the head of the Executive, the president or the premier, nominates candidates for a constitutional justice position that are legislatively confirmed or approved. Legislative approval usually requires a majority (more than 1/2 the votes) or supermajority (more than 2/3 of votes) rule. This institutional design provides a check and balance for the different governmental bodies in the judicial appointment and confirmation process. It limits the politicization that may arise from the political interests of a political party holding a majority within the bodies responsible for the nomination and affirmation of these justices.

The oldest constitutional court in Asia, Taiwan's Constitutional Court, adopts this model. According to the 1947 ROC Constitution, Grand Justices shall be nominated by the President with the consent of the Control Yuan by

17 Ginsburg, Tom, above note 1, p. 44.
18 Ferejohn and Pasquino, above note 16.
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majority rule. During its democratization movement of the 1990s, the functions of the Control Yuan were limited and changed. Hence, the approval of constitutional justices was first transferred to the National Assembly and then to the Legislative Yuan in the 2000 Constitutional Amendments.

When the ruling party occupies both the executive and legislative branches, the cooperation model with simple majority voting rule in the legislative approval process may risk creating a de facto single-body appointment mechanism, where both the executive and legislature decide according to political party preferences. An excellent example of this situation is the Constitutional Court of Taiwan. Before the democratization movement in Taiwan, the ruling party, KMT, controlled both the presidency and the congress, which resulted in the cooperation appointment operating as a single-body appointment. But when there was a divided government in 2007 a reversed scenario occurred in the nomination and approval process. The only way to improve cooperation model is through the incorporation of procedural arrangements that lead to more deliberations in lieu of partisan fighting among those responsible for the process of appointing and affirming justices.

Representation Model

The majority of the Asian countries with constitutional courts, four out of six, adopted a representation model against the backdrop of democratic transition from late 1980s to early 2000s. Countries establishing this constitutional court mode include South Korea, Indonesia, Mongolia, and Cambodia. In these countries, the constitutional courts are composed of 9 justices with appoints divided proportionally in thirds, where the executive, legislative, and judiciary branches each appointing one third of the justices.

The representation model is called as “monocratic” as a single political organ could decide the nomination unilaterally. The politicized inclinations of the representation model are manifested in two aspects as an obvious power sharing mechanism and a tendency to nominate justices who are loyal to the interests of the appointing organs. First, by allocating equally the numbers of appointees to the three departments, the representation model balances the power and interests of different branches. Second, without the approval of other government bodies, the appointing bodies have full discretion to select the appointees who act in accordance with their own interests.

20 The Additional Articles of the ROC Constitution art. 5 para. 1, 2000.
21 Ginsburg, above note 1, pp. 43-44.
23 Ferejohn and Pasquino, above note 16.
Staggered Terms Model

In contrast to the above two models, one of the more interesting developments in appointment procedures in Asia is the use of staggered terms model in Taiwan and Cambodia. Staggered term means that the terms of justices expire in different years. As mentioned above, the 1997 Constitutional Amendment in Taiwan provides the numbers and term of Grand Justice. This new system also creates the potential for a more diverse arrangement of the terms for Grand Justices. First, the term of service of each Grand Justice is calculated independently. Second, the new system took effect in 2003 giving the President the power to appoint 8 justices that shall serve for four years and the remaining grand justices shall serve for eight years. The terms of constitutional justices have become staggered since after. In Cambodia, the Constitutional Council is composed of 9 members whose term is limited to 9 years and one-third of its members shall be renewed every 3 years. Thus, Cambodia has a staggered term system for the members of the Constitutional Council who sit on the bench for a maximum of 9 years, and they shall not be reappointed after the nine-year term expires.

By opting for this staggered term arrangement, countries reduce the disproportionate role that luck plays in the selection of justices, and it brings a fairer distribution of appointments. This arrangement when observed from another perspective raises the possibility that more power sharing will occur by guaranteeing that each appointment body of different regimes has a chance to decide the composition of the constitutional courts. In other words, the staggered term arrangement provides a balance of appointment power during the regime change. In this sense, staggered terms are politicized.

Dynamic Power Sharing Model

Another model is illustrated by Constitutional Court of Thailand that relies on a dynamic power sharing model in which more functional and dynamic appointment procedure is in place. Thailand’s constitutional court is composed of 9 members. The King of Thailand appoints constitutional justices upon the advice of the Senate. His appointment, however, is only nominal because the true appointment power for these justices resides with other governmental bodies. Among the 9 justices appointed, the judiciary selects 5, and the Senate picks 4 from the list submitted by the Selection Committee for Judges of the Constitutional Courts. The Selection Committee consists of the President of the Supreme Court of Justice, the President of the Supreme Administrative Court, the President of the House of Representatives, the Leader of the

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24 The Constitution of the Kingdom of Cambodia, art 137, para. 1.
25 Ditullio and Schochet, above note 5, pp. 1123-1126.
26 Constitution of the Kingdom of Thailand, Sec. 204, para. 1, 2007.
Opposition in the House of Representatives and the President of a constitutional independent organ elected amongst Presidents of such independent organs.\textsuperscript{27} If the Senate does not approve the nominees on the list, it shall request the Selection Committee to reconsider and resubmit the list. The Selection Committee shall resubmit the list within 30 days. However, if the Selection Committee disagrees with the Senate's decision and confirms its original list with unanimous resolution, it shall refer the list to the Senate for further appointment.\textsuperscript{28} In cases where the Selection Committee does not decide the nominees in the period prescribed, the judicial department shall take the duty.\textsuperscript{29}

In comparison to other models, the appointment procedure in Thailand is very complex. Four features account for this complexity. First, the role of the executive branch is very restricted, so it eliminates the interference and manipulation of the executive branch in the process.\textsuperscript{30} Second, the judiciary plays a significant role in the appointment procedure based on its presence on the Selection Committee. Third, the leader of the opposition party is included in the Selection Committee. Fourth, the Constitution also contains a backup mechanism in case of a deadlock. On the one hand, this model tries to insulate the force of the executive branch while it also creates a more dynamic power sharing mechanism among the forces of the judiciary, the ruling party, and the opposition party. This new model clearly illustrates that appointment procedure of constitutional justices is inevitably a field of power sharing.

So far, these discussions support the notion that no matter what model of appointment procedures is adopted, the constituency of constitutional courts is inevitably decided by a power allocation mechanism. From the normative, scholars have argued this mechanism is due to democratic responsiveness.\textsuperscript{31} This explanation does provide a normative basis, but we cannot ignore the message conveyed by the mechanism itself – power allocation and balance is significant to the constituency of the constitutional courts. These Asian cases demonstrate that the power allocation mechanism have evolved into a more delicate design in order to prevent political deadlock.

\textbf{Expansion of Functions}

\textsuperscript{27} Constitution of the Kingdom of Thailand, Sec. 204, 2007.  
\textsuperscript{28} Constitution of the Kingdom of Thailand, Sec. 206, para. 1 (b), 2007.  
\textsuperscript{29} Constitution of the Kingdom of Thailand, Sec. 206, para. 2, 2007.  
\textsuperscript{31} See e.g., Ferejohn, above note 2, p. 43.
In the beginning, the establishment of constitutional courts was designed to exercise the power of judicial review, which was a process born from the U.S. Supreme Court. However, constitutional courts, as a separate institution from the ordinary judicial system, have been authorized to perform functions other than judicial review. These ancillary powers expand the functions of these courts, and they constitute a significant feature of constitutional courts. Such a feature differentiates the functions of constitutional courts from their U.S. Supreme Court counterpart, and it also illustrates the judicialization of politics. Constitutional courts are easily involved in political conflicts due to these ancillary functions. A more thorough survey of the ancillary powers of constitutional courts globally has been performed. This section will analyse the expansion of the powers of Asian constitutional courts in a timeframe. It finds that these ancillary powers did not arise at the same time in Asian contexts.

The powers of Asian constitutional courts did not arise suddenly, instead they expanded slowly over time. Based on this observation, an argument can make that constitutional courts are more and more involved in political conflicts in Asian contexts. When one look at the rise of the power of Asian constitutional courts in terms of timeframe, there are three periods to be observed – the period after World War II, the period of the 1980s and early 1990s, and the period of late 1990s and 2000s. These periods coincide with three historical events that might affect the establishment and reform of Asian constitutional courts, namely, World War II, the third wave of democratization, and the Asian financial crisis. The powers of constitutional courts are categorized into these three periods by the time they were authorized to Asian constitutional courts.

Functions arising after WWII

The first constitutional court in Asia was established by the 1947 ROC Constitution. It was designated to perform the function of judicial review, examining whether laws and regulations contravene the constitution ad hoc. This power is not unique since it was eventually granted to the other five constitutional courts in Asia, not in the same form or type. All 6 constitutional courts allow abstract review whereas South Korea provides its constitutional court the power of concrete review. Pre-promulgation constitutional review is performed by Thailand and Cambodia.

In addition, two other functions were granted to Taiwan’s Constitutional Court, the power to solve competence disputes and the power to render unified interpretation of laws and regulations. The former power is also authorized

33 The Constitution of the Republic of China, art. 78.
to the other constitutional courts while the latter is only granted to the constitutional court in Taiwan. This arrangement makes sense, because dispute resolution of government bodies is a natural extension of interpreting the constitution.

**Functions arising in the 1980s and early 1990s**

During the 1980s and early 1990s, South Korea, Mongolia and Cambodia established their functioning constitutional courts and Taiwan made some changes to the powers of its constitutional court by constitutional amendments during the democratic transition. Three ancillary powers emerged in Asian contexts during this period, and they include supervision by political parties, removal of public officers and proposal of legal norms. Supervising political parties and reviewing the dissolution of political parties allows the constitutional court to probe into the activities and the interaction of political parties. In a polity where political party politics operate, supervision of other political parties is part of the political process and duty of a political party. The decision on whether the program or activities of a political party are in violation of the constitution shall be left to the people. Matters regarding political party supervision inevitably attain a high political profile. In Asia, political party supervision first emerged in South Korea and Taiwan followed by the constitutional courts in Thailand and Indonesia. At least one study shows that 28% of contemporary constitutions contain such a provision.°

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Four of the 6 constitutional courts in Asia (67%) are authorized with this function explicitly by their constitutions, indicating that Asian constitutional courts are more politicized in this sense.

Another ancillary function emerging during this period in Asia is the power of these courts to decide the impeachment or removal of significant public officers, especially leaders such as the president and the vice president. Impeachment or removal of political leaders is not a purely legal matter, since it often generates serious political conflicts. This power first appeared in Taiwan, South Korea and Mongolia, and it is now practiced by Indonesia. Of the 6 constitutional courts in Asia, 4 (67%) perform this function, and this rate is, again, higher than that the one-third of the courts holding this power globally. Moreover, adjudication of impeachment or removal of significant public officers is not restricted to the president and the vice president. In South Korea, for example, the Constitutional Court shall adjudicate on impeachment of President, Prime Minister, Members of the State Council or Ministers, Justices of the Constitutional Court, judges or Commissioners of the National Election Commission, and Chairman and Commissioners of the Board of Audit

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34 Ginsburg and Elkins, above note 32, p. 1448.
35 Ibid., 1449.
and Inspection.\textsuperscript{36} Thus, constitutional courts many have significant powers to affect their governments.

Granting the power to propose legislation explicitly to constitutional courts is rare in the constitutions of the world,\textsuperscript{37} not to mention the power to propose constitutional amendments. Such power turns constitutional courts into an active and positive lawmaker, blurring the line of the judiciary with the legislature and transforming constitutional courts into political actors. The Mongolian Constitutional Tset is explicitly granted the power to propose constitutional amendments,\textsuperscript{38} which demonstrates its high political profile. Likewise, the Thai Constitutional Court is allowed to propose legislations regarding not only its organization, but also its jurisdiction.\textsuperscript{39}

Functions arising in the late 1990s and 2000s

During the 1990s and 2000s, Thailand and Indonesia established their constitutional courts, and at the same time, four ancillary powers also emerged in Asian contexts. These four ancillary powers include (1) reviewing electoral disputes, (2) certifying emergence decrees, (3) reviewing treaties, and (4) reviewing the behaviors of senators.

Reviewing electoral disputes is the most common ancillary powers of constitutional courts. Among the constitutional courts worldwide, 55\% of them are granted this power.\textsuperscript{40} Electoral disputes, by nature, are legal issues that belong to the jurisdiction of ordinary courts. Some functions, such political party supervision, exemplify judicialization of politics. Granting the constitutional courts the power to review electoral disputes, however, turns issues of judicial nature into political one. Allocating certain significant electoral disputes under the jurisdiction of the constitutional courts changes the nature of electoral disputes, and hence, underscores the political inclination of constitutional courts. Examples of the power of constitutional courts to adjudicate electoral disputes are seen in Indonesia,\textsuperscript{41} Thailand,\textsuperscript{42} and Cambodia.\textsuperscript{43} The other three ancillary functions are only present in the

\textsuperscript{36} The Constitutional Court Act of Korea, art. 48.
\textsuperscript{37} Ginsburg and Elkins, above note 32, p. 1446.
\textsuperscript{38} The Constitution of Mongolia art. 66, para 3.
\textsuperscript{39} Constitution of the Kingdom of Thailand, Sec. 139 (3) (2007); Constitution of the Kingdom of Thailand, Sec. 142 (3), 2007.
\textsuperscript{40} Ginsburg and Elkins, above note 32, p. 1443.
\textsuperscript{41} The Law on Constitutional Court, No.24/2003, art. 71-74.
\textsuperscript{42} Constitution of the Kingdom of Thailand, Sec. 91, 92, 182, 183, 233, 2007.
\textsuperscript{43} The Law on the Organization and the Functioning of the Constitutional Council of Cambodia, art. 25. Although the Cambodian Constitutional Council was established in 1993. The power was not granted explicitly to it until the promulgation of the Law on the Organization and the Functioning of the Constitutional Council of Cambodia in 1998. Hence, the power of deciding electoral disputed appeared in Asian constitutional courts in the late 1990s.
Constitutional Court of Thailand. The low rate of these three powers within Asian constitutional courts conforms to global trends.

Based on the foregoing discussions, there are some key observations on the power expansion of constitutional courts in Asia. First, instead of appearing in a specific period, the types of power grew with time. Second, the youngest constitutional court, especially the one in Thailand, enjoys the most ancillary functions, making it lean toward becoming the guardian of political processes. Third, in comparison with the global trend, the constitutional courts in Asia tend to be involved political functions due to the expansion of their powers.

**Dynamic Review Process**

Theoretically, the constitutional court shall have the final say with regard to matters within its jurisdictions. The only way to change constitutional adjudications is to amend the Constitution. Such a rule thumb, however, is broken by the Mongolia Constitutional Tset.

According to the Mongolian Constitution, a constitutional judgment or finding rendered by a panel composed of five justices shall become valid and binding with legislative approval. If the judgment or finding is disapproved by the legislative branch, the judgment or finding shall be reviewed by the full bench of the Constitution Tset. Where the Constitutional Court renders a decision with supermajority, the decision takes effect immediately.

This dynamic review process allows the parliament and the constitutional court to share the power of constitutional review, probably a legacy of the socialist regime. It reduces the absolute authority of the Constitutional Tset, requiring the Constitutional Court to interact with the parliament and to take the opinions and reactions of the parliament into consideration. The Constitutional Tset is incorporated into the political process and shall be sensitive to the will of the political branches. The Constitutional Tset, in this sense, becomes more political by nature.

**Increased Politicized Inclinations**

This part analyzes the institutional designs of the constitutional courts in Asia from four dimensions: term, appointment, functions and review procedure. The
above discussion shows that the institutional designs of Asian constitutional courts are indeed politicalized. Moreover, the analysis of these experiences reveals that the politicized inclinations evolve and increase with time.

First is politicization in the sense of power allocation. The Thai case of a more dynamic appointment procedure and the Mongolian case of the balance of the constitutional court and the legislative indicates the power allocation both within the constitutional court and between the constitutional court and other branches become more subtle and delicate. Such development accentuates that constitutional courts are taken as both a political player and an institution where political forces struggle. Second, in the sense of dealing so-called mega-politics, the Asian cases show that constitutional courts are becoming a guardian of political process. Younger constitutional courts get involved in political conflicts more easily. Third, in the sense of making decisions based on political motivation, both the renewable term and the newly emerging staggered terms arrangement are likely to drive justices make political decisions.

This finding of the increased politicized inclinations with time further triggers an inquiry into why and how these Asian constitutional courts were founded which will be discussed in the next part.

**Contexts**

The 6 constitutional courts were not established in the same period and context. Taiwan’s Constitutional Court was established soon after the World War II, even earlier than the booming of the constitutional courts in Europe. The youngest, the Thai Constitutional Courts, was established in 2007. This more than 60 years of Asian practice could be divided into three periods, namely before the global spread of constitutional courts, during the 1980s and 1990s and after the first financial crisis in Asia.

*Before the Global Spread of Constitutional Courts: Political Power Bargaining and Distrust*

The Republic of China (ROC) was founded in 1912, and the negotiation of its constitution started in the early 1930s, but the process was interrupted by the civil war. The constitutional making resumed in 1945 at the conclusion of the World War II. Various political parties made the constitution based on the process of negotiation. During the negotiation, the two biggest parties, the Kuomintang (KMT) and the Communist Party were very distrustful of each other, and hence, Chun-Mai Chang, a member of a third party had to handle the drafting task. Chang drafted the constitution based on his understanding of the U.S. experience, where he incorporated judicial review into his consolidated constitutional draft. In the following enactment, the KMT tried to
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replace its own draft with Chang’s draft, to which the Communist Party and other parties strongly disagreed. Finally, the ROC Constitution was enacted in 1946 based on Chang’s draft.47

In the 1940s, when the ROC Constitution was in the making, constitutional review was not a judicial mandate widely practiced or even discussed in Asia. Understandably, whether to establish a constitutional court and its function was not a focus in the negotiation. As a result, the 1947 ROC Constitution takes the cooperation model and only grants limited and traditional power to the Grand Justices. The term and other details were prescribed in later rules governing the operation of the Council of Grand Justices. It is reasonable to argue that the role and function of the ROC Constitutional Court were not clear when it was established. The political parties might take it as a decoration in building a constitutional state which belonged as part of the modernization project.48

Democratic Transition during the 1980s and 1990s: The Rise of Opposition Parties

In the 1980s and early 1990s, some Asian countries began their democratic transition with the third wave of democratization globally. In this period, three new constitutional courts were established in South Korea, Mongolia and Cambodia while some significant changes were made to the older Taiwan’s (ROC) Constitutional Courts. In contrast to the political bargaining after the war where political power was more distributed among the parties, the political conflicts in this period were featured by the rise of opposition parties and their resistance against authoritarian regimes. In the context of democratic transition, political parties were more aware of the institutional role of constitutional courts.

Taiwan’s Constitutional Court built by the 1947 ROC Continuation in China did not become a full functioning institution until the democratization in the late 1980s. The 1992 Constitutional Amendments expanded the power of the Constitutional Court by granting the power to review the dissolution of political parties. In 1993, the law governing the procedures of the Constitutional Court was amended and renamed as the Constitution Interpretation Act. Four important institutional changes were made in the amendment: (1) lowering the voting threshold, (2) allowing the minority in the parliament to file petition, (3) allowing citizens to file petitions, and (4) making the review process more judicialized. In the 1997 Constitutional Amendments,

further alterations were made that included changing of the term of Grand Justices to 1 term only and adopting the staggered term system was adopted.

In the 1980s, South Korea, which shared the common feature of successful economic development, began its democratization against the backdrop of military authoritarian rule. Constitution was amended in tandem with democratization. The amended Constitution was the product of the negotiations between the military dictator and the opposition party. Actually, the Constitutional Court established by the 1987 South Korea Constitutional was not the first institution with judicial review power. There had been judicial review both in centralized and decentralized forms, but none had been effective.\textsuperscript{49}

In 1989, with the collapse the Soviet Union, calls for democratic reform also emerged in Mongolia. The reform towards a democratic constitution took place after the first democratic election, in which the ruling party, the Mongolian People's Revolutionary Party (MPRP) swept the opposition party, the Mongolian Democratic Union in Ulaanbaatar (MDUU). The Constitution Drafting Commission under the Great Hural was established in after the 1990 national election. The Commission was composed of 20 members from various parties. The constitution-making in Mongolia was focused on the protection of human rights and the institutional design of the government system and the judiciary. In the process of constitution-making, there were lots of conflicts and compromises between the MPRP and the reforming parties. The first Constitutional Tset was established to assure the proper application of the new constitution.\textsuperscript{50} The establishment process of the Mongolian Constitutional Tset indicates that the “courtness” of the Mongolian Constitutional Tset is quite thin. Its name, “Constitutional Tset”, echoes with the thin “courtness”. In Mongolian, “tset” means the umpire in the wrestling game. Therefore, the Constitutional Tset was expected to be a mediator among political branches, rather than a court which focuses on human right protection and application of the constitution.

With the decrease of the control of the Vietnamese Communist Party over Cambodia in the 1980s, Prime Minister Hun Sen and Prince Shhanouk, who represented two political forces, launched a series of negotiations regarding constitutional reform. The reform was closely connected with the Paris Agreement signed in 1991. The 1993 national election for the Constitutional


\textsuperscript{50} For the details, see Tom Ginsburg, “Distorting Democracy? The Constitutional Court of Mongolia”, chapter 6 in above note 1, 161-166.
Assembly was successful owing to the efforts of the UN Transitional Authority in Cambodia (UNTAC) established in the Paris Agreement. According to the Paris Agreement, the constitution shall be promulgated within three months of the election of the Constitutional Assembly. The Paris Agreement also provided that the essential elements of modern democratic constitutions, including rule of law, a bill of rights, democratic political processes and independent judiciary, shall be contained in the new Cambodian Constitution. Although the UN interfered with the reform in the first beginning, the international forces were excluded from the constitution-making process. The new constitution was passed under the secret negotiations between the winning party led by Prince Norodom Ranaridh and the Cambodian People’s Party led by Hun Sen. Cambodian Constitutional Council was established in the newly passed constitution. Basically it took the French model due to the French colonial background. However, the Cambodian Constitutional Council did not begin to operate until 1998.51

Responding to Government Failures in the Late 1990s and 2000s

The third wave of Asian constitutional courts emerged after the first financial crisis in late 1990s and early 2000s. This period differentiated itself from the period of democratic transition, because of the features of globalization and governmental reform.52 In this period, the call for constitutional courts was not only to resist authoritarian regime, but also to respond to government failures for some major functions.

The Thai Constitutional Court was first established with the 1997 Thai Constitution, which is named the People’s Constitution. This name reveals that the efforts of the citizens and public input created it. The driving force of the 1997 Constitution was the merchants and the middle class living in the urban area who were unsatisfied with the government’s inability and impotency in dealing the economic collapse in the middle of the 1990s. They called for a constitutional reform toward a government capable of responding the economic challenges brought by globalization. As a result, many independent institutions were designed with the 1997 constitution to prevent the government from corruption. The Constitutional Court is one among the many “watchdog” institutions.53 The 1997 Constitution was turned into a failure

53 Peter Leyland, “The Genealogy of the Administrative Courts and the Consolidation of Administrative Justice in Thailand”, in Andrew Harding and Penelope Nicholson (eds.),
because of the Taksin Regime. The 18\textsuperscript{th} Constitution in 2007 was deemed as correction to the 1997 Constitution and the Taksin Regime.\textsuperscript{54} It was aimed to put more supervision on the political branches based on the failure of the 1997 Constitution. The Constitutional Court, not surprisingly, was enhanced and given more power to guard the political process.\textsuperscript{55}

Indonesia began its reform with the resignation of Suharto in 1998. The constitutional court was created in the 2001 Constitutional Amendments and started to operate in 2003. Similar to Thailand, Indonesia’s constitutional engineering was made under economic hardship due to the economic collapse in 1997. The constitutional reform was believed to provide the foundation of good governance and stable economy.\textsuperscript{56} The Indonesian Constitutional Court was established to assure that policies are made with accountability, to stabilize the operation the government and to correct the wrongdoings of the government.

### Legitimacy

The political nature of courts has been criticized both from normative and positive perspectives. From the normative perspective, courts are perceived as lacking democratic legitimacy and the accountability of courts lies in application of law neutrally. Political courts, making political decisions rather than applying neutrally, are democratically not accountable. From the positive perspective, political courts are blamed for two reasons. First, politicization of courts, lacking of democratic legitimacy on the one hand and exposing the courts in political controversies on the other, diminishes the authority of the courts. Second, courts may be an efficient channel to resolve political conflicts or deadlock but courts might interrupt the dialogues of the civil society while giving a quick solution to political conflicts. As a result, political courts may be seen as not helpful, or even harmful, to democratic deliberation.

The politicization of the Constitutional courts in Asian bears strong contextual support. The legitimacy of the political constitutional courts in Asia could be well established as we look into the contextual backdrop of their creation and operation in Asia. The arguments are made from two dimensions:

\begin{itemize}
  \item \textsuperscript{55}Harding, Andrew and Peter Leyland, “The Constitutional Courts of Thailand and Indonesia: Two Case Studies from South East Asia,” above note 53, pp. 122-123.
  \item \textsuperscript{56}Ibid., pp. 123-124.
\end{itemize}
social expectation and judicial strategy. The former is about what role were Constitutional Courts expected to play. The latter is about whether and how these constitutional courts achieve the function expected. In “Courts: A Comparative and Political Analysis”, Martin Shapiro questions whether there is a prototype of courts and his answer is negative. He further points out courts are just like other political institutions and are given various political functions. In line with this analytical framework and observations, this paper argues that Asian Constitutional Courts are created and expected to be political courts and they fulfill their functions by advancing dialogues.

Conclusion

The analysis of the 6 constitutional courts in Asia correspond the global spread of judicial review in Asia, but also provide an institutional practice with the creation of separate (constitutional) court in lieu of normal court system such as that of Japanese Supreme Court. This separatist practice, however, bears strong constitutional significance based on the foregoing analysis and comparison of the constitutional courts of the 6 countries. The most outstanding feature drawn from this analysis is the politicization of the courts.

While institutional arrangements vary among Asian constitutional court, they are often perceived as political courts or often politicized. An investigation into the institutional design in terms of nomination and appointment, newly assigned functions and other institutional factors has revealed the built-in nature of political courts among these Asian practices. Institutional designs do move the courts toward politicization with the expansion of power and more dynamic power sharing in the appointment and review processes. This finding becomes more consolidated when considered the backdrops of creating these constitutional courts in three time frames. These constitutional courts were established with contextual roots of politicization, despite their divergent times and political-economical contexts. The legitimacy of the political courts in Asia could be drawn from the expectation of the society as well as the dialogue-advancing judicial strategy as practiced by not all but some Asian constitutional courts, such as that of Korea and Taiwan.

Constitutional Adjudications of the Supreme Court of Japan

Yasuo Hasebe*

Organisation

The Supreme Court (Saikō-Saibansho) is the highest judicial court of the country and, according to Article 81 of the Constitution; it is also the ‘court of last resort with power to determine the constitutionality of any law, order, regulation or official act’. The Court’s constitutional review authority inheres in its judicial power. It exercises constitutional review to the extent it is necessary to resolve legal disputes. In one of its early rulings, the Court declared that even without Article 81 its review authority would have entailed from the fact that all judicial courts should obey and uphold the supreme law of the land, that is, the Constitution.\(^1\) The reasoning is reminiscent of that of Marbury v. Madison, 5 U.S. 137 (1803), which argues for the power of judicial review without explicit textual authority in the US Constitution.

The Supreme Court is composed of the Chief Justice (Chōkan) and fourteen Associate Justices. The Chief Justice is appointed by the Emperor (Ten-nō) as recommended by the Cabinet,\(^2\) and other Justices are appointed by the Cabinet.\(^3\) Since the 1960s, a convention has been established that among fifteen Justices, six are appointed from judges of lower courts, four from attorneys, four from bureaucrats including public prosecutors, and one from academic lawyers. As to Justices appointed from attorneys, when a vacancy occurs, a committee within the Japan Federation of Bar Associations (Nichi-Ben-Ren) recommends several candidates to the Supreme Court. The Chief Justice picks one of them and recommends him or her to the Cabinet. Strictly speaking, the Cabinet has the final veto on appointing Justices, but in practice decisions are made by the Court itself.\(^4\) Almost every Justice is appointed when he or she is around 60 years old and retires when he or she reaches the

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1 The Grand Bench decision of 8 July 1948, 2 KEISHŪ 801.
2 Article 6 (2) of the Constitution.
3 Article 79 (1) of the Constitution.
age of 70.\(^5\)

Hearings and adjudications of the Supreme Court are carried out either by the Grand Bench (Dai-Hōtei) composed of all 15 Justices or by one of the Petty Benches (Shō-Hōtei), each composed of five Justices. A constitutional question, which reaches the Court for the first time, is to be decided by the Grand Bench, and a statute, regulation, order, or other official act can be held to be unconstitutional only by the Grand Bench. When a majority of Justices at one Petty Bench reaches the conclusion that they should decide on a novel constitutional question, or hold any official action to be unconstitutional, the case is to be referred to the Grand Bench. The doctrine of constitutional avoidance, imported from the United States in the 1960s, has often been used to avoid referring cases to the Grand Bench as hearings and adjudications involving all the Justices there are cumbersome.\(^6\) Around 40 Research Officials (Chōsakan), selected from lower court judges, assist Justices in their work. They are not assigned to individual Justices, but belong to the entire Court. The Court deals with around 9,000 cases per year.\(^7\)

**Adjudications of the Supreme Court: Prominent Cases**

Although Japanese courts have not been very active in exercising their power of constitutional review,\(^8\) their decisions have had significant impacts on various areas. Here are some examples.

**Equality**

Article 14 (1) of the Constitution stipulates that: “[a]ll of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.”

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\(^5\) Article 50 of the Judicial Courts Act (Saibansho Hō) requires that Justices retire at 70.

\(^6\) See Masami Ito, *Saibankan to Gakusha no Aida (A Life between a Justice and an Academic)*, Tokyo: Ōhikaku, 1993, pp. 118-19. Mr. Ito was formerly a professor of the University of Tokyo and served as a Justice of the Court from 1980 to 1989. According to the doctrine of constitutional avoidance, judicial courts should construe ambiguous statutes so as to avoid raising serious constitutional doubts. See, for example, NLRB v. Catholic Bishops, 440 U.S. 490, 507 (1979).

\(^7\) According to a former Justice of the Court, around 95% of the cases are trivial ones. See Tokiyasu Fujita, *Saikōsai-Kaisōroku (Memoirs of A Supreme Court Justice)*, Tokyo: Ōhikaku, 2012, p. 42. Fujita, an administrative law professor, served as a Justice from 2002 to 2010.

\(^8\) Only in 9 cases, the Court has held statutes enacted by Parliament unconstitutional since its establishment.
According to case law of the Supreme Court, differential treatment of people is constitutional as far as it has a ‘reasonable’ basis.\(^9\) To be reasonable, the treatment should have a legitimate purpose and also the content of the differential treatment should be proportionally related to the purpose. While, under the influence of American jurisprudence, the dominant academic view argues that classifications based on ‘race, creed, sex, social status or family origin’ are inherently ‘suspect’ and strict scrutiny should be applied to them, case law has not clearly adopted such a view.

In its ruling on 4 April 1973, 27 KEISHŪ 265, the Grand Bench held that Article 200 of the Criminal Code, which stipulated that a patricide and matricide should be punished with death penalty or imprisonment for life, was unconstitutional and void. While the legislative purpose upholding the traditional moral of respecting ascendants was legitimate, the Court reasoned, the punishment was disproportionally severe and against the equality under the law since a patricide or matricide could be committed under mitigating circumstances.\(^10\) Some academics argue that the Court’s argument implies that this clause is unconstitutional on the ground that it inflicts ‘cruel punishment’ prohibited by Article 36 of the Constitution.

In a decision of 4 July 2008, 62 MINSHÛ 1367, the Grand Bench struck down a treatment of an illegitimate child born by a foreign mother and acknowledged by a Japanese father after the birth.\(^11\) According to the then Nationality Act, such a child could get a Japanese nationality only when his or her parents got married. Taking into account the fact that the Japanese nationality is a necessary condition for a child to get basic social services like education in Japan as well as the fact that a child is not accountable for whether her parents get married, the Court held that the constitutionality of such a differential treatment should be ‘carefully scrutinised’. While the law has a legitimate purpose to accord the nationality only to a child who is closely related to the Japanese society, the Court said, marriage of parents is not a necessary condition for a child to acquire a close relationship to the Japanese society in the light of changing social perceptions about marriage and family and recent trends of foreign laws.

Article 24 (1) of the Constitution stipulates that: ‘marriage shall be based only on the mutual consent of both sexes and it shall be maintained through

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9 The Grand Bench decision of 27 May 1964, 18 MINSHÛ 676 (laying off temporarily a local civil servant in light of his old age and mediocre performance was held not against the equality clause).

10 In this case, the accused had been sexually abused by her father since her childhood, and killed him as he tried to forcibly confine her in order to obstruct her marriage with her boyfriend. As to the constitutionality of capital punishment, see 2.4 below.

mutual cooperation with equal rights of husband and wife as a basis’. This clause can be traced back to the draft Constitution prepared by General MacArthur’s staff at GHQ,\(^\text{12}\) who intended to raise the social status of women and specifically to reform traditionally accepted ideas regarding the subservient relationship of wife to husband.

Article 24 (2) stipulates that: ‘with regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes’.\(^\text{13}\) After the enactment of the Constitution in 1947, clauses of the Civil Code relating to family and inheritance were fundamentally rewritten from the standpoint based on these two constitutional clauses. This newly enacted part of the Code is generally called ‘the New Civil Code’.

However, some scholars have maintained that certain pre-modern ideas persist in the laws pertaining to family matters. For example, according to Article 900 of the Civil Code, an illegitimate (born out of lawful wedlock) child could inherit by intestate succession from his or her parent’s estate only half of the portion of a legitimate child. In its decision of 5 July 1995, 49 MINSHÛ 1789, the Grand Bench upheld this clause on the grounds that this apportionment protects not only the interests of legitimate family members but to some extent those of illegitimate children as well. If desired, the majority reasoned, the parents of illegitimate children can either adopt them (turning them into legitimate children), or specify a larger bequest to them in a will. A minority opinion supported by five justices argued that this unequal treatment of illegitimate children unreasonably punishes and stigmatized them on grounds for which they are not themselves accountable.

In a recent decision of 4 September 2013, the Grand Bench changed completely its former doctrine and held the unequal treatment of illegitimate heirs under Article 900 to be unconstitutional. The Court held that taking into consideration the changing social perceptions about marriage and family,

\(^{12}\) Kenzo Takayanagi, Ichiro Ohtomo and Hideo Tanaka, *Nihonkoku Kenpō Seitai no Katei (The Making of the Constitution of Japan)*, Tōkyō: Yūhikaku, 1972, pp. 169-170. The Constitution of Japan 1946 was imposed by the Allied occupying forces after the Second World War. Immediately after the war, the Japanese government had been preparing a more conservative, lukewarm proposal to amend the then-current Constitution of the Empire of Japan 1889, but after learning of this proposal, General Douglas MacArthur, Supreme Commander for the Allied Powers (SCAP), decided to propose his own version of a draft constitution, prepared by his staff in the Government Section at the General Headquarters (GHQ) of the occupation, which he pressed the government to adopt as the basis of an amended Constitution.

\(^{13}\) Apparently this text does not assume the existence of same-sex marriages, though this does not necessarily mean that the legalization of same-sex marriage would be unconstitutional under the current Constitution.
recent trends of foreign laws, as well as the recent transformation of relevant legal statutes, the notion that every child should be respected as an equal individual has become firmly established in the Japanese society; and this notion entails that inflicting disadvantages to an illegitimate child on the ground that its parents are not formally married for which fact the child itself is totally unaccountable is without reasonable basis and unjustifiable despite the broad discretion of the legislature. The Court concluded that the relevant clause has become unconstitutional at the latest in July 2001, when the disputed inheritance commenced.\footnote{Since the Court affirmed that in 1995 the relevant clause was constitutional, strictly speaking this decision did not overrule its precedent. Still, this ruling means a colossal policy change on the part of the Court. In order to avoid overturning established legal situations which retroactive effects of this ruling might bring about, the Court added that already settled legal decisions and arrangements after July 2001 would remain still valid and effective. We might say that the Court made recourse to the device of ‘prospective overruling’ in order to avoid destabilising earlier inheritances.}

As described below at 2.2 (1), the Court has tried vigilantly to guarantee the equality of voting rights in mal-apportionment cases. Indeed, the Court has proclaimed that the protection of the democratic process, including free communication of ideas and information,\footnote{For example, see the Grand Bench decision of 26 November 1969, 23 KEISHÛ 1490 [Hakata Station Case] (press was accorded qualified privileges against seizure of its unpublished materials by investigative authorities); the Grand Bench decision of 11 June 1986, 40 MINSHÛ 872 [Hoppō Journal Case] (judicial injunction against publishing a journal conveying information of electoral candidates is permitted only in most exceptional circumstances).} is among its most important roles.

**Electoral Systems**

The Principle of ‘One Person, One Vote’

The Equal Protection Clause, Article 14 of the Constitution of Japan, provides that: ‘all of the people are equal under the law’, and Article 43 (2) specifically prohibits ‘discrimination because of race, creed, sex, social status, family origin, education, property or income’, where the right to vote is concerned. A disputed question was whether equal value must be given to each vote so that a gross mal-apportionment of seats between constituencies is unconstitutional. When the districts for the members of the Lower House were first drawn in 1947 under the current Constitution, the maximum difference between the numbers of voters per seat was 1 to 1.5. But the difference widened, mainly because people increasingly moved from rural to urban areas.

In 1976, the Supreme Court faced a case where the maximum difference in
the weights of votes amounted to 1 to 5; that is, in the most populated district, an MP represents five times the number of voters of the least populated one. The Grand Bench held that the Constitution required that each vote must be given equal value, and while the Parliament could take into account of various factors as administrative boundaries, citizens’ structure, traffic convenience, and geographical features, in drawing up constituencies, a gross difference of 1 to 5 was unconstitutional since no mitigating rationale for it was conceivable.\(^{16}\)

However, the Court indicated no clear standard of constitutionality for deciding whether a given population difference is permissible. Anyway, the Court did not demand stringent mathematical equality here. According to the Court, a difference is unconstitutional only when ‘no mitigating rationale is conceivable’ and also ‘a reasonable grace period for redrawing districts has elapsed’ since such a gross difference had been identified. The Court has never indicated any numerical standard.

Until the 1994 electoral reform, members of the Lower House were elected by the single non-transferable vote system.\(^{17}\) Constitutional scholars read the somewhat murky case law in these days as implying that a 1 to 3 deviation is acceptable for the House of Representatives.\(^{18}\) On the other hand, the dominant academic view has been that a deviation beyond 1 to 2 should be unconstitutional in the light of the ‘one person, one vote’ principle. However, this 1 to 2 standard does not seem much superior to the 1 to 3, because the only tenable principle is that the value of each vote should be equal or almost equal.\(^{19}\)

Since the 1994 electoral reform, 300 members of the Lower House are elected from single-member constituencies.\(^{20}\) The Act Establishing the

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19 This is not to deny that 1 to 2 standard is better than 1 to 3 standard in the light of the principle of equal value for each vote. But neither standard follows logically from that principle.
20 The number of MPs was 500 when the new electoral system was introduced in 1994. In 2000 the number was reduced to 480, among whom 180 members are elected by proportional representation system and the remaining 300 members are elected by the first-past-the-post system.
Boundary Commission provides that the Boundary Commission established under the Cabinet Office (Naikakufu) will make recommendations every 10 years about how to redraw boundaries of constituencies. Seven members of the Commission are appointed by the Prime Minister with the assent of both Houses of the Parliament for a term of five years. Their recommendations are submitted to the Prime Minister, who must then report them to the Parliament. The Parliament is expected to amend the boundaries in accordance with the recommendations. In drawing up recommendations, the Commission shall see to it that, “in principle”, the maximum difference of the weights of votes between constituencies should be within 1 to 2. While the text of the Act does not require that the Parliament follows recommendations of the Commission, the Parliament has respected them to date.

When first general elections after the reform took place in 1995, the maximum difference was 1 to 2.309. The Supreme Court, in a 1999 ruling, applied the same standard as before, holding that the difference was within the Legislature’s discretion.

In elections for the House of Councillors, the Court apparently uses the same standard of constitutionality, but applies it more leniently partly because the Parliament is allowed, the Court says, to take into account the fact that councillors elected from local districts or prefectures function as de facto representatives of their prefectures. In a 1983 ruling, the Court held that a deviation of 1 to 5.26 was within the Legislature’s discretion. But in 1996 the Court ruled that a difference amounting to 1 to 6.59 was unconstitutional because no mitigating rationale was conceivable for such a gross difference.

The Court’s attitude in mal-apportionment cases has become more stringent in recent years. In a decision of 23 March 2011, 65 MINSHÛ 755, the Grand Bench held that the one-seat-special-allocation-system (Hitori-Betsuwaku-Hōshiki) was unconstitutional since this peculiar seat-allocation system,

21 The Act Establishing the Boundary Commission, Articl 3 (1). However, this article included a peculiar seat allocation system called Hitori-Betsuwaku-Hōshiki, under which, among the 300 seats of the Lower House which are elected by the first-past-the-post system, one seat is first allocated to each of 47 prefectures, and after that, the remaining 253 seats are to be allocated in proportion to the number of populace of each prefecture. On the constitutionality of this system, see the text accompanying to note 26 below.


23 That is, a difference is unconstitutional only when no mitigating rationale is conceivable and also a reasonable grace period for redrawing districts elapsed since such a gross difference had realised.

24 The Grand Bench decision of 27 April 1983, 37 MINSHÛ 345. Prefectures are administrative units similar to French ‘departements’. About half of councillors are elected from the same geographical areas as prefectures.

25 The Grand Bench decision of 11 September 1996, 50 MINSHÛ 2283. However, the Court held that a reasonable grace period for redrawing districts had not elapsed.

26 See the Act Establishing the Boundary Commission, Articl 3 (1).
bringing about significant deviation from the one-person, one-vote principle, lacked rational basis. While the purported rationale was that this system was necessary to reflect effectively the opinions of people residing in less populated districts, the Court reasoned that since MPs should be “representatives of the whole nation” this rationale could not constitute sufficient justification to deviate from the equal value principle.

And in its recent ruling on an election for the House of Councillors, the Court clearly held that in order to realise the equal value principle, the basic architecture allocating seats on the basis of prefecture boundaries should be re-examined. The Court now seems to indicate that the essential function of councillors is not representing prefectures where they are elected, but representing the nation as a whole.

Access to the Ballot: Postal Voting

In 1948, the Parliament introduced a system that enabled severely handicapped voters to cast votes by mail. But in 1951, on the grounds that this system was often abused, the Parliament abolished it. A physically handicapped person who was denied access to the ballot since the abolition sued the government contending that he was discriminated against on the basis of his disability.

In 1974, the Sapporo district court held the abolition, and inaction afterwards on the part of the Parliament, to be unconstitutional and awarded damages to the plaintiff. The court said that the Constitution required the Parliament assure that every voter could actually cast a vote. The Parliament was absolved from this duty only when there was a legitimate interest to deny the right and the Parliament had no less restrictive means to vindicate the interest. The court found that although preventing abuses of the postal voting system was a legitimate purpose, the Parliament had less drastic means to realise it than totally abolishing the system.

On appeal, the Sapporo high court ruled in 1978 that the abolition of the system was unconstitutional, but in a 1985 ruling the Supreme Court dismissed the plaintiff’s claim by drastically limiting the scope of responsibility the Parliament owed through compensation litigation. Referring to the parliamentary immunity stipulated in Article 51 of the Constitution, the Court held, the Parliament is not legally liable for legislative action or inaction unless the Parliament committed ‘gross errors’ such as making laws that are literally in contradiction to the Constitution. In principle, the Legislature is only politically responsible to the entire nation, not legally responsible to any
individual in its legislating activities. In 1974 after the defeat at the Sapporo district court, the Parliament amended the Public Offices Election Act and resurrected postal voting system.\(^{30}\) In other words, though the government conceded that abolishing the postal voting system was politically imprudent, it still defended its position up to the Supreme Court to save its face.

Access to the Ballot: Japanese Nationals Living Abroad

In 1998, the Parliament amended the Public Offices Election Act to make possible for Japanese nationals living overseas to participate in elections for members of both Houses of the Parliament. The Act stipulated, however, that voters living abroad could vote only for members elected by proportional representation.\(^{31}\)

In the ruling of 14 September 2005,\(^{32}\) the Supreme Court held that this limitation of the access to the ballot was unconstitutional. A restriction on the right to vote is not allowed unless there is compelling reason to do so, and it is compelling only when the fair execution of an election becomes extremely difficult without the restriction.\(^{33}\) The government asserted that it could not inform voters abroad of information necessary for them effectively to participate in elections of single-member constituencies for the Lower House and prefectural constituencies for the Upper House. But the Court held that such an assertion was implausible in this global information society. The Court also held that the Parliament negligently failed to make it possible for Japanese living abroad to participate in national elections until 1998, and that this denial of access to the ballot was a ‘gross error’ entitling plaintiffs to compensation from the State.

\(^{30}\) Article 49 (2) of the Public Offices Election Act. The decisions explained in the text are in response to the government’s failure to resurrect and implement the postal voting system at elections from 1951 to 1974.

\(^{31}\) Supplementary Provision, Article 8. That is, nationals overseas could not vote for single-member elections for the House of Representatives nor for Councillors elected from prefectures.

\(^{32}\) The Grand Bench decision of 14 September 2005, 59 MINSHÛ 2087.

\(^{33}\) Following this doctrine, the Tokyo district court in its decision of 14 March 2013 held that Article 11 (1) of the Public Offices Election Act, which denied people under the guardianship the right to vote, was unconstitutional because there was no compelling reason to restrict the right to them. In May 2013, Parliament abolished the clause and recovered the right to vote of every person under the guardianship.
Political Contributions by Corporations

Under the Political Funds Control Act (*Seiji Shikin Kiseihō*), corporations may contribute money to political parties. Since a corporation is composed of individuals, who may not share a common political view, there was dispute on whether corporations may make contributions to political parties.

In March 1960, Yahata Steel Corporation, the largest steel corporation in Japan at the time, contributed 3.5 million yen to the Liberal Democratic Party, the party in power. The plaintiff, a shareholder of the corporation, brought an action against the directors seeking compensation for the money, claiming that contributing to a political party was not authorised by the statutes of the company.

The Tokyo district court held for the plaintiff on the grounds that contributing to a specific party was unlikely to receive a unanimous approval of stockholders. The Tokyo high court reversed the decision. The Supreme Court affirmed the high court ruling. According to the Court, while corporations are not entitled to political rights (including the right to vote), since corporations are obliged to pay taxes there is no reason to prohibit them from expressing opinions regarding national or local government policies. Besides, the Court went on, since the articles on fundamental rights of the Constitutions should be applied to corporations as far as their characteristics allow it, corporations should enjoy the same liberty as natural persons to carry out political activities, such as supporting, endorsing, or objecting to specific policies of the government or political parties. The Court therefore held that the corporations’ right to contribute money to political parties was guaranteed under the Constitution. This rather peculiar image of the democratic process is, however, reasonably in congruence with the conception of ‘pluralist democracy’ which I suspect the Court embraces.

However, the Court treated contributions from certain corporations differently. In March 1996, it held that an association of licensed tax accountants could not contribute money to political organisations on the grounds that tax accounts in practice were legally required to be members of their local associations. Since contributions to political parties, the Court ruled, were closely related to individual freedom of speech and creed, such

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35 Articles. 21-21.3 of the Political Funds Control Act. While this Act was first enacted in 1995, the legal situation regarding contributions by corporations has not much changed since the 1960s.

36 The Grand Bench decision of 24 June 1970, 24 MINSHÛ 625 [Yahata Steel Corporation Case].

37 See Section 2.3 below.

38 The Third Petty Bench decision of 19 March 1996, 50 MINSHÛ 615.
involuntary associations should not by a majority vote coerce their members to contribute to specific political organisations. According to this line of reasoning, the Yahata Steel Corporation decision may be distinguished because stockholders of Yahata can sell off their shares whenever they think political views of the management conflicts with theirs.

**Economic Freedoms and the Conception of Democracy**

The precedents on the electoral system and related issues show that the Court should not be viewed as excessively deferential to the political branches. Its decisions have made an undeniable impact in favour of an open and transparent political system based on the principle of equality of citizens. But a question still remains: What kind of democracy does the Court endeavour to protect? As the Court has repeatedly declared its main task to be the preservation of democratic process, this question is vital to grasp how the Court understands its own mission. I myself suspect that the Court is attempting to preserve ‘pluralist democracy’, and this self-definition of the Court’s role makes its attitude appear deferential to the political branches. In ‘pluralist democracy’ numerous parties seek to advance their own goals. The parties compete with each other and make alliances in order to achieve these goals as effectively as possible. This process of competition and compromise eventually produces legislative acts that are implemented by judges and administrators.

In general, these laws reflect not genuine public interests, but rather various private interests of particular groups or corporations. From the perspective of ‘pluralist democracy,’ if a proposed legislative bill genuinely serves some wider public interest, then its benefits will be too thinly spread throughout the populace for individual citizens to have an incentive to fight for its enactment. Since it is more rational to free-ride on the altruistic initiatives of others than to risk one’s own initiatives, no rational person is likely to undertake such initiatives. In contrast, if a proposed bill is likely to advance the private interests of particular groups or corporations, then those interests are likely to devote substantial resources and energy to promoting its enactment. Thus, more often than not, legislative initiatives and results reflect particular rather than public interests.

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than general interests.\textsuperscript{41}

In the realm of economic freedoms, the Supreme Court has adopted a doctrine that differentiates between legislation that is ‘passivist’ and legislation that is ‘activist’ in purpose. In legislation that is ‘passivist’, which purports merely to maintain the public order or protect public health and safety, the Court requires a strict correlation between the legislative purpose and the measures adopted.\textsuperscript{42} On the other hand, if the parliament proclaims an ‘activist’ purpose of intervening to protect particular industries or social groups, the Court requires only a theoretical rationale for the adopted legislative measures. \textsuperscript{43} Consequently, whereas ‘passivist’ legislation is closely scrutinised and, in some cases, found unconstitutional, ‘activist’ legislation is almost invariably upheld as constitutional.\textsuperscript{44}

Constitutional scholars in Japan are widely sceptical of the wisdom of this judicial doctrine, which apparently makes it more difficult for the Parliament to pursue ‘passivist’ legislation benefiting the general interests of society than to pursue ‘activist’ legislation benefiting narrow particular interests. However, many of the same academics naïvely assume that members of the parliament are usually forthright in expressing their purposes and motivations in the course of the legislative process. Actually, lawmakers may often dissimulate their genuine purposes.\textsuperscript{45}

According to the so-called pluralistic view of democracy, competing parties in the legislative process are likely to pursue their own narrow interests rather than the general interests of society. From this perspective, the role of the Supreme Court is restricted to assuring fairness and transparency of the legislative process.

By this logic, when a ‘passivist’ legislative bill purports to promote general public interests, its expressed purpose usually is a smoke screen concealing

\textsuperscript{42} The Grand Bench decision of 30 April 1975, 29 MINSHŪ 572 (regulation prohibiting a new pharmacy near existing stores of the same trade struck down as insufficiently related to its purpose of protecting public health).
\textsuperscript{43} The Grand Bench decision of 22 November 1972, 26 KEISHŪ 586 (regulation prohibiting against newly setting up a marketplace for small retailers upheld as rationally related to its purpose of protecting retailers from excessive competition).
some purpose that serves special interests. The Court must therefore ensure that the Parliament has indeed promoted the public interest in such legislation by including measures to realise its publicly asserted purpose. If there is no close correlation between the alleged purpose and the adopted measures restricting economic freedoms, it is the responsibility of the Court to send it back to the Parliament. Through this process of constitutional review, the real purposes of legislation are brought to light, and fairer competition will ensue. On the other hand, activist legislative bills endorse particular interests openly and must be approved by a majority of the Parliament; hence, the Court sees no need to intervene. So, under this apparently curious judicial doctrine, we find the Court to have performed its proper function.

If the Court applies more stringent constitutional tests to ‘activist’ pieces of legislation and strikes them down, this would merely bring us back to the previous regulatory situation before the invalidated regulation was enacted; and this earlier legislative regime could be similarly contaminated with the particular private interests that existed at that time. If every regulation is thrown away, no economic activity is practicable. There would be no neutral baseline which everyone would regard as fair and unobjectionable.

In several cases concerning parliamentary immunity, the Supreme Court has endorsed this ‘pluralistic’ view of democracy to provide broad, almost unconditional immunity for members of the parliament. The Court has held that parliamentary immunity is necessary to ensure that ‘lawgivers fairly reflect the plural opinions and varied interests of society within the legislative process, co-ordinate these opinions and interests through unfettered deliberation, and finally arrive at a consensus of the will of the state by majority decision’. And as I said at the end of 2.2, the image of democratic process presupposed in the Yahata Steel Corporation decision is also reasonably in congruence with the conception of ‘pluralist democracy’.

The Right to Life

Article 13 of the Constitution, in its second sentence, states that the “right to life [...] shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.”

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46 Yasuhiro Okudaira points out that the entry regulation of pharmacy store, struck down by the decision of 30 April 1975, in fact was actually introduced in response to the demand to protect the interest of existing pharmacy stores. See his Kenpō Saiban no Kanōsei (Potential of Constitutional Adjudication), Tokyo: Iwanami Shoten, 1994, pp. 103-04.
47 Supreme Court decisions of 21 November 1985, 39 MINSHÛ 1512 (see 2.2 (2) above) and 9 September 1997, 51 MINSHÛ 3850.
48 The Grand Bench decision of 19 March 1996. See 2.2. (4) above.
As the qualification concerning the public welfare indicates, this right is not considered absolute. Article 31 provides that a person may be deprived of ‘life’ as a criminal penalty. The Supreme Court has held that capital punishment is not a ‘cruel punishment’ prohibited by Article 36 if it is executed by hanging.\textsuperscript{49}

One judicial precedent\textsuperscript{50} indicates that the right to autonomy deriving from Article 13 of the Constitution may override the obligation to respect life. The plaintiff, a Jehovah’s Witness suffering from liver cancer, asked her doctor not to make any blood transfusions during her operation. Although the doctor accepted the patient’s request, he actually made a blood transfusion when he thought it absolutely necessary to save the patient’s life. The Tokyo High Court held that the doctor infringed the patient’s religious autonomy and awarded her consolatory compensation. The Supreme Court rejected the defendant’s appeal, confirming that the plaintiff’s right to autonomy must be respected under tort law.\textsuperscript{51} This line of reasoning seems to imply that even if the doctor had not made a blood transfusion and the patient had died, the doctor would not have been legally responsible for her death. Moreover, it also seems to imply that what must be respected is not life itself or the state of being alive, but the value of autonomous life, which may be violated when others rewrite an agent’s life-plan.

The legality of abortion is not as controversial an issue in Japan as it is in some Western countries. According to Article 14 of the Maternity Protection Act (Botai Hogo Hō), officially designated doctors may artificially terminate pregnancy when continuing pregnancy is “unusually harmful to the mother for physical or economical reasons” (emphasis added).

\textbf{Religion and the State}

Article 20 of the Constitution provides that: “no religious organization shall receive any privileges from the state’ and ‘the state and its organ shall refrain from religious education or any other religious activity.” Besides, Article 89 stipulates that ‘no public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association’. Under the \textit{Meiji} Constitution, Shinto was regarded as \textit{de facto} established religion, and other denominations were often suppressed or persecuted. Articles 20 and 89 were enacted in light of these hard experiences.

\textsuperscript{49} The Grand Bench decision of 12 March 1948, 2 KEISHŪ 191. Article 51 of the Juvenile Delinquency Act (Shōnen Hō) stipulates that no person should be executed for crimes which he committed before he reached 18 years of age.

\textsuperscript{50} The Tokyo High Court decision of 9 October 1998, 1629 HANREI JIHÔ 34.

\textsuperscript{51} The Third Petty Bench decision of 29 February 2000, 54 MINSHŪ 582 [Blood Transfusion Case].

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As to the test of constitutionality of state action with regard to these disestablishment clauses, the Supreme Court has adopted the so-called purpose-effect standard (*Mokuteki-Kōka-Kijun*), which is roughly modelled on the Lemon test in the United States.\(^\text{52}\)

A governor of Ehime prefecture donated public money to *Yasukuni* and *Gokoku* shrines on the occasions of customary Shinto fetes. Both are Shinto shrines dedicated mainly to soldiers of the imperial Army killed in action, mostly during the Second World War.\(^\text{53}\) Donated money from 1981 till 1986 amounted to 166,000 yen in all. The plaintiffs, residents of Ehime prefecture, brought an ‘inhabitants’ suit’ under Article 242-2 of the Local Government Act (*Chihō-Jichi-Hō*), challenging the constitutionality of the donations.\(^\text{54}\) The Supreme Court found the donations unconstitutional in light of the purpose-effect standard.\(^\text{55}\) According to the Court, “the principle of the separation of religion and the state, enshrined in Articles 20 and 89 does not ban every governmental involvement with religion, but prohibits merely such involvement that exceeds the appropriate limit in light of the social and cultural circumstances in Japan.” And the “religious activities” the state should refrain from under Article 20 are “such activities as their purposes have religious significance and their effects advance or inhibit religion”. In this case, it is unthinkable that ordinary people regard the donations as mere gestures of social courtesy. Then the donors themselves cannot but recognise more or less that the donations have religious significance [...]. It is undeniable that these activities have provoked the impression that the prefecture advances these particular religious bodies [...] and that they have raised the concerns about these particular religions.

Therefore, the Court concluded, as the purpose of the donations “had inevitably religious significance, and their effects advances particular religions”, they are unconstitutional under Articles 20 and 89 of the Constitution.

Sunakawa City in Hokkaido Prefecture let its land for no charge to one of its neighbourhood associations for decades, on which residents built a Shinto shrine and held religious fetes periodically. Citizens of the city brought an

\(^{52}\) Lemon v. Kurtzman, 403 U.S. 602 (1971). The Lemon test is composed of 3 elements: first, the government action must have a secular, legitimate purpose; second, the primary effect of the government action must neither advance nor inhibit religion; third, the government action must not cause an excessive governmental entanglement with religion.

\(^{53}\) Gokoku shrines of local prefectures are regarded as branches of Yasukuni shrine, which is situated in Tokyo. Both Gokoku and Yasukuni mean securing peace of the country.

\(^{54}\) This suit is comparable to the taxpayers’ suit in the United States. In an inhabitant’ suit the plaintiff need not show that he or she is a taxpayer of the relevant local government. The plaintiff should solely show that he or she resides there.

inhabitants’ suit asserting that letting the property of the city be used for the shrine was against Articles 20 and 89 of the Constitution. In its decision of 20 January 2010, the Supreme Court agreed.56 The Court pointed out that there was no secular legitimate purpose for the city to lend the land and this gratuitous lending provoked the impression that the city advanced this particular shrine. However, the Court added that retrieving the land and having destroyed the shrine is not the only way to correct the illegal administration of the public property. The city can reconcile the constitutional principle of anti-establishment with the residents’ free exercise of religion by, for example, lending the land for appropriate charge or transferring it to the neighbourhood association outright, the Court argued.

It is noteworthy that the Court did not use the purpose-effect standard in this case. Instead, it used a more obscure and lenient standard of “whether the government's involvement with religion exceeds the appropriate limit in light of the basic end of Articles 20 and 89: that is, securing freedom of religion”. I suspect that the Court thought that the accommodating options like transferring the land to the neighbourhood association would be unconstitutional under the purpose-effect standard, which means there is no way out but destroying the shrine. In order to deliver an appropriate solution to this case upholding both the anti-establishment principle and freedom of religion, therefore, the Court seemed to conclude that the purpose-effect standard should not be used here.

Eventually Sunakawa City decided to rent out to a representative of the residents a portion of the land to maintain the shrine. The Court concluded that the City’s action did not contravene the anti-establishment principle, since to rent the land for an appropriate rental price did not provoke impression that the City advanced a particular religion.57

**Horizontal Effects**

Both the dominant academic view and case law recognize that constitutional rights have so-called horizontal effects. In the Mitsubishi Resin case, the Court argued, while provisions of the constitution were not intended to regulate directly the relations between private parties...where actual or feared damage to an individual’s basic equality or freedom inflicted by other private parties exceeds socially permissible limits in mode and extent, through appropriate

56 The Grand Bench decision of 20 January 2010, 64 MINSHÛ 1 [Sorachibuto Shrine Case].  
57 The First Petty Bench decision of 16 February 2012, 66 MINSHÛ 673.
interpretation and/or application of various general clauses like Article 90 and 709 of the Civil Code, proper accommodations of conflicting interests would be achieved.\footnote{The Grand Bench decision of 12 December 1973, 27 MINSHÛ 1536. Article 90 of the Civil Code states that contracts against the public order and good moral are void. Article 709 states that damage caused by torts should be compensated.}

According to this case law doctrine, these general clauses of the Civil Code should be interpreted in conformity with the import of the principles of the Constitution.\footnote{This is called the ‘indirect horizontal effects’ doctrine in Japan. While a couple of scholars assert that the Supreme Court has recognised no horizontal effect, this view is not widely shared. Justice Masami Ito points out in his constitutional law textbook that the Nissan Motors decision (see note 60 below) holds that Article 90 of the Civil Code should be interpreted in conformity with the equality principle of the Constitution. He himself joined the Court opinion of this decision. See his Kenpô, 1995, p. 35.} For example, in the well-known Nissan Motors case, the Supreme Court voided an employment regulation of a major corporation that stipulated different retirement ages for male and female employees.\footnote{The Third Petty Bench decision of 24 March 1981, 35 MINSHÛ 300.}

Moreover, to offer a different example, when the privacy of an individual is infringed by a media company, the constitutional right to privacy is understood to apply indirectly through the tort clause in the Civil Code.\footnote{See, for example, the Third Petty Bench decision of 8 February 1994, 48 MINSHÛ 149, and the Second Petty Bench decision of 13 March 2003, 57 MINSHÛ 229.} The Court has seen to it that through its horizontal-effects control the dignity and autonomy of each citizen is duly protected.

\section*{In the Guise of Conclusion}

With regard to the role of judicial review in protecting freedoms of speech, conscience, and religion, the predominant academic view is that the Court has not been sufficiently activist in upholding its commitment to the ‘preferred position’ of these freedoms.\footnote{The Court has repeatedly declared that these freedoms are basic components of democratic political process which the judicial review should sustain. See, for example, the decisions of 11 June 1986, 40 MINSHÛ 872 [Hoppô Journal Case] (note 15 above) and 8 March 1989, 43 MINSHÛ 89.}

Several explanations have been offered for the apparent reluctance of the Court to use its review powers; one is that the constitutionality of most laws enacted by the Parliament is meticulously scrutinised in advance by the Cabinet Legislation Bureau, which was set up in 1875, modelled on the French Conseil d’État.\footnote{Matsuo Nakamura and Teruki Tsunemoto, “The Legislative Process: Outline and Actors”, in: Yoichi Higuchi (ed.), above fn. 18, Tokyo, 2001, pp. 195, 199, and 200.} Members of the bureau are recruited from the judiciary or
bureaucrats with equivalent abilities in law. Therefore, the Court is assured
that it does not need to examine carefully the constitutionality of most of
statutes. In other words, the constitutional review system in Japan is composed
of two parts: a priori review by the Cabinet legislation bureau and a posteriori
review by the Supreme Court.

Secondly, the conception of ‘pluralist democracy’, which the Court seems
to embrace, may explain why in the eyes of constitutional scholars the Court
is not sufficiently vigilant in policing democratic process.64

However, the main reason why the Court is reluctant to strike down state
actions may reside in its primary self-image as a judicial body. One prominent
former Justice says that the primal task of the Court is not wielding power of
constitutional review or constructing coherent jurisprudential doctrines, but
giving an appropriate solution to each case at hand. It strikes down a statute
only when it is absolutely necessary to give concrete justice to the case.65

From this viewpoint, constitutional review is just a contingent power for
the Court to perform its duty as a judicial body. The Court has preferred to
have recourse to restrictive (saving) construction of the relevant statutes in
order to avoid raising serious constitutional questions rather than declare state
actions to be unconstitutional, for which the Court has to convene its Grand
Bench.66 If the Court can solve appropriately a case by some restrictive
construction and without striking down a state action, the Court is more than
willing to do so.67 For the Court, its constitutional review power is just one of
its toolkits to deliver concrete justices to cases at hand.

64 See part “Economic Freedoms and the Conception of Democracy” above. For other
possible explanations, see Tom Ginsburg and Tokujin Matsudaira, “The Judicialization of
Japanese Politics?”, in: Tom Ginsburg and Harry N. Scheiber (eds.), The Japanese Legal
System: An Era of Transition, Berkeley, CA: University of Berkeley, 2012, pp. 33-43; see
also my, “The Supreme Court of Japan: Its adjudication on electoral systems and economic
65 Fujita, above fn. 7, pp. 136, 138, and 145. This self-image as a judicial body is closely
related with the recognition that the essential capacity for Justices is phronēsis, or the
capacity of concrete judgment that is not itself rule-governed (ibid., p. 122). See also his,
“The Supreme Court of Japan: Commentary on the Recent Work of Scholars in the United
66 See note 6 above and the accompanying text.
67 A recent example of such an attitude is the Second Petty Bench decision of 7 December
2012, 2174 HANREI JIHÔ 24, where the statutes prohibiting public servants from making
political activities were restrictively interpreted to protect the freedom of speech, and a
public servant who distributed communist newspapers while he was off-duty were held
not guilty.
Searching for the Leak: Press Freedom vs. Criminal Prosecution in the Jurisprudence of the European Court of Human Rights

Lasse Schuldt*

Introduction

When journalists publish secret information, they regularly face legal consequences. The owner or possessor of the respective data, a private person or, more commonly, the state, might launch proceedings against individual journalists, editors or against the media company. Among the most common responses by state authorities are searches and seizures at the journalists’ workplaces or homes in order to investigate the breach of confidentiality.¹

These cases involve delicate legal questions as the journalists can invoke press freedom as guaranteed by national constitutional law, whereas the state claims the necessity to protect certain information against being communicated to the public.

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Within Council of Europe (CoE) member states\(^2\), national courts need to pay respect not only to domestic constitutional law but also to the obligations under the European Convention on Human Rights (the Convention) as well as to the jurisprudence of the European Court of Human Rights (ECtHR, the Court). The Convention forms the standard that all CoE member states are contractually bound to uphold. The Court exercises its jurisdiction in order to ensure the observance of the engagements undertaken by the states who are parties to the Convention and the protocols thereto (Art. 19 of the Convention). Any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the contracting states can refer the matter to the Court after having exhausted all domestic remedies (Art. 34, Art. 35 (1)).

This article addresses the balance between the rights of the press (Article 10) and the interests of the state within the framework of the Convention. The analysis is based on ten decisions by the Court that dealt with searches and seizures in cases when secret information had been published by the press. These ten cases shall briefly be introduced before moving on to the legal analysis. It is to be noted that in none of the cases was any of the involved journalists found guilty of a crime. Furthermore, it shall already be mentioned that the Court found violations of Article 10 of the Convention in nine of the ten cases.\(^3\)

**A brief overview of the case material**

In *Vereniging Weekblad Bluf! vs. The Netherlands\(^4\)*, the editorial staff of the magazine “Bluf!” had come into possession of a quarterly report by the Dutch internal security service. Before being able to publish any of its content, an investigating judge ordered the applicant association’s premises to be searched and had the entire print run of the respective issue of “Bluf!” seized. The magazine was subsequently withdrawn from circulation by a court order. Criminal charges against the staff were dropped.

Searches and seizures were also conducted in the case of *Roemen and Schmit v. Luxembourg\(^5\)*. Mr. Roemen had published an article in the “Lëtzebuergere Journal” making public that a member of the government had

\(^2\) The Council of Europe currently consists of 47 member states. Within geographical Europe, only Belarus and the Kosovo are not CoE member states, see [http://www.coe.int/en/web/portal/47-members-states](http://www.coe.int/en/web/portal/47-members-states).

\(^3\) No violation was found in ECtHR, Stichting Ostade Blade v. The Netherlands, below fn. 12.

\(^4\) ECtHR, Chamber judgment of 09.02.1995, 16616/90.

\(^5\) ECtHR, Chamber judgment of 25.02.2003, 51772/99.
been convicted of tax fraud. Mr. Roemen based the article on official
documents that he had access to. After the minister had brought criminal
charges, Mr. Roemen’s home and workplace were searched. No evidence was
found. Subsequently, his lawyer’s office was also searched where the police
found a piece of evidence. After initially being charged with “handling
information received in breach of professional confidence” by the
investigating judge, the investigation was eventually closed.

Similarly, in *Ernst and others v. Belgium*⁶, the workplaces of four
journalists at the newspapers “De Morgen”, “Le Soir” and “Le Soir Illustre”
and at the “R.T.B.F.” TV stations were searched. Documents, discs and hard
drives were seized. The searches and seizures were part of criminal
investigations into constant information leaks at the office of the public
prosecution. No criminal charges were brought against the journalists them-

In *Tillack v. Belgium*⁷, the German magazine “Stern” had published two
articles written by Mr. Tillack reporting on allegations by a European civil
servant concerning irregularities in the European institutions. The Belgian
judicial authorities subsequently opened a criminal investigation against Mr.
Tillack suspecting him of having bribed a civil servant at the European Anti-
Fraud Office (OLAF) in order to receive internal documents. His home and
workplace were searched. Almost all of his working papers and tools were
seized and placed under seal (sixteen crates of papers, two boxes of files, two
computers, four mobile telephones and a metal cabinet). No inventory of the
items seized was drawn up. No criminal charges were brought to court. The
allegations against Mr. Tillack turned out to be false rumors.

In *Sanoma Uitgevers B.V. v. The Netherlands*⁸, the applicant company
intended to publish an article about illegal car races in the upcoming edition
of the magazine “Autoweeek”. Before the date of publication, police officers
and public prosecutors demanded photographic materials be handed over to
them and threatened to search the whole of the company’s premises. The
editor-in-chief refused and was detained for four hours on the premises. The
company finally handed over the material which was seized by the police.

A number of documents were seized in a similar way in the case of *Martin
and others v. France*⁹. Mr. Martin and other journalists had published a
number of articles in the newspaper “Le Midi Libre” quoting from a
provisional auditing report alleging that the region of Languedoc-Roussillon
had been mismanaged under the presidency of a certain politician.
Investigations on the account of a suspected violation of professional secrets

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⁶ ECtHR, Chamber judgment of 15.07.2003, 33400/96.
⁷ ECtHR, Chamber judgment of 27.11.2007, 20477/05.
⁸ ECtHR, Grand Chamber judgment of 14.09.2010, 38224/03.
⁹ ECtHR, Chamber judgment, 12.04.2012, 30002/08.
led to the offices of “Le Midi Libre” being searched by the police. Documents and hard drive copies were seized. Eventually, no criminal charges against any of the journalists have been brought to court.

Another case that reached the Court from France involved allegations of systematic doping in the “Cofidis” Tour de France cycling team. *Ressiot and others v. France*\(^{10}\) concerned searches and seizures at the newspapers “L’Équipe” and “Le Point” which targeted particularly the workplaces of five journalists who had reported about investigations led by the anti-drug authority against members of the cycling team. The articles contained information from the investigation file including telephone tapping transcripts and lists of seized items. Besides the searches at the newspapers’ offices, the homes of two of the journalists were searched, too. Further, the police requested the mobile phone telecommunication data (incoming and outgoing calls) of three journalists from the respective telephone operating companies. The same was ordered for L’Équipe’s telefax line. Moreover, one journalist’s mobile phone was put under surveillance for the duration of one month. In the subsequent criminal trial, all five journalists were acquitted from all charges.

In *Nagla v. Latvia*\(^{11}\), the producer and reporter of the weekly investigative news programme “De facto”, Ms. Nagla, had reported about probable security flaws in a database maintained by the Latvian state revenue service. She had obtained actual data samples from the database that were downloaded and sent to her by a person referring to himself as “Neo”. A few days later, the police asked her for access to the e-mail correspondence with “Neo”. Ms. Nagla declined to disclose the identity of her source or any information which could lead to its disclosure. Though a person suspected to be “Neo” had subsequently been arrested, the police conducted a search at Ms. Nagla’s home. The seized items included a personal laptop, an external hard drive, a memory card and four flash drives. Ms. Nagla was not charged with any crime.

The case of *Stichting Ostade Blade v. The Netherlands*\(^{12}\) was a particular case for it was characterized by the search for a letter in which the organization “Earth Liberation Front” claimed the responsibility for a bomb attack in Arnhem. The letter had been sent to the magazine “Ravage”. As the actual letter could not be found, the police took four computers, application forms of new subscribers, address wrappers, a diary, a telephone index, a typewriter, data of contact persons and other editorial materials as well as private data of the editors from the magazine’s premises. Complaints by the publishers of “Ravage” to the courts were not successful.

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\(^{10}\) ECtHR, Chamber judgment of 28.06.2012, 15054/07 and 15066/07.
\(^{11}\) ECtHR, Chamber judgment of 16.07.2013, 73469/07.
\(^{12}\) ECtHR, Chamber decision of 27.05.2014, 8406/06.
The recently decided case of Görmüs and others v. Turkey\textsuperscript{13} dealt with the search at the premises of the weekly newspaper “Nokta”. The newspaper had published an article revealing that the General Staff of the Turkish armed forces had created lists of journalists and non-governmental organisations considered to be either pro or against the armed forces. The lists were the basis for inviting “friendly” journalists and NGOs to military events. The newspaper’s premises were subsequently searched. Though Mr. Görmüs, the newspaper’s director, had handed over the requested material at the beginning of the operation, the officials seized all digital data from 46 professional and private computers.

**Article 10 and press freedom**

The factual recounts demonstrate the deep impact of criminal investigations on journalists and media organizations that had published secret information. Though the searches undertaken by public authorities varied in scale, all actions limited the press in the free exercise of its profession. What is more, massive searches and seizures executed in order to discover journalists’ sources may have an additional chilling effect on the future practice of the press. Before this background, the article will now discuss the Court’s assessment of searches and seizures before the background of the state’s interest in secrecy and the public’s right to know. It briefly addresses the scope of protection under Article 10 and the requirements for restrictions as pronounced by the Court, before then concentrating on the Court’s interpretation of what is “necessary in a democratic society”.

**Article 10 – Freedom of expression**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security,

\textsuperscript{13} ECtHR, Chamber judgment of 19.01.2016, 49085/07.
Lasse Schuldt

territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for main-taining the authority and impartiality of the judiciary.

Scope of protection under Article 10

In its jurisprudence, the Court emphasizes that the promotion of free political debate is a fundamental feature of a democratic society and attaches the “highest importance” to freedom of expression. Though freedom of the press is not expressly mentioned in Article 10, the Court has repeatedly highlighted the role of the press as “public watchdog” and accorded it a comprehensive protection. The Court considers it incumbent on the press to impart information and ideas on matters of public interest while also emphasizing a right of the public to receive them. Article 10 protects the whole creative and research process as well as the distribution of the information.

Whereas the text of Article 10 (“everyone”) does not indicate a differentiated personal or material scope, the Court has accorded the press an institutional protection that cannot be claimed by an individual who does not work for the press. This protection relates to, for example, editorial confidentiality, protection of sources, or access to public events for the purposes of reporting. Notably, the Court considers the protection of journalistic sources one of the basic conditions for press freedom and “part and parcel of the right to information, to be treated with the utmost caution.”

Without such protection, the Court has held, sources may be deterred from assisting the press in informing the public on matters of public interest.

This special protection of the press naturally provokes the difficulty to decide who is considered part of the press. According to the traditional notion, “press” refers to periodically published printed works. However, over time press freedom’s specific guarantees have been applied to many kinds of media,

14 ECtHR, Dupuis and others v. France, above fn. 1, para. 40.
15 ECtHR, Observer and Guardian v. United Kingdom, above fn. 1, para. 59 (b); Bergens Tidende and others v. Norway, ECtHR 26132/95, Chamber, para. 49.
16 ECtHR, Observer and Guardian v. United Kingdom, above note 1, para. 59 (b).
17 C. Mensching in: Karpenstein/Mayer, EMRK Kommentar (ECHR commentary), 2nd ed. 2015, Art. 10, para. 15.
18 ECtHR, Tillack v. Belgium, above fn. 7, para. 65.
19 ECtHR, Goodwin v. United Kingdom, above fn. 1, para. 39; Voskuil v. The Nether lands, above fn. 1, para. 65; ECtHR, Nordisk Film & TV A.S. v. Denmark, see above fn. 1, page 10: “one of the cornerstones”.
20 C. Mensching, above fn. 17, para. 14.
including TV, radio and internet publications. The increasingly relevant question whether bloggers can invoke the special guarantees of press freedom (such as source protection), has not yet been explicitly addressed by the Court. The answer most likely depends upon criteria indicating whether the blogger operates the blog comparably to a press publication. From a functional perspective, the simple criterion should be whether a blog intends to impart information (facts or opinions) to the public. If that is the case, periodical blogs and one-time content uploads should in principle be treated alike as this would reflect the Court’s similar position towards printed works. Slightly different questions are posed by portals like “WikiLeaks” that offer access to edited or unedited copies of (confidential) documents. These portals usually do not explain, rate or comment on the individual content. Rather, they largely limit themselves to uploading. However, from the perspective of the public’s right to receive information under Article 10, portals such as “WikiLeaks” functionally deserve a protection similar to the press. In particular, the protection of sources is vital for them.

According to Article 10 paragraph 2, the exercise of the freedoms stipulated in the first paragraph carries with it “duties and responsibilities”. Paragraph 2 enumerates possible grounds for restrictions that, in order to pass the Court’s muster, must be prescribed by law and necessary in a democratic society. With regard to press freedom, however, the Court has translated the “duties and responsibilities” clause into the protection of journalism that is exercised “in good faith and on an accurate factual basis”; journalists shall provide “reliable and precise information in accordance with the ethics of journalism.” Moreover, in the recent Grand Chamber decision of Bédat v. Switzerland, the Court reaffirmed the previously developed notion of “responsible journalism”. The contents of the collected or disseminated information as well as a journalist’s conduct must reflect this notion of responsibility. In that

21 See, from the perspective of German constitutional law, Johanna Kujath, Der Laienjournalismus im Internet als Teil der Medienöffentlichkeit im Strafverfahren (Lay internet journalism as a part of media publicity in criminal proceedings), Berlin: Duncker & Humblot, 2011, Chapter 1, C. III.
24 ECtHR, Dupuis and others v. France, above fn. 1, para. 46.
25 See the references in ECtHR, Pentikäinen v. Finland, Grand Chamber judgment of 20.10.2015, 11882/10, para. 90.
regard, “the fact that a journalist has breached the law is a relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly.”

It is apparent that the Court does not strictly separate the scope of protection from the question whether a restriction is justified. Instead, the Court states that it is one of the “general principles” of freedom of expression under the Convention that “the protection afforded by Article 10 of the Convention to journalists is subject to the proviso that they act in good faith.” The Court thereby seems to mix the scope with possible reasons for a restriction. In that regard, it might be critically asked whether simple domestic laws can actually be enough to limit a freedom’s scope under the Convention. This article is, however, not the place for analyzing the Court’s methodological approach. Rather, it suffices to state that the notions of “good faith” and “responsible journalism” have to be taken into account when deciding whether a state has violated Article 10 or not.

**Restrictions prescribed by law**

The freedoms laid down in Article 10 paragraph 1 may be subject to certain “formalities, conditions, restrictions or penalties” (paragraph 2). Furthermore, every restriction must be “prescribed by law”. With regard to the cases analyzed for the purpose of this article, this requirement has rarely caused any trouble. As a general rule under Article 10, the Court merely demands that the restriction must have “some basis in domestic law”. The Court understands the term “law” in its substantive sense. It has included both written law, encompassing enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament, and unwritten law including judge-made law.

The Court usually limits its scrutiny to verifying whether the law was accessible and foreseeable at the material time. However, when it comes to measures restricting the protection of journalistic sources, the Court adopts a stricter approach demanding mechanisms for review by a judge or other independent and impartial decision-making body.

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26 ECtHR, Bédat v. Switzerland, above note 1, para. 50.
27 ECtHR, Stoll v. Switzerland, above note 1, para. 103.
28 ECtHR, Ekin Association v. France, above note 22, para. 44.
29 ECtHR, Sanoma Uitgevers B.V. v. The Netherlands, above note8, para. 83.
30 ECtHR, Sunday Times v. United Kingdom, Plenary judgment of 06.11.1980, 6538/74, para. 49.
31 ECtHR, Sanoma Uitgevers B.V. v. The Netherlands, above note 8, para. 90.
is in principle desirable to entrust supervisory control to a judge.\textsuperscript{32}

A relevant case in this regard is \textit{Sanoma}, where a public prosecutor ordered the disclosure of journalistic sources. Though the advice of an investigating judge was sought, his involvement was merely conceded voluntarily by the public prosecutor and lacked a basis in law. Moreover, his advice was not binding. Therefore, the Court held that the prosecutor’s order was not prescribed by law in the sense of Article 10. Furthermore, it stated that any judicial review \textit{post factum} could not cure these failings since the identity of the journalistic sources would have been disclosed already at that point.\textsuperscript{33} The Court elaborated:

\begin{quote}
The requisite review should be carried out by a body separate from the executive and other interested parties, invested with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the sources’ identity if it does not. (…) Although the public prosecutor, like any public official, is bound by requirements of basic integrity, in terms of procedure he or she is a “party” defending interests potentially incompatible with journalistic source protection and can hardly be seen as objective and impartial so as to make the necessary assessment of the various competing interests.\textsuperscript{34}
\end{quote}

Regarding the public prosecutor’s power to order the execution of searches and seizures in cases of urgency, the Court demands an involvement of an independent judge before the seized items are examined. In the case of \textit{Nagla v. Latvia}, the investigating authorities decided, almost three months after the broadcast in question and after the applicant had agreed to testify, that a search at Ms. Nagla’s home was necessary. They proceeded under the urgent procedure without the involvement of a judicial authority that could have examined the relationship of proportionality between the public interest of investigation and the protection of the journalist’s freedom of expression. The Court held that “it may be impracticable for the prosecuting authorities to state elaborate reasons for urgent searches; in such circumstances the necessary assessment of the conflicting interests could be carried out at a later stage, but

\begin{footnotes}
\textsuperscript{32} E CtHR, Telegraaf Media Nederland Landelijke Media B.V. and others v. The Netherlands, above note 1, para. 98.
\textsuperscript{33} E CtHR, Sanoma Uitgevers B.V. v. The Netherlands, above note 8, paras. 96-99.
\textsuperscript{34} E CtHR, Sanoma Uitgevers B.V. v. The Netherlands, above note 8, paras. 90, 93.
\end{footnotes}
in any event at the very least prior to the access and use of the obtained materials.”\(^\text{35}\)

Finally, another important conclusion that can be drawn from \textit{Sanoma} relates to the question how severe an action of the state must be in order to be considered a restriction. In \textit{Sanoma}, the editorial offices were actually not searched. However, the police detectives and public prosecutors threatened to seal and search the whole of the applicant company’s premises, if need be for an entire weekend and beyond, and remove all computers. In the given case, the threatened search would have entailed a financial damage for the applicant company as, during that weekend, articles were to be prepared for publication on the subject of the wedding of the Netherlands Crown Prince.\(^\text{36}\) Being faced with these facts, the Court held that it must take the threat “as seriously as it would have taken the authorities’ actions had the threat been carried out. (…) While it is true that no search or seizure took place in the present case, the Court emphasises that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources.”\(^\text{37}\) In the words of the Court:

Not only the offices of \textit{Autoweek} magazine’s editors but those of other magazines published by the applicant company would have been exposed to a search which would have caused their offices to be closed down for a significant time; this might well have resulted in the magazines concerned being published correspondingly late, by which time news of current events (…) would have been stale. News is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest (…). This danger, it should be observed, is not limited to publications or periodicals that deal with issues of current affairs.

It follows that searches and seizures do not actually need to be carried out in order to qualify as a restrictive measure. A threat can be enough if a chilling effect on the press that depends on the trust of its sources, cannot be ruled out. In the eyes of the Court, this is usually the case. Threats of searches and seizures are, therefore, interferences like searches and seizures that have actually been executed.

Case study: Searches and seizures under German criminal procedural law

\(^{35}\) E CtHR, Nagla v. Latvia, above note 11, paras. 98, 100.
\(^{36}\) E CtHR, Sanoma Uitgevers B.V. v. The Netherlands, above note 8, para. 18.
\(^{37}\) E CtHR, Sanoma Uitgevers B.V. v. The Netherlands, above note 8, paras 70-71.
The legal framework dealing with searches and seizures at journalists’ workplaces or homes can differ materially from country to country. Generally, all CoE member states recognize press freedom as a constitutional right. Its actual significance in the case of criminal investigations, however, also depends on the provisions of criminal procedural law and court jurisprudence. By way of example, the German provisions relating to searches and seizures and their application in cases when journalists are targeted shall be presented here.

According to Section 98 subsection (1), second sentence, of the German Code of Criminal Procedure (Strafprozessordnung, StPO, the Code), seizures in the premises of an editorial office, publishing house, printing works or broadcasting company may be ordered only by the court.\(^{38}\) The same requirement applies to searches.\(^{39}\) However, due to explicit privileges accorded to the press by the Code, an order of searches and seizures is usually unlawful: Seizures of documents, sound, image and data media, illustrations and other images in the custody of media professionals\(^{40}\) or of the editorial office, the publishing house, the printing works or the broadcasting company, shall be inadmissible insofar as they are covered by the right of such persons to refuse to testify (Section 97 subsection (5), first sentence, StPO).

Therefore, as long as members of the press are considered to be witnesses in a particular investigation, there is no legal possibility for searches and seizures at press premises or at the homes of journalists. According to the Code’s mechanism, the limits of searches and seizures concerning journalists as witnesses are determined by the scope of their right to refuse testimony. This scope is wide and covers any information concerning the author or contributor of comments and documents, or concerning any other informant or the information communicated to them in their professional capacity including its content, as well as concerning the content of materials which they have produced themselves and matters which have received their professional attention (Section 53 subsection (1), second sentence, StPO).

However, this carefully designed protection of media professionals collapses as soon as they themselves are considered to be suspects. An act of accusation changes a concerned person’s status from witness to suspect. Criminal suspects cannot claim witness privileges, but rather have the right to

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\(^{38}\) This provision does not apply to a journalist’s home. In this regard, the prosecutor’s office retains the power to order searches and seizures in exigent circumstances.


\(^{40}\) Section 53 subsection (1), first sentence, number 5, StPO, defines media professionals as “individuals who are or have been professionally involved in the preparation, production or dissemination of periodically printed matter, radio broadcasts, film documentaries or in the information and communication services involved in instruction or in the formation of opinion”.

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remain silent. The restrictions described above do not apply anymore, and the exclusive power of the judge to order searches and seizures is complemented by the prosecutor’s power in exigent circumstances. Furthermore, in case a witness (such as a media professional) is not accused, the restrictions on seizures also do not apply if, for example, certain facts substantiate the strong suspicion that the person entitled to refuse to testify participated in the criminal offence (Section 97 subsection (2), third sentence, StPO). It can therefore be seen that any act of incrimination has a significant impact on the position of a journalist with regard to his protection against measures of investigation.

In the past, German public prosecutors frequently constructed a suspicion against journalists suspecting them of aiding and abetting to commit a breach of official secrets (Section 353b of the Criminal Code), based on the mere fact that confidential content appeared in a newspaper. This suspicion opened the possibility to search editorial offices. Their actual goal in most of the cases was to find the leak within the ranks of the state authority. In none of the cases has a journalist been actually accused in court.

The above-mentioned practice of constructing a “fake” suspicion has been found unconstitutional by the Federal Constitutional Court in the famous “Spiegel” and “Cicero” judgments: “Searches and seizures as part of a criminal investigation against media professionals are unconstitutional if they exclusively or primarily serve the purpose of identifying the person of an informant.” Furthermore, the Constitutional Court clarified that the mere publication of an official secret can in itself never justify suspecting the involved journalists of aiding and abetting to a breach of official secrets. Rather, the prosecution needs to establish specific facts that the public official who leaked the information intended the subsequent publication. Only in that case could a predicate offence (breach of official secrets) be assumed. Moreover, in the meantime the German legislator has excluded any criminal

42 Federal Court of Justice, judgment of 03.12.1991, 1 StR 120/90, BGHSt 38, 144, pp. 146-147.
43 For the inconsistencies of this regulation, however regarding a previous version of the law, see Schuldt, above fn. 41, p. 64.
44 For a critical discussion of journalists’ criminal liability of aiding and abetting in these cases, see Schuldt, above fn. 41, pp. 208-236.
45 See the evidence in Schuldt, above fn. 41, pp. 37-51.
46 Federal Constitutional Court, judgment of 05.08.1966, 1 BvR 586/62, 610/63, 512/64, BVerfGE 20, 162.
47 Idem, judgment of 27.02.2007, 1 BvR 538/06, 2045/06, BVerfGE 117, 244.
48 Ibid., first “Leitsatz” (guiding principle).
liability of media professionals in case they limit themselves to the publication of official secrets that they received from a source.\textsuperscript{49}

Overall, it can be seen that the German criminal procedural law in conjunction with the jurisprudence of the Federal Constitutional Court provides a high level of protection of the press against searches and seizures. As long as journalists are not themselves the suspects of a crime, it is virtually impossible for state authorities to access journalists’ materials or sources. Furthermore, a criminal suspicion against journalists needs to be based on something else than the mere publication of confidential information. If, however, journalists are actively involved in acquiring official secrets, for example by stealing documents or by bribing or instigating public officials to disclose confidential information, they cannot claim a privileged treatment anymore.

\textit{Necessary in a democratic society}

The article now moves on to discuss the arguments of the Court regarding the question whether searches and seizures targeting the press could be justified before the Convention. The decision whether or not a particular measure that restricts the freedom guaranteed by Article 10 is “necessary in a democratic society” (Art. 10 para. 2) requires a comprehensive balancing of interests in the light of the case as a whole.\textsuperscript{50} Clearly, journalists are not above the law.\textsuperscript{51} Even when they report on matters of serious public concern, the Convention does not grant a wholly unrestricted freedom of expression.\textsuperscript{52} Under the notion of “necessary in a democratic society”, the Court determines whether the respective restriction corresponded to a “pressing social need”, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient.\textsuperscript{53} In its\textsuperscript{54}

\textsuperscript{49} Since 2012, Section 353b subsection (3a) reads: Acts of aiding by a person listed under section 53(1) first sentence, number 5 of the Code of Criminal Procedure shall not be deemed unlawful if they are restricted to the receipt, processing or publication of the secret or of the object or the message in respect of which a special duty of secrecy exists.

\textsuperscript{50} E CtHR, Telegraaf Media Nederland Landelijke Media B.V. and others v. The Netherlands, above note 1, para. 124.

\textsuperscript{51} See the Court’s indignant response to journalists who destroyed the material they had received from a confidential source, though they had already been summoned by a tribunal to deliver the documents, thereby making any further judicial review of the affair impossible: E CtHR, Keena and Kennedy v. Ireland, above note 1, para. 48: “The Convention does not confer on individuals the right to take upon themselves a role properly reserved to the courts.”

\textsuperscript{52} E CtHR, Stoll v. Switzerland, above note 1, para. 102.

\textsuperscript{53} E CtHR, Telegraaf Media Nederland Landelijke Media B.V. and others v. The Netherlands, above note 1, para. 123.
assessment, the Court takes into account the interests involved in the respective case, the control exercised by domestic jurisdictions, the applicants’ conduct and the proportionality of the impugned measures.\(^{54}\) Regarding orders to disclose journalistic sources, the Court emphasizes the potentially chilling effect of such an order and demands proof of an “overriding requirement in the public interest”.\(^{55}\) Moreover, particularly relevant in the present context, the Court has held that press freedom assumes even greater importance in circumstances in which state activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature.\(^{56}\)

**Margin of appreciation**

However, when the Court assesses the legality of measures that aim at the protection of confidential information against disclosure, it proclaims to leave the domestic courts a certain margin of appreciation. In the words of the Court, “this power of appreciation is not, however, unlimited but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10.”\(^{57}\) The (in)famous margin of appreciation doctrine generally still lacks contours. It remains opaque under which exact circumstances the CoE member states are accorded which margin. Though this is not the place to critically assess the doctrine’s conceptual basis,\(^{58}\) the application of the doctrine to cases involving the disclosure of secret information by the press is particularly obscure.

Regarding these cases, the Court justifies applying the doctrine by referring to the lack of a common ground among the contracting states. It has held that the rules aimed at preserving the confidential or secret nature of certain sensitive items of information and at prosecuting acts which run counter to that aim “vary considerably not just in terms of how secrecy is defined and how the sensitive areas to which the rules relate are managed, but also in terms

\(^{54}\) ECtHR, Görmüs and others v. Turkey, above note 13, para. 52.
\(^{55}\) ECtHR, Goodwin v. United Kingdom, *supra* note 1, para. 39; Voskuil v. The Netherlands, above note 1, para. 65.
\(^{56}\) ECtHR, Stoll v. Switzerland, above note 1, para. 110; Görmüs and others v. Turkey, above note 13, para. 48.
\(^{57}\) ECtHR, Telegraaf Media Nederland Landelijke Media B.V. and others v. The Netherlands, above note 1, para. 123.
of the practical arrangements and conditions for prosecuting persons who disclose information illegally. The Court therefore accords the domestic courts a margin of appreciation in assessing the necessity and scope of an interference because of their “direct, continuous contact with the realities of the country”.

At the same time, however, the Court has repeatedly stated that in cases where freedom of the press is at stake, the authorities have only a limited margin of appreciation to decide whether a “pressing social need” exists.

What is more, the Court emphasizes that “the most careful scrutiny on the part of the Court” is called for when the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern.

The concrete repercussions of invoking the margin of appreciation doctrine remain therefore unclear: On the one hand, the fact that press freedom is concerned leads to a limited margin of appreciation. On the other hand, the fact that the press publishes confidential information grants the domestic courts a wider margin of appreciation. Consequently, in cases concerning disclosures of confidential information by the press, references by the Court to the margin of appreciation doctrine do not seem to be actually operationalized. In practice, it can be observed that the Court might name the doctrine among the principles that need to be applied to the facts of the case. When it comes to the actual weighing of interests, however, the Court exercises its jurisdiction apparently without constraints. Neither does the Court clearly state which exact questions it leaves to be answered by the domestic courts, nor does it limit itself to merely controlling whether there was an “obvious” violation. It therefore seems to amount to a mere payment of lip service when the Court, after thoroughly balancing an extensive number of interests and arguments, comes to the conclusion that “the domestic authorities did not overstep their margin of appreciation.”

It might be concluded that references by the Court to the margin of appreciation doctrine should primarily accommodate the member states’ concern regarding the Court’s subsidiary role as laid down in Articles 1, 13 and 35. Concrete repercussions that could

59 ECtHR, Stoll v. Switzerland, above note 1, para. 107.
60 ECtHR, Bédat v. Switzerland, above note 1, para. 54.
61 ECtHR, Editions Plon v. France, above note 1, para. 44; Stoll v. Switzerland, above note 1, para. 105.
62 ECtHR, Stoll v. Switzerland, above note 1, para. 106.
63 See, for instance, ECtHR, Stoll v. Switzerland, above note 1, para. 162.
64 Additional Protocol No. 15 amending the Convention by, inter alia, introducing a reference to the principle of subsidiarity and the margin of appreciation doctrine has not yet entered into force. The text of Protocol No. 15 can be found here: http://www.echr.coe.int/Documents/Protocol_15_ENG.pdf, last accessed on 31 August 2016.
influence the outcome of the case are at least not visible in the Court’s judgments.

Assessing the case material

When it comes to systematizing the Court’s jurisprudence on searches and seizures in cases of disclosures of secret information, it needs to be observed that the Court usually discusses a number of arguments without clearly categorizing them. Rather, the Court takes into account various factors that together form the basis of its decision. However, having in mind the German Constitutional Court’s jurisprudence presented earlier, it shall be examined whether the Court recognizes at least one “red line”: that searches and seizures, which exclusively or primarily serve the purpose of identifying a source, constitute, in every case, a violation of press freedom. Subsequently, various other arguments employed by the Court will be discussed.

Targeting sources: A “red line” never to be crossed?

In seven of the ten cases analyzed for this article, the Court found that the state authorities executed searches and seizures in order to establish the identity of the source. In Roemen and Schmit where Mr. Roemen had published an article making public that a member of the government had been convicted of tax fraud, the Court noted that “the searches in the instant case were not carried out in order to seek evidence of an offence committed by the first applicant other than in his capacity as a journalist. On the contrary, the aim was to identify those responsible for an alleged breach of professional confidence and any subsequent wrongdoing by the first applicant in the course of his duties.”

Similar accounts can be found in the cases of Ernst, Tillack, Martin, Ressiot (“single aim”), Nagla, and Görmüs. In all of these cases, the public authorities’ exclusive or primary goal was to unveil the identity of the informant. The Court compares these searches and seizures with court orders compelling disclosure, and holds:

65 ECtHR, Roemen and Schmit v. Luxembourg, above fn. 5, para. 52.
66 ECtHR, Ernst and others v. Belgium, above fn. 6, paras. 100, 103.
67 ECtHR, Tillack v. Belgium, above fn. 7, para. 63.
68 ECtHR, Martin and others v. France, above fn. 9, para. 85.
69 ECtHR, Ressiot and others v. France, above note 10, para. 122.
70 ECtHR, Nagla v. Latvia, above fn. 11, paras. 82, 95.
71 ECtHR, Görmüs and others v. Turkey, above fn. 13, para. 57.
even if unproductive, a search conducted with a view to uncover a journalist’s source is a more drastic measure than an order to divulge the source’s identity. This is because investigators who raid a journalist’s workplace unannounced and armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist.\textsuperscript{72}

The Court further notes that “the extent to which the acts of compulsion resulted in the actual disclosure or prosecution of journalistic sources [is] irrelevant for the purposes of determining whether there has been an interference with the right of journalists to protect them.”\textsuperscript{73} In other words, it does not matter whether the identity of an informant has actually been unveiled. In cases of searches and seizures that aim at disclosing a source, this aim is enough to characterize the operation as an interference\textsuperscript{74}, despite of a potentially contradictory opinion in \textit{Stichting}.\textsuperscript{75}

However, it would be erroneous to conclude that a search for the source is in any case in violation of the Convention. Rather, the conclusion that the Court draws from it is that “the measures thus undoubtedly came within the sphere of the protection of journalistic sources.”\textsuperscript{76} Consequently, the fact that state authorities aim at closing the internal leak by searching a newspaper’s office needs to be assessed in light of the strict standards that apply to the protection of journalistic sources. But it does not in itself constitute a violation. This becomes clear when the Court, in \textit{Tillack}, held:

\begin{quote}
It is clear that, at the time when the searches in question were carried out, their aim was to reveal the source of the information
\end{quote}

\begin{notes}
\item\textsuperscript{72} ECtHR, Roemen and Schmit v. Luxembourg, above fn. 5, para. 57; similarly, in Ernst and others v. Belgium, above fn. 6, para. 103; Ressiot and others v. France, above fn. 10, para. 125; Nagla v. Latvia, above fn. 11, para. 95; Görmüs and others v. Turkey, above fn. 13, para. 57.
\item\textsuperscript{73} See, for instance, ECtHR, Sanoma Uitgevers B.V. v. The Netherlands, above note 8, para. 67.
\item\textsuperscript{74} Note: Not necessarily as a violation; see the following paragraphs.
\item\textsuperscript{75} ECtHR, Stichting Ostade Blade v. The Netherlands, above fn. 12, para. 72: When responding to the applicant foundation’s complaint “that the search destroyed the confidentiality of information entrusted to the magazine’s editors”, the Court, in a quite lapidary fashion, held that “nothing is known about this information, nor has the applicant foundation suggested that it, its informants and contributors or its readership suffered as a result.” However, in that case, the persons who had sent the letter were not considered “sources” in the sense of Article 10, see below “Source or not?”.
\item\textsuperscript{76} ECtHR, Roemen and Schmit v. Luxembourg, above note 5, para. 52; Martin and others v. France, above fn. 9, para. 85; Ressiot and others v. France, above note 10, para. 123.
\end{notes}
reported by the applicant in his articles. Since OLAF’s internal investigation did not produce the desired result, and the suspicions of bribery on the applicant’s part were based on mere rumours, (...) there was no overriding requirement in the public interest to justify such measures.\(^77\)

Thus, it can be seen that an “overriding requirement” justifying the search for the source, is, at least in theory, still conceivable. Similar evidence can be taken from the Roemen case. There, the Court found that the Government had “entirely failed to show that the domestic authorities would not have been able to ascertain whether [there were crimes committed] without searching the applicant’s home and workplace.”\(^78\) This means that the search of Mr. Roemen’s home and workplace was not the least severe measure. The public authorities should have launched a thorough internal investigation first. However, in case these alternative measures had all failed, searches and seizures at a journalist’s home and workplace were not a total taboo.

Likewise, in Ernst, the Court stated that the Belgian government had failed to show that, in absence of the impugned searches and seizures, it would not have been able to investigate the leaks emanating from the office of the Public Prosecutor.\(^79\) Comparable reasoning can be found in Martin.\(^80\) In Ressiot, the Court accepted that the French authorities had, in vain, lead prior investigations to establish the identities of potential informants among the judicial personnel. It then continued by holding that France had nevertheless violated Article 10 due to the excessive and intimidating scale (“impressive and spectacular”) of the operation.\(^81\) In Nagla, the Court supported its finding that the search of Ms. Nagla’s home was designed to disclose her sources by holding that the search warrant was drafted in very vague terms and that there was no proper judicial oversight.\(^82\) In Görmüs, the Court held that the search was not necessary because the material sought by the military prosecutor had already been handed over. Moreover, the search and seizure were excessive in character.\(^83\)

From this material, it can be seen that searches and seizures which exclusively or primarily target a journalist’s source do not constitute a “red line” in the jurisprudence of the Court. Rather, the Court appreciates this fact in the context of asking whether a particular operation was actually

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77 ECtHR, Tillack v. Belgium, above fn. 7, para. 63.
78 ECtHR, Roemen and Schmit v. Luxembourg, above fn. 5, para. 56.
79 ECtHR, Ernst and others v. Belgium, above fn. 6, para. 102.
80 ECtHR, Martin and others v. France, above fn. 9, para. 86.
81 ECtHR, Ressiot and others v. France, above fn. 10, paras. 122, 125.
82 ECtHR, Nagla v. Latvia, above fn. 11, paras. 95, 100-101.
83 ECtHR, Görmüs and others v. Turkey, above fn. 13, para. 58.
“necessary”: State authorities must choose the least severe means (e.g. internal investigations) and may only resort to searches and seizures at press premises if all other measures have been conducted to no avail. The initial thesis drawn from the example of the German Constitutional Court holding that such operations inherently violate press freedom needs, therefore, to be qualified: Targeting sources by searching journalists’ workplaces or homes may be one argument in finding a violation of Article 10, but it is not, in itself, the decisive one. Rather, the Court assesses whether such operation was actually necessary.

Excessive and intimidating searches and seizures

In six of the ten cases analyzed for this article, the Court found that the particular searches and seizures were not only unnecessary but even excessive and intimidating. Systematically, these cases can be treated under the question whether an interference constituted the least severe means. However, as will be shown, the Court found them to have a particularly deep impact on the protection of journalistic sources.

In Ernst, where the prosecution launched investigations into information leaks emanating from its own office, the Court noted that it was “struck by the massive character of the operation” that took place at eight locations simultaneously and that employed 160 police officers. Numerous documents, discs and hard drives were seized from journalists. Similarly, in the case of Tillack, the Court took the amount of property seized by the authorities into consideration: “Sixteen crates of papers, two boxes of files, two computers, four mobile telephones and a metal cabinet. No inventory of the items seized was drawn up. The police even apparently lost a whole crate of papers, which were not found until more than seven months later.” Thus, the measures were disproportionate.

Though in Sanoma the public authorities merely threatened to conduct a large-scale search, the Court made clear that, had it been executed, “not only the offices of “Autoweek” magazine’s editors but those of other magazines published by the applicant company would have been exposed to a search which would have caused their offices to be closed down for a significant time.” In Ressiot, the case that involved revelations about doping at the Tour de France, the Court also highlighted the operation’s scale (searches at editorial offices, seizures of computers and messaging lists, surveillance of

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84 ECtHR, Ernst and others v. Belgium, above fn. 6, para. 101 (author’s translation from the French original).
85 ECtHR, Tillack v. Belgium, above fn. 7, para. 66.
86 Ibid., para. 68.
87 ECtHR, Sanoma Uitgevers B.V. v. The Netherlands, above fn. 8, para. 70.
mobile and fixed telephones). It concluded that “the searches at the journals’ offices, impressive and spectacular, must have surely left a deep impression on the professionals who worked there, and they must have perceived them as a potential threat to their freedom to exercise their profession.”

In the case of Nagla, the Court marked the searches and seizures conducted by the Latvian authorities as excessive, primarily as a result of a wide-reaching search warrant. The Court held that “the search warrant was drafted in such vague terms as to allow the seizure of “any information” pertaining to the crime under investigation allegedly committed by the journalist’s source, irrespective of whether or not his identity had already been known to the investigating authorities.” Furthermore, the data storage devices that were seized by the authorities contained not only information capable of identifying her source of information, but also information capable of identifying her other sources of information.

Finally, the Court denounced a particularly excessive behavior of the Turkish authorities in the case of Görmüs. Here, the concerned journalists had already handed over the impugned material that they had received from a whistleblower. Nonetheless, the officers proceeded to copy the complete data of 46 computers—an operation that took about 65 hours. The Court held that such an intervention was “of a nature that discourages all possible sources from assisting the press in informing the public about questions regarding the armed forces, even if these questions are of public interest. (...) The indiscriminate extraction of all data located on the devices allowed the authorities to collect information that did not have any link to the investigated facts.”

As can be seen from the preceding accounts, the Court relates the excessive and intimidating character of an operation to the protection of journalistic sources. According to the Court’s jurisprudence, unnecessary searches and seizures are disproportionate and thereby violate Article 10. However, excessive, intimidating, or “spectacular and impressive” operations may have an even deeper impact on press freedom because potential sources are likely to be scared off. The Court therefore considers excessive searches as particularly harmful not only for the concerned journalists in a given case, but rather holds that such measures have “a dissuasive effect on other journalists

88 ECtHR, Ressiot and others v. France, above fn. 10, para. 125 (author’s translation from the French original).
89 ECtHR, Nagla v. Latvia, above fn. 11, para. 95.
90 Ibid., para. 82.
91 ECtHR, Görmüs and others v. Turkey, above fn. 13, paras. 59, 73 (author’s translation from the French original).
or other whistleblowers by discouraging them from reporting irregular or debatable actions by public authorities.”

Source or not?

The answer on the question whether a person furnishing confidential material to the press is considered a “source” has a substantial influence on the outcome of the “necessary in a democratic society” test. As has been shown in the preceding paragraphs, the Court considers the protection of journalistic sources one of the cornerstones of press freedom under Article 10 of the Convention. Principally, every informant of the press is considered a source. However, the case of Stichting provides an example of circumstances under which a person who has sent material to the press would not be considered a source. In Stichting, the Court eventually held that there was no violation of Article 10.

According to the facts of the case, the Dutch police forces searched the editorial office of the bi-weekly magazine “Ravage”. The day before, the magazine’s editors had issued a press release in which they announced the upcoming issue of the magazine, to be released the following day, which would include the letter of the “Earth Liberation Front” (ELF) claiming responsibility for a bomb attack. The search was carried out in the context of criminal investigations against the perpetrators of three bomb attacks that had occurred in Arnhem.

In response to the applicants’ claim that the case concerned the protection of journalistic sources and that the Court’s relevant case law should apply, the Court held that “it does not follow [from its case law] that every individual who is used by a journalist for information is a “source” in the sense of the case-law mentioned.” The Court continued:

It is undeniable that, even though the protection of a journalistic “source” properly so-called is not in issue, an order directed to a journalist to hand over original materials may have a chilling effect on the exercise of journalistic freedom of expression. That said, the degree of protection under Article 10 of the Convention to be applied in a situation

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92 ECtHR, Görmüs and others v. Turkey, above fn. 13, para. 74 (author’s translation from the French original).
93 Stichting is the only case among the cases analyzed for this article in which the Court did not find a violation of Article 10.
94 ECtHR, Stichting Ostade Blade v. The Netherlands, above fn. 12, para. 62.
like the present one does not necessarily reach the same level as that afforded to journalists when it comes to their right to keep their “sources” confidential. The distinction lies in that the latter protection is twofold, relating not only to the journalist, but also and in particular to the “source” who volunteers to assist the press in informing the public about matters of public interest.95

Before this background, the Court held that the magazine’s informant was “not motivated by the desire to provide information which the public were entitled to know.” Rather, he “was claiming responsibility for crimes which he had himself committed; his purpose in seeking publicity through the magazine “Ravage” was to don the veil of anonymity with a view to evading his own criminal accountability. For this reason, the Court takes the view that he was not, in principle, entitled to the same protection as the “sources” in [other cases].”96 The outcome of the case was thereby substantially predetermined because the Court accorded the magazine a significantly lower level of protection. One might even argue that the Court restricted its control to an unnecessarily narrow scope. This becomes clear when the Court brushed off claims that other investigatory leads were available. In this regard, the Court responded:

Even assuming such to be the case, the Court cannot find that the original document, whether on its own or in conjunction with other evidence, was incapable of yielding useful information. Indeed, if that be so then it cannot be seen what prevented the editors of the magazine from handing it over of their own accord.97

In this passage, it appears that the Court had made up his mind already and that it was not willing to depart from that route. As the sender of the letter was not considered a source, the argument that the searches might possibly not have been the least severe means is declared irrelevant. In other words, just because the protection of journalistic sources was of reduced importance in the given case, the Court did not apply a full-scale proportionality test anymore. It did not determine whether the searches and seizures were actually necessary. This is questionable from a methodological point of view and should be criticized. In any event, the case of Stichting demonstrates how the

95 Ibid., para. 64.
96 Ibid., para. 65.
97 Ibid., para. 71.
outcome of a case may depend on the question whether a provider of material is considered a source or not. This needs to be born in mind when assessing claims under Article 10.

Reporting questions of public interest

When dealing with press reports disclosing secret information, the Court normally assesses whether the respective article has contributed to the discussion of a topic of public interest. If this is the case, an interference “cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.”98 Hence, the threshold for justification is lifted to a higher level: Searches and seizures must not only be the least severe means, rather, the underlying public interest in the protection of confidential information must also clearly outweigh the public’s right to know. In this regard, the Court apparently employs a balancing test in order to assess a given measure’s proportionality in the narrow sense. In this balancing exercise, the Court also takes into account whether the impugned information can (still) legitimately be considered confidential and whether the journalists acted in good faith.

In the case of Bluf!, the Court had little difficulty in weighing the concerned interests as it held that the impugned security service’s quarterly report was not confidential anymore. The document in question was six years old at the time of the seizure. Further, the Court noted, “it was of a fairly general nature, the head of the security service having himself admitted that in 1987 the various items of information, taken separately, were no longer State secrets (…). Moreover, the report was marked simply "Confidential", which represents a low degree of secrecy.” Finally, the publishers reprinted a large number of copies and sold them in the crowded streets of Amsterdam. “That being so, the protection of the information as a State secret was no longer justified and the withdrawal of issue no. 267 of Bluf! no longer appeared necessary to achieve the legitimate aim pursued.”99 Accordingly, the Court found the searches and seizures at the editorial offices in violation of Article 10.

In Roemen, the Court noted that Mr. Roemen had published an established fact concerning a fiscal fine that had been imposed on a minister by decision of the director of a public authority. There was, therefore, “no doubt that he was commenting on a subject of general interest.”100 Similarly, in the case of

98 E CtHR, Fressoz and Roire v. France, above fn. 1, para. 51; Roemen and Schmit v. Luxembourg, above fn. 5, para. 54.
99 E CtHR, Vereniging Weekblad Bluf! vs. The Netherlands, above fn. 4, paras. 41-45.
100 E CtHR, Roemen and Schmit v. Luxembourg, above fn. 5, para. 54.
Martin, the articles written by Mr. Martin and his colleagues quoted from a provisional auditing report alleging that the region of Languedoc-Roussillon had been mismanaged under the presidency of a certain politician. The Court held that information relating to the management of public funds by local elected officials and civil servants was “a topic of general interest for the local community; the applicants had the right to make this information known to the public.” Furthermore, the Court noted that the journalists had marked the auditing report as provisional and subject to possible changes. They had therefore acted in good faith and in accordance with journalistic ethics.

Unsurprisingly, the Court also found that the topics on which Mr. Ressiot and his colleagues had reported on – doping in professional sports, in this case cycling, as well as issues of public health connected to this affair – were of a “very important” public interest. The articles, therefore, responded to an increasing public demand for information about the practices of doping in sports and issues of public health. The public had “a legitimate interest in being informed as well as in informing itself about the investigation [into doping allegations concerning the “Cofidis” cycling team].” Though the articles contained information from the prosecutor's investigation file including telephone tapping transcripts and lists of seized items, the public’s right to know, in conjunction with the excessive character of the searches and seizures, outweighed the grounds of secrecy attached to an ongoing criminal investigation.

In Nagla, Ms. Nagla had reported about probable security flaws in a database maintained by the Latvian state revenue service. The Court noted that the subject-matter on which she had reported made a twofold contribution to a public debate. It was primarily aimed at keeping the public informed about the salaries paid in the public sector at a time of economic crisis, when a variety of austerity measures had been introduced. It is not insignificant that, around the same time, legislative amendments were being drafted to make information concerning salaries in public institutions available to the general public (...). In addition, the applicant’s broadcast also exposed security flaws in the database of the State Revenue Service, which had been discovered by her source.

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101 ECtHR, Martin and others v. France, above fn. 9, para. 79 (author’s translation from the French original).
102 Ibid., para. 81.
103 ECtHR, Ressiot and others v. France, above fn. 10, paras. 114-116 (author’s translation from the French original).
104 ECtHR, Nagla v. Latvia, above fn. 11, para. 97.
Before this background and under the impression of the disproportionate seizures, the state authority’s operation was not justified by an “overriding requirement”.

Finally, in the case of Görmüs, the Court had the opportunity to address the notion of “national security” invoked by Turkey. Mr. Görmüs and his colleagues had revealed that the General Staff of the Turkish armed forces had created lists of journalists and non-governmental organizations considered to be either pro or against the armed forces. The Court held that the disclosure of this information was not able to threaten national security, clarifying that this notion needs to be interpreted in a restrictive manner.105 On the contrary, the articles contributed to a public debate about the role of the Turkish military in the country’s politics.106 “Excluding questions relating to the armed forces completely from the public debate is not acceptable.”107 Rather, having regard to the freedom of access to information in a democratic society, the Court held that the public interest in the disclosure of information evidencing debatable practices of the armed forces is of such an importance that a possible loss of the public’s confidence in the military, in the wake of the disclosure, must be accepted. The Court reiterated that “a free discussion of problems of public interest is essential in a democratic state; one should beware of discouraging the citizens of expressing themselves about these problems.”108

The Court also held that the journalists had reported in an objective manner, without any intention to obtain personal gains, and that there was no evidence that they held any personal grudge against the military services concerned.109 Thus, they had acted in good faith.

From these accounts, it can be deduced that reports on topics of public interest enjoy a high level of protection. Though the public’s right to know still needs to be balanced with possible grounds for secrecy, only overriding requirements on the side of the state or an individual may justify an interference with press freedom.110 An existing public interest therefore reinforces the arguments for holding particular searches and seizures in violation of the Convention.

105 ECtHR, Görmüs and others v. Turkey, above fn. 13, para. 37.
106 Ibid., paras. 54-55.
107 Ibid., para. 62 (author’s translation from the French original).
108 Ibid., para. 63 (author’s translation from the French original).
109 Ibid., para. 69.
110 With regard to ongoing criminal investigations, the presumption of innocence can be a strong argument against disclosures; see, for instance, ECtHR, Bedat v. Switzerland, above note 1; further, Tourancheau and July v. France, above note 1; Campos Damaso v. Portugal, above fn. 1; Laranjeira Marques da Silva v. Portugal, above fn. 1; Pinto Coelho v. Portugal, above note 1; Ressiot and others v. France, above fn. 10.
Conclusion

The analysis of the Court’s jurisprudence relating to searches and seizures in cases where journalists had published confidential material enables the formulation of rough guidelines for the assessment of future cases. First of all, when it comes to searches and seizures that have an impact on the protection of journalistic sources, the Court demands mechanisms for review by a judge or other independent and impartial decision-making body. Second, searches that primarily or exclusively aim at disclosing the identity of the source are not by itself prohibited. However, this fact may serve as a strong argument that there was a violation of Article 10. Third, any intimidation of journalists by excessive interferences will very likely result in a violation. Fourth, if a provider of information is not considered a “source”, the level of protection as regards press freedom is significantly lowered. And fifth, reports on matters of public interests enjoy a high level of protection. A matter is of particular public interest if it reveals mismanagement or other debatable behavior on the part of the state.
Rethinking Violence in Myanmar: A Confronting Imperative for Domestic and International Actors

Jonathan Bogais *

Introduction

Exploitation, inequality, discrimination reveal the universal rights that violence denies. These three paradigms are central to the critical juncture Myanmar faces. The ability of the new government to address them will determine the success – or failure – of the transitional process from five decades of autocratic rule to democracy.

This article aims to explore violence in Myanmar and the gruelling task facing the newly elected president, Htin Kyaw, and National League for Democracy (NLD) leader, Aung San Suu Kyi. It examines the situation on the ground and the pressures from domestic and international actors. It looks at the complex environment in which violence evolves; the political ambiguity of the figures of violence and, symmetrically, the ambiguity of politics when it is confronted with violence. It concludes with a recommendation to all actors when looking at the way ahead for the new government.

Challenges

With a new government and parliament backed by a strong mandate, Myanmar has the opportunity to develop a comprehensive programme of legislative reforms in compliance with international human rights norms to protect the rights of the whole population. Involving civil society, reforming and strengthening the independence of the judiciary and improving access to justice will be indispensable to strengthen the rule of law and build trust in national institutions.

To address these objectives, the new leadership must first face its greatest challenge: violence, which is endemic at all levels of society. Partly a legacy of five decades of authoritarian rule under the previous military dictatorship, violence in Myanmar involves ethnic and religious conflicts, internally displaced people, incitement and discrimination, land grab, forced eviction and child abuse. Human rights violations are systemic and legitimised through a vast number of complex legislations enacted by previous rulers. The current Constitution (2008) was framed to discriminate against minorities and civil society. It also prevented Aung San Suu Kyi from contesting the presidency, obliging her to use a subterfuge – the specially created position of State Adviser – to effectively govern the country ‘above the president.’ Another form of violence, however, that is not a legacy and is deeply entrenched at all levels of Myanmar’s society is religious violence. So far, there has

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been no attempt to structurally address the serious human rights concerns it causes on the ground by any party, to the contrary.

The second challenge facing the new leadership is a need for an entire overhaul of the judicial system, without which the reform process will be obstructed. An independent judiciary capable of enforcing legislation fairly and consistently is necessary for the operation of the rule of law. The separation of powers and the independence of the judiciary in Myanmar are guaranteed by the 2008 Constitution yet are hindered by the control the executive exercises over the judiciary. There is also widespread evidence of judicial corruption. A December 2015 report of the Judicial and Legal Affairs Complaints and Grievances Investigation Committee stated that the judiciary remains one of the country’s most corrupt institutions, confirming the existence of a chain of bribery involving judges at different levels taking instructions from their superiors. The report also stated that training given to individuals holding judicial positions was inadequate.

**Issues at Stake**

Violence in Myanmar falls into two main categories: (1) violence caused by conflict (ethnic and religious); and, (2) violence caused by development such as land grab and forced evictions.

**Ethnic Conflicts**

A Nationwide Ceasefire Agreement (NCA) was signed between the Government and eight armed groups on 15 October 2015. This follows the signature of a number of bilateral ceasefire agreements with 14 ethnic armed groups since 2011. However, violent confrontations continue in parts of Myanmar, including Kachin and Shan States, as well as Chin, Rakhine and Karen States. The conflict between two ethnic groups, the Ta’ang National Liberation Army (TNLA) and the Restoration Council of Shan State (RCSS) in Shan State, which first erupted in November 2015 has recently intensified.

Human rights violations are committed by all parties to the conflicts and civilians bear the burden of the ongoing fighting. Attacks against civilian populations, extrajudicial killings and torture, inhumane and degrading treatment, abductions of men, women and children, as well as looting, property confiscation and destruction, have been reported. Allegations of forced recruitment, child and underage recruitment - notably on the part of ethnic armed groups – are still made. Over 96,000 people remain displaced in Kachin and northern Shan States as a result of the conflict. 3,000 new displacements have occurred in February 2016 following fighting between the RCSS and the TNLA. In southern Shan State, many of those displaced by the clashes in late 2015 have reportedly now returned. However, 2,000 people remain displaced, some in camps lacking adequate drinking water and sanitation.
Religious Violence

Hundreds of protesters joined by some Buddhist monks demonstrated outside the US Embassy in Yangon on 28 April this year over its use of the term *Rohingya* in an Embassy statement of concern following the drowning of dozens of people after their boat capsized off the coast of Rakhine state. The protest outlines community polarisation against Muslims fueled by hate speech and calls for extreme measures by radical Buddhist groups such as the *Ma Ba Tha* in the name of “protecting race and religion”. Attacks and threats are mainly directed at Muslim communities but also often target anyone offering a different perspective and speaking for non-discrimination.

The need to address the deeply entrenched human rights issues in Rakhine State and to take adequate steps to put an end to highly discriminatory policies and practices against the Rohingya and other Muslim communities constitutes a significant challenge for the new government. These restrictive policies, which deny the affected population some of their most fundamental rights, severely impact all aspects of their life, including access to livelihood. Restoring freedom of movement for all is of particular importance. Evidence on the ground suggests that ongoing discriminatory restrictions to freedom of movement are largely used to contain the Rohingya population within and between townships and people there must obtain specific authorisation to travel outside Rakhine State.

Local orders in northern Rakhine State also require Rohingya to obtain permission to marry and seek to limit couples to two children. Consequently, additional children may not be included in the family household list and remain unregistered with detrimental consequences for the child. Children have the right to be registered at birth notwithstanding nationality, statelessness or legal status of the child’s parents. These local orders are the results of *Ma Ba Tha*’s local and national campaigns against Muslims that received bi-partisan support before the November 2015 election. The strong anti-Muslim feeling in the predominantly Buddhist (Theravada) country is unlikely to change and neither is the top-down rejection of the Rohingya’s existence. Aung San Suu Kyi still refers to them as *Bengalis* (not Rohingya) and labels them as illegal immigrants in Myanmar. Meanwhile, *Ma Ba Tha* has already indicated that it would strongly oppose any attempt to change the orders. In this highly polarised and discriminatory context, the Rohingya community is unlikely to receive the help it so desperately needs, leading to more departures by sea and more tragedies.

Internally Displaced People (IDPs)

Despite calls from the UN Special Rapporteur on Myanmar, Yanghee Lee, requesting the government to uphold the right to health of the entire population in Rakhine and ensure equal access and medical treatment to all in public health facilities, irrespective of religion, ethnicity or citizenship, reports of cases of preventable death due to lack of access to emergency medical treatment by Muslim patients are mounting. Restrictions on freedom of movement affect mostly Rohingya patients who also often fear for their safety outside communities or camps. The Special
Rapporteur highlighted the increasingly dire housing conditions for the majority of IDPs, including some 95,000 located in Sittwe rural camps. Longhouses accommodating multiple families were initially designed to last only two or three years and many are now collapsing. Attempts by the Special Rapporteur to secure long-lasting solutions to displacement in accordance with international standards, including voluntary returns to places of origin and protection from continuous segregation of communities have failed. The reality on the ground suggests that such protection cannot – and very likely would not - be guaranteed.

According to the Special Rapporteur, the lack of access to IDP camps hampers much-needed information collection and reporting on conflict-related concerns and violations. Humanitarian access to 1,000 civilians displaced in Sumprabum (Kachin State) remains restricted, despite reports indicating an urgent need for emergency shelter and medical supplies. An estimated 4,000 individuals reportedly remain in China displaced from the Kokang self-administered zone. Little information is available on the status of the fighting in this area nor on steps taken to investigate alleged human rights violations reported during the fighting in 2015. IDPs in camps in and around this area are apparently facing difficult conditions, with restrictions on movement, and no access to markets, education or livelihoods. Fighting has also flared in Rakhine and southern Chin States between the Arakan Army and the Myanmar army, displacing hundreds of people.

United Nations teams and their partners do not have regular, independent and predictable access to all those needing humanitarian assistance.

**Land Grab and Forced Evictions**

Land issues present another critical challenge for the new Government. An estimated 70 per cent of Myanmar’s population live in rural areas relying on agriculture and related activities. Forced evictions, land-grabbing and land confiscations for development projects, mining and other natural resource extraction are increasing poverty, displacement and destroying livelihoods, with consequential effect on a range of other rights, including access to health and education, and a loss of cultural and traditional knowledge. There is usually little or no consultation with affected communities, limited or no compensation provided, and limited access to effective legal remedies. In an attempt to protect their rights, people are increasingly resorting to public protests against land confiscations. Unfortunately, some of those exercising their right to peaceful assembly, including farmers and land-rights activists, face intimidation, threats and criminal prosecution, as the complex web of legislations in place prevents them from exercising their rights. Arrests are frequent, a situation made worse by the lack of effective rule of law and a corrupt judicial system.

The Land Confiscation Investigation Commission reported to the Union Parliament on 25 January 2016 that many land disputes remain unresolved and that government bodies did not comply with relevant laws, procedures and recommendations from the Commission. The new National Land Use Policy, adopted in January 2016, could be the first step towards an overarching land law following a process of extensive consultation with all stakeholders to help protect the rights of
farmers and rural communities across Myanmar, and increase the confidence of the private sector looking to invest.

Legal Provisions

The continuing application of vexed legal provisions (both historic and recently-enacted) to arrest, prosecute, and convict civil society actors, journalists, and human rights defenders needs to be addressed with particular attention to sections of the Peaceful Assembly and Peaceful Procession Laws, the Penal Code of the Unlawful Associations Act, the Official Secrets Act, the Emergency Provisions Act and the Telecommunications Act. Detention under these laws is incompatible with international human rights standards.

Myanmar's UN Special Rapporteur, Yanghee Lee, has just presented the new government with a 100-day challenge. The task list includes lifting restrictions on freedom of movement in Rakhine State, meeting a 30 percent quota for women participating in the peace process and stopping the use of landmines. “How can you expect communities to recreate bonds if they continue to be segregated?” she said. Pressure is also mounting within the international community for the new government to find solutions to a whole range of structural, economic and human rights issues to help build investors’ confidence in the new Myanmar.

Conclusion

Myanmar in its current state is an overly complex environment and a broad challenge to the new government that requires a structural review of most institutions. Quick-fixes may appease international actors but are not the solution. Instead of trying to derive the three key-paradigms: exploitation, inequality, discrimination, logically from a single or from a superior essence of the political as many international observers and commentators do, one should problematise how they become articulated in different conjunctures and political practices. This topography has another function which is more analytical. It schematises the notion that modalities of violence are intrinsically heterogeneous and can never become reduced to a single, simple causality - and the idea that they continuously overlap and reinforce each other. Disjunction and fusion must be represented as complementary characteristics of violence, the understanding of which may be the first step towards a much needed cultural adjustment and the basis for an indispensable series of compromises.
Since 2015, the Lower Mekong region is going through an extreme drought period, with high temperatures, less than average rainfall and reduced flow in rivers. Such extreme situations are litmus tests for the functioning and the resilience of water resources management strategies and water governance as such. In particular, they show whether agreed upon regional water governance arrangements work – or not. One just needs to open a newspaper these days in Cambodia, Laos, Thailand or Vietnam to see that the tests fail in the Lower Mekong region. The unmitigated impacts of the drought – reduced flow and therefore insufficient usable water as well as sea water intrusion into the Mekong delta – have repercussions in all Mekong countries. The drought is a risk to social coherence, food security, ecology, and economic activities beyond agriculture such as navigation. Even though there is scientific proof that in a strong El Niño year, droughts are to be expected in Southeast Asia, the 2015/16 drought seems to be catching the governments of the Mekong basin by surprise.

Actual responses illustrate that long-term, coordinated and joint management of the transboundary Mekong water resources, as necessary as it is in such a crisis situation, is still work in progress. While Vietnam prepares its Mekong delta communities for emergency response to the increasing salinization of its groundwater, canals and rivers, Cambodia had to start distributing emergency drinking water to some drought-stricken communities. Both countries expect severe losses in their rice production this year. And both countries are at the receiving end of the Mekong basin. This is especially relevant in a year like 2015/16 that saw too little rainfall to e.g. fill the Tonle Sap Lake and enable it to play its role as gigantic water buffer for the dry season needs. Laos seems to be torn between grappling with domestic drought impacts, showing responsibility by helping out Cambodia and Vietnam by releasing water from its Nam Ngum 1 Dam and others, and working with Thailand on a bilateral cross-border (and thus cross-Mekong) diversion of Nam Ngum water into Thailand’s dry Northeast, a project that yields little
tangible benefits for Laos, apart from diplomatic credit by Thailand. Thailand itself has lately shown little consideration of transboundary accountability, trying to quickly put into place massive diversion schemes for Mekong waters. Although such dry season diversions need to be notified under the Mekong Agreement of 1995, that Cambodia, Laos, Thailand and Vietnam are signatories to, Thailand has so far avoided this step.

The signing of the Mekong Agreement in 1995 created the Mekong River Commission (MRC), an intergovernmental organisation which provides a unique platform for its four member countries to tackle challenges connected to water resources management in a joint manner. The mandate of MRC is to “promote and coordinate sustainable management and development of water and related resources for the countries' mutual benefit and the people's well-being”. It has a regional flood centre that provides monitoring and forecasting services, but has only recently started to work on drought management.

Typical to crisis situations are attempts to divert attention from own shortcomings. Several national media outlets in the Mekong region have clearly linked the 2015/16 drought to water use and above all hydropower development upstream. In particular, Chinese dam building on the Upper Mekong has been linked to the current drought impacts. Hydropower development certainly has impacts on environmental quality, biodiversity and depending on the type of dam, also flow quantity, if international sustainability criteria aren’t followed in the planning and implementation. Although China has already built six Mekong dams, and is building or planning at least five more, the total water storage needed to actually cause a drought as massive as the current one in the Lower Mekong basin, has not been built so far. China contributes a long-term average of only 17% to the total annual flow of the Mekong River. The operational regime of the Chinese dams (release water for power production in the dry season, store water in the wet season) is in line with the water needs of the Lower Mekong countries, which are higher in the dry season than in the wet season. The Chinese developments have led and will further lead to a pronounced shift of flow that would naturally occur during the wet season into the dry season, thereby levelling the historic hydrograph of the Lower Mekong.

Given the fact that some water storage is available in the Chinese reservoirs prompted Lower Mekong governments, particularly Vietnam, to ask for a release of stored water to ease the sea water intrusion in the Mekong delta. The Chinese government announced a temporary water release from its Jinghong dam from mid-March to mid-April. Accompanied by a lot of publicity and words of thanks by regional leaders, such a release to free storage space in the reservoirs before the start of the seasonal rains would have happened sooner
It’s a gesture of goodwill, not less, not more. But this move was a welcome backdrop for the Chinese efforts to be seen as a cooperative Lancang-Mekong Cooperation (LMC) partner by the MRC member countries, culminating in the LMC’s Sanya Declaration on 23 March 2016 that made explicit reference to future cooperation on flood and drought management. Water resources management of the Mekong has thus reached the realm of regional geopolitics. Little is known outside foreign ministries on the actual content of the LMC concept note and the so called “early harvest” investment projects. The LMC still needs to show whether it will have a lasting positive impact on a more coordinated management of the Mekong’s water resources between the MRC member countries and China and to some extent Myanmar. While it is a diplomatic effort, past Chinese cooperation with other neighbours e.g. in Central Asia make it unlikely that China has an interest to enter into a new binding agreement to coordinate the Mekong water use. The likelihood of entering the existing Mekong Agreement and thus Proposed infrastructure investment projects in the region, possibly financed by the Chinese-backed Asian Infrastructure Investment Bank, might even lead to further challenges for the Mekong’s water resources. The MRC proactively pointed out their readiness to work with China in the LMC framework on ensuring regional cooperation in water resources management.

The MRC is certainly well placed to play a constructive role in regional water management, also involving coordination with China and Myanmar which had previously expressed interest to enter the Mekong Agreement. The MRC could foster this interest. MRC has adopted five procedures that are regulating how the Mekong waters can be sustainably managed, focusing e.g. on flow maintenance, water quality and consultation on big infrastructure projects with impacts on the Mekong’s resources, such as hydropower dams or water diversion. Critics of the MRC, who would like to see the organisation active in preventing harm to the Mekong by e.g. stopping dam building on the mainstream, are overlooking that the MRC doesn’t have an implementation mandate, but depends on how its member countries interpret and implement its procedures. The four member countries are the actual owners of MRC. MRC actions and plans are always the result of partly very extensive consultation and negotiation processes among the four member countries. The Secretariat of MRC is thus the wrong addressee for criticism, which rather should address those member countries that are responsible for developments the MRC critics don’t agree to. The current crisis situation exemplifies the fact that some MRC member countries choose to rate their national agenda over a

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1 [http://ffw.mrcmekong.org/historical_rec.htm](http://ffw.mrcmekong.org/historical_rec.htm).
2 The Sanya Declaration intends to „Enhance cooperation among LMC countries in sustainable water resources management and utilization […].“
joint regional approach, if they see it necessary because of domestic challenges or political imperatives. What is actually needed is decisive action on both the regional and the national level, in order to cope with the impacts of the drought, and for sustainable water resource management in general.

On the regional level, MRC provides the established coordination, consultation and negotiation framework. MRC can first of all provide a joint understanding of the nature of droughts, their possible impacts and the possibilities to mitigate these impacts. Cambodia, Laos, Thailand and Vietnam clearly need to coordinate their responses to droughts (as well as other extremes such as floods). This surely can be triggered by the MRC Secretariat, which can call for meetings on issues of urgent mutual concern, such as the current drought crisis. Some of these possibilities will be transboundary in nature, like water releases or the use of ecosystem-based adaptation and/or mitigation measures. MRC member countries need to be transparent about the availability and use of the water resources and they need to enter into negotiations on water-related benefit sharing mechanisms. Joint water resource management can first of all identify the national and regional benefits, and then define approaches to ensure equal shares of these benefits for all member countries. In the mid-term, the countries can also develop joint (non-infrastructure or infrastructure) projects that will help them to cope with future drought situations and other extremes that climate change is likely to bring to the region. All of these options are embedded in the Mekong Agreement. They need action by MRC member countries to be effective; hence MRC-led action planning in regard to the current drought would be a first step. The future Mekong Adaptation Strategy and Action Plan that is currently being developed by MRC is a very good starting point for further, mid- to long term responses and actions.

On the national level, policy decisions, whether permanent or restricted to drought years, need to be taken to manage water efficiently, specifically in sectors with a high degree of consumptive use. Sustainable solutions to drought management would inevitably have impacts on water and land use by economic activities such as irrigated agriculture. Should droughts occur more often due to climate change, decision makers will need to raise the question if e.g. Northeast Thailand can really afford to grow paddy rice, or whether it will have to shift to other crops and thus water management regimes? Or whether the pumping of groundwater for whichever economic activity in Vietnam’s Mekong delta can still be sustainable, or needs to be restricted to combat sea water intrusion and secure access to potable water?

Crisis times provoke crisis management. The MRC member countries have an organisation and the instruments at hand to move from crisis to sustainable and long-term management of the common water resources of the Mekong. Crises like the current one can be avoided by making use of the MRC and its
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instruments in a cooperative manner. Only joint action, agreed upon in a transparent way, based on the scientific expertise of the MRC Secretariat, will lead to sustainable solutions. It needs the political will of all four MRC member countries to realise them.
The Taiwan Question after the 2016 Elections: Significance for Cross-Straits Relations

Chin-peng Chu*

For both sides of the Taiwan straits, the “Taiwan Question” is a topic of vital significance. But it is also especially complicated, because it is seen “also with regard to the military, which is the biggest political hot spot of the Chinese foreign affairs” from the perspective of some scholars. This is connected with the danger of a military conflict. The Taiwan question or the so-called cross-strait relation is not only a central problem of the low-politics, but also it correlates with the military balance of power and with the general view of security policy in the Asia-Pacific region as well as the appropriate role of the USA for this region. The 1996 Taiwan straits crisis can be seen as an example. From 1996 to 2016, six direct presidential elections have taken place in Taiwan. In the recent presidential and legislative elections on January 16, 2016, the Democratic Progressive Party (DPP) won both the presidency (winning 56 percent of the vote) and a majority in the Legislature (picking up 68 out of 113 seats). The DPP leader Tsai Ing-wen has become the first woman to hold the office of President and, also for the first time in history, voters gave DPP, which is skeptical of closer ties to main-land China, broad authority in administrative and legislative powers. The ruling Kuomintang (KMT) which has long been regarded as the party to develop and maintain peace and stability in the Taiwan Strait suffered its worst electoral defeat in history, and the New Power Party (NPP) which emerged from the Sunflower Student Movement in 2014 and advocates also for Taiwan’s independence won 5 seats in parliament and became the third-largest party, a fact that might be observed as a significant indicator for the future development of the cross-strait relations. This article discusses firstly Taiwan’s international legal status; secondly, it will examine the cross strait relations in the historic context, especially focusing on Ma Ying-jeou’s administration since 2008; and finally the article will explain the significance of Cross-Strait relations in after the aftermath of the DPP’s victory and how Beijing will interact with Taiwan’s new government.

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Cross-strait Relations from a Legal and Economic Perspective

The issue of the international legal status of the Republic of China (Taiwan) concerns the question if Taiwan shows all elements, after the current criteria, of a state in the sense of the international law. With regard to the necessary criteria, the so-called “Three elements theory of state” of the German Professor of constitutional law, Georg Jellinek, is significant. Namely, the state must exercise authority that is outwards only bound by international law (external sovereignty) and is internally autonomous (internal sovereignty); second, it must be assigned to a people; and third, it must be assigned to an enclosed territory. Therefore, there is no real doubt about an existent duality (China and Taiwan) – in the sense of international law. So, their respective territory is not to deny as well the existence of the current population. Also, they both have own governments in Beijing and in Taipei that can control effectively and constantly the current population and the current territory inside and outwards. It was therefore evidently impossible for Taiwan as well as for China to access effectively to the current other territory or population. Appropriately, under international law, we can differ between a constitutive and a declaratory theory of legal effect of state recognition. However, it is not to hide that – this is the case in legal arguments – next to polar opinions there exist also conciliatory opinions that should not be taken into consideration here. The representatives of the declaratory theory are of the opinion that the state quality is given by fulfilling the named characteristics of a state. The state is born by realization of these characteristics, the act of state is executed.

During the period of 1952 to 1980, Taiwan had registered an average annual growth rate of up to 9%, maintaining a stabilized economy and equitable distribution of income. Praised as a miracle, Taiwan’s economy was a fine example that many countries in the world try and take as a model. In the mid-1980s, changes in the international economic environment could be observed in two aspects. On the one hand, newly industrialized countries had seen rapid growth and had shown strong competitiveness in the traditional international market; on the other hand, protectionism dominated the international trade.

Changes in Taiwan’s domestic environment could be observed from political, social and economic aspects. Since the beginning of the 1980s, Taiwan authorities, with a deliberate push of those in power, had loosened its grip step by step, leading to the lifting of martial law in 1987, imposed over the past several decades. This trend had further stimulated the democratic spirit in Taiwan’s society. All kinds of social movement, such as self-help, environmental and labor consciousness, as well as claims, came along successively, which had undoubtedly a very negative influence on the business environment in Taiwan. Facing significant changes in domestic and
international economic circumstances, various industries encountered more and more problems in their developments, which seriously discouraged the willingness of investment of the private sector. In order to adapt to the new economic context, Taiwan’s government implemented policies, on the one hand, to reinforce assistance to traditional labor-intensive industries so as to increase the labor productivity and to bring their products into a higher bracket, and on the other hand, to accelerate the development of capital-intensive or technology-intensive industries in order to upgrade rapidly Taiwan’s industries. Along with the intensification of globalization and international competition, China has now become Taiwan’s second largest trading partner, the largest export market, the second largest import source and the number one source of trade surplus. In addition, China is the hot spot for overseas investment of Taiwanese companies.

The development of cross-strait bilateral trade is closely related to the investment of Taiwanese companies in China. In particular, these two elements appear to be complementary. In other words, investment pushes forward trade and prompts the rapid development of cross-strait bilateral trade, along with the ongoing economic development of China. At large, as a result of the augmentation of the scale of cross-strait economic exchanges, the economic integration of Taiwan and China has grown deeper and deeper, which basically offers more benefit than harm to Taiwan’s economic development. However, the opposite argument says that Taiwan, after several decades of economic development, is confronted with the pressure of structural transformation.

Moreover, it should be underlined that cross-strait economic exchange has not been normalized as of yet because of the existing political confrontation even though cross-strait economic relations have gone through a rapid development over the past twenty years. Particularly as from 1995, the political antagonism between Taiwan and China has aggravated, rather than being pacified. Zero-sum games in the diplomatic arena and missiles targeting Taiwan deployed in certain mainland China’s offshore regions by the Chinese government have intensified the hostility across the Taiwan Strait. This political conflict impedes not only normal bilateral economic exchanges. Besides, cross-strait problems have become a bone of contention between the ruling party and the opposition one, affecting the political stability and social harmony in Taiwan.
Chin-peng Chu

KMT’s and DDP’s Mainland China Policy Compared (2000-2016)

The two sides of the Taiwan Straits have been separate for almost 60 years. They experienced military conflicts and confrontation during the period of the Cold War. Until Taiwan took measures to allow compatriots in Taiwan to visit mainland China on November 2, 1987, the interaction between Taiwan and China has been increased. With regard to the low-politics level, economic, trade, scientific, technical, academic and non-political contacts continue to develop as both sides increase external ties. With regard to political topics for discussion, China advocated the “one country, two systems” doctrine and “three direct links of trade, mail, and air and shipping services and bilateral exchanges”. The Taiwanese authorities responded with “one country, two governments” and the so-called “Three-no” policy, namely no contact, no talks and no compromise.

From the historical perspective, the cross-strait relationship went through several reconfigurations before the current contradiction between growing economic interaction and serious political issues. The paradigmatic shift in cross-strait tensions was the ROC’s loss of international legitimacy that followed its withdrawal from the UN in 1971 and the recognition of the People’s Republic of China (PRC) by the US and Japan in 1979. Internally, both the ROC and PRC underwent significant leadership shifts in the mid-1970s which led to a degree of policy sclerosis and conservatism in approaches to cross-strait relations. For much of the 1980s, the initiative in cross-strait relations shifted to the PRC. Taiwan continued to enjoy high rates of economic growth. The political and economic transformations initiated by Deng Xiaoping along with a sophisticated diplomatic strategy with respect to both the US and Japan supported the “peaceful reunification” strategy. The policy position adopted by the Chinese Communist Party (CCP) was to promote reunification under the banner of “One Country, Two Systems” and this has remained at the heart of the PRC’s strategy since that time. In Taiwan, in the early 1980s, its policy on cross-strait relations was sclerotic not only in domestic but in international issues.

Until the late 1980s, the Taiwan question was a spectrum of two-dimensional politics: politics at the intersection of the ongoing Chinese civil war and the shifting international Cold War. The 1970s represented a critical turning point in the evolution of politics concerning Taiwan issues. Taiwan lost its marginal strategic edge in the context of the global Cold War. At the international level, there emerged the one-China framework, which substantially corresponded to PRC’s version of one-China at the expense of de-legitimizing Republic of China (ROC) as an independent sovereign entity in the international community. Since 1949, the conflict between mainland and Taiwan has remained basically a civil war. But during the past 20 years,
this conflict has evolved into a choice between reunification and independence. The issue of national identity has become an extremely hot issue in political life in Taiwan. Many scholars and officials from the PRC refuse to accept the idea that the nature of the PRC-Taiwan conflict is based on identity. The reasons are not only due to the difference in values and the political and social system. Additionally, Taiwan’s isolation in the international community and the military threat from the mainland have also strengthened Taiwan’s sense of solidarity.

In 1999, Taiwan’s President Lee Teng-Hui dropped another political bomb by declaring cross-straits relation as a “special state-to-state relation-ship”, which challenged the one-China policy principle and almost led to a political crisis. Lee’s statement has been defined usually as the “Two states theory”. The significance of the “special state- to-state” announcement is that it may have represented an abandonment of the one-China policy and may be a strategy in a process of declaring Taiwan’s independence. However, a regime change occurred in March 2000, from the normally pro-unification KMT to the normally pro-independence Democratic Progressive Party/DPP. Chen Shui-bian won the 2000 Presidential elections and the DPP become the ruling party. During his first ruling period, Chen’s policy on national identity and cross-straits relations emphasized Taiwan nationalism and Taiwan consciousness, but did not directly challenge China’s position on Taiwan independence. In his inaugural speech in May 2000, he indicated “5 Nos”, namely he would not declare Taiwan’s independence, change the national title, enshrine the “state-to-state” model of cross-straits relations in the constitution or endorse a referendum on independence, as long as China did not use military force against Taiwan. Only two years after Chen’s declaration, Chen took a much sharper position on cross-straits relations in 2002, advancing a theory of “one country on each side of the Taiwan Strait”. Thus, in the 2004 Presidential elections, Chen emphasized Taiwanese nationalism and initiated an issue to promote major constitutional change and revision. Therefore, both the Chen’s administration and China’s regime have used nationalism to gain popular support and ruling legitimacy. The cross-straits relations have become what Robert Putnam terms a “two-level game” at both the domestic and international levels influencing each other. Beijing also chose to ignore Chen Shui-bian because the DPP government refused to acknowledge the 1992 consensus on the “One China” principle, the so-called “yi zhong ge biao” policy of one China with their own interpretations. Facing the domestic changes in Taiwan, China worried that the trend toward a separate Taiwanese identity may make peaceful reunification impossible. Thus, China repeatedly emphasized the possible use of force to deter Taiwan from declaring de jure independence. To sum up, despite his “4 Nos and one without” pledge, the DPP government had no interest in dealing with the mainland under the one-
China concept. Both sides were unable to open a dialogue on “three direct-links” and Beijing prolonged its “wait-and-see” strategy dealing with regard to the DPP government.

In the year 2008, Taiwan’s newly elected President Ma Ying-jeou gave the go-ahead to further relax cross-strait economic policies. Ma reaffirmed the so-called “1992 consensus” with the mainland, under which both sides agree to accept that there is “one China” but differ over how to define it. It means, the dispute over sovereignty was set aside in the interests of better relations. In his inaugural speech, Ma stated that both sides should “face reality, pioneer a new future, shelve controversies and pursue a win-win solution”. Ma’s views were very much in line with CCP’s president Hu Jintao’s proposed “four continuations”, namely “building mutual trust, shelving controversies, finding commonalities despite differences, and creating together a win-win solution”. According to Ma’s speech, he was committing himself to the maintenance of the present limbo, of Taiwan’s de facto but no de jure independence. He urged China to “seize the historic opportunity to achieve peace and co-prosperity”. Ma kept using the word “Taiwan” to demonstrate his determination to protect the island. The aim was to map out a cunning path between “one China” and “Taiwan identity”.

Since Ma Ying-jeou’s Presidential election, the political atmosphere has been improved between both sides. Ma’s administration is associated with a dramatic process of the KMT opening up towards China. Undoubtedly, Ma’s government realized that the positive development of cross-strait relations will affect Taiwan’s economy the most. That means, when cross-strait relations are peaceful and trade is normalized, Taiwan’s economy will fare better than that of other countries. Based on the above thinking, the Association for Relations across the Taiwan Strait (ARATS) and Straits Exchange Foundation (SEF) held 11 summits and signed 23 agreements and reached 2 consensus since 2008. Most meaningful for the political dialogue were not only Cross-strait ministerial high-level talks, but also Ma Ying-jeou’s and Xi Jinping’s first meeting in Singapore on Nov. 7 2015 as a historic step marking the first meeting after the separation of both sides since 1949.

However, under the new circumstances, the political economy of the Taiwan question has begun to take new dimensions. At the level of cross-strait relations, the new dynamic politics have manifested themselves predominately on political, diplomatic and military fronts since 2000, according to the analysis of some scholars. On the political front, there has emerged a renewed political confrontation across the Taiwan straits over the issues of unification and independence. On the diplomatic front, Taipei and Beijing have been fighting intensive battles over the status of Taiwan in the international community as Taipei is determined to challenge the one-China international framework. And on the military front, the Taiwan straits has become one of
the “hot spots” in the international security arena because of growing arms races. Compared with Chen Shui-bian’s government, Ma Ying-jeou’s administration indicated their hopes to maintain the status quo of Taiwan Straits and to establish peaceful a China-US-Taiwan relationship on the diplomatic level. Furthermore, politically, Ma has taken a moderate and friendly stance towards the mainland by repeating his “three-no” policy – no reunification, no independence, no war –, which effectively allayed fears and created an environment for a peaceful development of cross-strait relations. He asked for the withdrawal of Chinese missiles which threatened Taiwan’s security for creating a peaceful framework or peaceful agreement in the military fields. Lastly, economically, Ma boosted the progress of the “Three Links”, hoping this would bring economic benefits from the mainland. Basically, Ma advocated that the future cross-strait relations should shift from “mutual non-recognition” to “mutual non-denial”.

In sum, the economic and social interaction between Taiwan and the Mainland is broad and deep. The sovereignty and security issues are the two substantive strands of the cross-strait knot. Taiwanese identity politics has focused more on securing a democratic system and gaining international respect than on creating a separate state. The fundamental difference between the KMT and the DDP is the degree of the tilt. The KMT claims that the ‘status quo’ leans Taiwan closer to China through greater regional economic integration, like within the framework of Economic Cooperation Framework Agreement (ECFA), the participation in Regional Comprehensive Economic Partnership (RCEP), or the newly approaching Asian Infrastructure Investment Bank (AIIB) and One Belt One Road etc., while the DDP’s thinking is more about maintaining distance between both sides.

**New era for Cross-strait Relations after DPP’s Victory in the 2016 Elections**

When the Sunflower Movement occurred in 2014, there were some characteristics which may be seen as a turning point in cross-strait relations and also as a radical response to the top-down decision-making process within the KMT and CCP. On the one hand, there was the movement against the “Cross-strait Service Trade Agreement (CSSTA)” without ratification of “Cross-strait Agreement Oversight Legislature” by the Legislative Yuan, and on the other hand, the main leaders of the movement publicly expressed their support for searching Taiwan’s independence. Since then, the mainland policy agenda regarding negotiations for Cross-Strait Service Trade Agreement (CSSTA) and Trade-in-Goods are conditioned to the adaptation of the above mentioned “Oversight Legislature”. In this context, the DPP appears
to be the main political beneficiary, not only in the November 2014 nine-in-one municipal (local) elections, but also by winning the presidential and legislative elections in 2016. Certainly, there are many factors which contributed to the KMT’s failure and defeat, including: the rise of socio-economic inequalities, income distribution, housing costs, food safety, pension reform concerning public servants, the dissatisfaction of younger voters between 20-39 years with the KMT government etc. Consequently, the Cross-strait relations issue was quite unimportant in the elections, even though Ma Ying-jeou and Xi Jinping had created a mechanism for a future meeting of the national leaders under the principle of the “1992 Consensus”.

The DPP victory is absolutely not a fluke. But the election results demonstrate that the new Taiwan administration has to face an open fundamental question: Are there any possibilities for Cross-strait shifts? Do the election results reflect a more fundamental shift in political attitudes than simply a dissatisfaction with Ma Ying-jeou’s policies and their consequences? Richard C. Bush stated such a fundamental shift “would not only change the balance of power within Taiwan, but also the continued feasibility of China’s approach to reaching its goal of unification”. For China, Prime Minister Li Keqiang’s work report to the National People’s Congress in March 2014 regarding Taiwan may contain important principles, namely (1) from the 1992 Consensus to a ‘one China framework’; (2) reversing the order of importance between political and economic issues to prioritize politics through diversified communication channels; (3) pushing the new concept of a Cross-strait family to describe the relations with Taiwan. Xi Jinping also spoke of the same cultural and blood lineages on both sides of the Taiwan Strait during his meeting with Ma Ying-jeou in Singapore and he emphasized that “no one will be successful in dividing us”, “holding the family together” appealing to ethnic solidarity and national unity, and raised four points: adhering to the ‘1992 Consensus’; developing Cross-strait peace; expanding the effects of prosperity to more segments of the population and cooperatively pursuing a ‘Chinese Renaissance’. For China, in short, a divided country is by definition a ‘weak country’.

For Taiwan, the identity of Taiwanese people is drifting. Some public opinion surveys and the election results have shown that the majority of the people under 40 years consider themselves more as Taiwanese than Chinese, and that there is a major generation gap. The education and social narratives have played a key role in recent decades in shifting Taiwan’s identity. The KMT’s defeat shows that it ‘lost the ardent support of the people’. The turnout of the presidential election was only 66.27% of the voters, around 10% lower compared with the election 2012, the lowest turnout since 1996.
What is the DPP able to do in the new era? According to the report of DPP’s Secretary-General

Joseph Wu which he delivered at the Center for Strategic and International Studies (CSIS), Washington, DC, on January 19, 2016, major issues include: a stable majority in parliament; the Trans Pacific Partnership (TPP) participation, pension reform, the cross-strait agreement oversight legislation for domestic reconciliation; economic structural reform; building of external relations and foreign policy agenda in terms of friendship, improving relations with China not at the cost of Taiwan’s relations with the broader international community. With regard to the Cross-strait issue, especially to the question of the ‘1992 consensus’, DPP leader Tsai Ing-wen emphasized that “the DPP has never denied the historical fact of the cross-strait dialogues that took place in 1992, and indeed acknowledges the shared desire of the two sides at that time to advance cross-strait relations by fostering mutual understanding”. After the election results were announced, Tsai Ing-wen told the press that she seeks a mutually acceptable way of interacting with mainland China on the basis of equal dignity while avoiding confrontation and pre-venting surprises. The DPP also emphasized that in the new session of the legislature it will put forward the Cross-Strait Agreement Oversight Legislation as a priority to highlight its interest in peaceful and stable relations with mainland China. A more important and significant sign is that Tsai Ing-wen expressed that she will follow the status quo of the ROC constitution. From this aspect, people may expect that the DPP’s mainland policy will not go back to the period of Chen Shui-bian.

However, Tsai Ing-wen has so far avoided direct reference to the “1992 Consensus” and this will create considerable uncertainty for the future of cross-strait relations. In this context, any avoidance of endorsing the “1992 Consensus” can only “be interpreted by Beijing to mean a denial of the status quo in the Taiwan Strait”, said Songling Zhu, Professor at the Institute of Taiwan Studies at Beijing Union University. Moreover, China still remains a deeply distrustful and pragmatic approach towards the DPP and Tsai Ing-wen’s long-term intentions. The DPP has yet to rescind the party’s 2007 Normal Nation Resolution or the 1999 Resolution on Taiwan’s Future, which are premised on the notion of Taiwan as a sovereign entity separate from China. The other is Tsai Ing-wen’s role in the crafting of the controversial “Two States Theory” during Lee Teng-hui’s period and as a Chairwoman of Taiwan’s Mainland Affairs Council from 2000-2004, a period when cross-strait relations were particularly tense and fraught. Thus, gaining Beijing’s trust and confidence depends on what Tsai Ing-wen says and how the DPP’s Mainland China policy is implemented.
The Future Cross-Strait Relations: Challenges and Opportunities of the DPP Government

Chin-peng Chu*

Challenges of Taiwan’s New Government: Tsai Ing-wen’s new Policy Agenda

As the first female President of the Republic of China in Taiwan, Tsai Ing-wen’s inaugural address on May 20, 2016 demonstrates resolve in spearheading important reform agendas pertaining to building a better country for the younger generation; the pension system; the rigid education system; limited energy and resources; the distrust of the people to the judicial system; widening wealth disparities. Tsai emphasized that the new administration will help young people overcome national difficulties to achieve generational justice. Tsai’s addressed the following orientations as her political priorities:

• Transforming economic structures: The first step of the reform is to strengthen the vitality and autonomy of the economy, reinforce Taiwan’s global and regional connections and actively participate in multilateral and bilateral economic cooperation well as free trade negotiations like the Trans-Pacific Partnership (TPP) and the Regional Comprehensive Economic Partnership (RCEP). Tsai’s administration will promote a “New Southbound Policy” in order to bid farewell to the past overreliance in a single market, meaning that Tsai’s statement in the inaugural speech will keep distance to Mainland China’s market.

• Strengthening the social safety net: A pension reform and building of long-term care system are seen as important issues in this reform policy.

• Social fairness and justice: the Democratic Progressive Party (DPP) government will increase the cooperation with the civil society to deepen democratic institutions. Tsai will establish a Truth and Reconciliation Commission to pursue true social transitional justice.

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Regional peace and stability and Cross-Strait Relations: Tsai emphasized Taiwan may become marginalized without proactively participating in regional affairs. Based on her initiative of the New Southbound Policy, Taiwan will expand in particular its efforts to become an integral part of building regional and collective security. She stressed to safeguard national sovereignty and territory on the one hand and to maintain the existing mechanisms for dialogue and communication across the Taiwan Strait on the other hand. Tsai’s statement demonstrated that the DPP government will conduct cross affairs in accordance with the Constitution of the ROC and the Act Governing Relations Between the People of Taiwan Area and the Mainland Area. Based on historical facts since 1992 talks between Taiwan and Mainland China Tsai has been addressing four elements for further engagement in positive dialogue for both sides of Taiwan Strait, namely: the 1992 talks between the two Association for Relations Across the Taiwan Straits, ARATS) is historical fact; the existing Republic of China (ROC) Constitution order; outcomes of previous negotiations and interactions; and lastly the democratic principle and prevalent will of the people of Taiwan.

With regard to the diplomatic and global issues, the new Taiwan administration will actively participate in international economic and trade cooperation and also build an office for energy and carbon-reduction for cutting greenhouse gas emissions for a sustainable earth.

Among all the issues addressed in Tsai’s inaugural speech, whether she accepts the 1992 Consensus or not, is the most significant topic for those interested in the further development of Cross Strait Relations. It is not only because the 1992 Consensus has been strongly criticized inside the DPP by those who are in favor of an independent Taiwan, but also from regional neighboring countries and the international community which are concerned about how she and her administration will keep a peaceful and stable political and economic developmental environment in future. Tsai’s speech also suggested that she will make the economy her priority and that she will be committed to pursue multilateral and bilateral trade rather than concentrating on one single market, meaning China. But Taiwan’s economic situation and picture is complicated and often constrained by regional and international factors. Many comments pointed out that Tsai Ing-wen’s speech is only expressing an ideal map and that there are still a lot of variables and challenges, including domestic political conflict and international pressure, which might cause a crisis in the foreseeable future and which cannot be ignored.
Reactions from the Public in Taiwan and Beijing’s

Since Tsai’s victory in the presidential election in January 2016, she has been facing two important challenges: the first is how to balance and fulfill the demands and requirements of the Taiwanese electorate. The second is how to explain and define her “status quo” of the Cross-Strait Relations. For the first question, Tsai has demonstrated some significant issues as mentioned above and she promised that the new administration will initiate actions. Second, Tsai used some points to come as close as possible to the bottom line of the nature of Cross-Strait Relations, the so-called 1992 Consensus. In this regard, she defends the Republic of China as owner of the whole Chinese territorial sovereignty under the framework of the ROC Constitution which means Taiwan’s (ROC) China, not Beijing’s (PRC), and she emphasizes that she respects the 1992 dialogue as a historical fact.

For China, there is no possibility for further dialogue and cooperation or negotiation between Taiwan and mainland without two conditions being fulfilled: Taiwan explicitly acknowledges the 1992 Consensus on the one hand and Taiwan recognize its One-China Principle without ambiguity on the other hand. Even Tsai said that she will make good on her words with regard to consistent, sustainable and predictable Cross-Strait Relations. That means, Tsai’s speech might not be enough to rectify her pro-independence attitude and she never explains how to define her status quo and what is the real meaning of China as an “incomplete answer sheet.”

Tsai made no commitment to the controversial One-China Principle and 1992 Consensus. The Beijing-controlled Global Times Newspaper took this opportunity to warn that Cross-Strait Relations will enter an “era of uncertainty”. On the contrary, Taiwan’s public opinion survey published in June 2016 by the Mainland Affairs Council on Tsai’s inaugural speech demonstrated that 74.7% of Taiwanese agree that cross-strait affairs should be managed on the basis of the ROC Constitution and the Act Governing Relations between the People of the Taiwan Area and the Mainland China Area. Also 85% think both side should maintain the current mechanism for mutual communication and dialogue. According to a Television Broadcasts Satellite (TVBS) public opinion survey, conducted one month after Tsai’s new administration took office, about 49% agree that Tsai’s policy orientation is on the right way, including Cross-Strait Relations and regional development and cooperation,. In a word, most of the people give a thumb-up to Tsai’s first month in office.

In recent weeks, Taiwan and mainland China haven’t had any formal and official dialogue, no ring of the fax machine and no hotline between ministerial levels. All the mechanisms of the communication platform which have been established under former President Ma Ying-jeou have been stopped by the
mainland side. Beijing clearly declared that if there is no acknowledgement of the 1992 Consensus, there won’t be any negotiations with Taiwan. More and more issues and incidents have increased the pressure by mainland China, e.g., in March, China built formal diplomatic ties with Gambia, ending the “diplomatic truce”. In April, Taiwan’s delegation to the OECD’s steel committee was given the boot after China complained against Taiwan’s participation. Moreover, Kenya, Malaysia and Cambodia have been pressured to deport Taiwanese suspects to China, a move that was criticized by the DPP and many in Taiwan as an assertion of sovereignty. However, Beijing saw it as a matter of due course. Mainland China’s officials, academics, and universities have warned against reducing the scope or intensity of the exchange. At the World Trade Organization’s annual meeting in Geneva, China demanded Taiwan’s participation to happen only under the One-China Principle and with “Chinese Taipei” as a political designation. Furthermore, mainland China canceled a scheduled performance of the Puzangalan Children Choir from the Paiwan tribe in southern Taiwan in Guangzhou as they had sung the ROC anthem at Tsai Ing-wen’s inauguration. Beijing also plans to cut Taiwan-bound tourists in three stages by the end of 2016, estimated to fall under 2 million in 2016, sharply down from 3.85 million arrivals from the mainland recorded in 2015. Additionally, Taiwan may lose NT$ 3.4 billion every year if Beijing bars mainland students from coming to Taiwan. The head of mainland China’s ARATS, Chen Deming, stated that the observation of Taiwan’s new government is focus on its actions rather than on its words. Even though Chen emphasized that relations between the mainland and Taiwan’s new government should not affect Taiwanese enterprises doing business in China, commercial cooperation and people-to-people interaction, he still stated that the resolution of the “Taiwan question” is entering a new calculus in which mainland China’s power is increasing, combined with a reduction of U.S. intervention. Moreover, after the accident of a Taiwan navy missile misfire on 1 July 2016, Zhang Zhijun, Head of the State Council’s Taiwan Affairs Office (TAO), called for a “responsible explanation” of the matter. He stated again the importance of “safeguarding the peaceful development of Cross-Strait Relations based on the political foundation of the 1992 Consensus.” All in all, it has been shown that China’s strategy is not to make Taiwan more isolated from China.

Besides the above mentioned possible impacts for Taiwan, other consequences will occur in various fields of policy if there is no political basis in form of the 1992 Consensus. Even Taiwan investors are confident that President Tsai can clear obstacles to cross-strait controversial issues and hope that the new DPP government will push for the ratification of a trade-in-services agreement that was signed in 2013. They urged the DPP to complete the negotiations on a trade-in-goods agreement. For investors, without those
two agreements, other negotiations between both sides will be meaningless. Besides, cross-strait fishing and agricultural cooperation and exchange in the farming sector have also grown rapidly over the years. Taiwan’s agricultural investment in mainland China has reached US$ 3.45 billion and Taiwan’s fishing business employs up to 30,000 Chinese sailors. Any adjustments of the policy will cause negative impacts. The rosy prospects are now doubted by individual farmers and associations in the farming sector.

Chinese scholars have mixed views on cross-strait connections following Tsai’s inaugural speech. The majority opinion agrees that bilateral relations face a bumpy ride in the near future, because they said that Tsai did not provide a clear stance on the 1992 Consensus. Even though Tsai adjusted her comments on that consensus, they were still dissatisfactory in their eyes. Huang Jiashu, Professor at Renmin University, commented that Taiwan’s mainstream public opinion to maintain the status-quo of “no unification, no independence, no use of force” has become “anti-unification and tolerance of independence” or “resistance to unification and de facto independence”. Many estimate that if the two sides continue grappling with each other, Taiwan will gradually lose its bargaining chips vis-a-vis China and, according to comments of Zhu Weidong and Li Yihu, Cross-Strait Relations will enter a vicious cycle. In response to those arguments, the Taipei Times, a favorite of the pan-green media in Taiwan, commented on June 14, 2016 that these were Beijing’s “bully tactics to control Taiwan.”

Opportunities of Tsai’s Administration for Constructive Cross-Strait Relations

From a historical perspective, there was an understanding only in 1992 under the former President Lee Teng-hui’s Kuomintang (KMT) government that both sides referred to under the heading that “there is only one China but different interpretations.” This formed the consensus for further negotiations. The DPP rejected the existence of the consensus and Tsai Ing-wen is striving for “a formula that will not shatter the current stability” in Cross-Strait Relations. Tsai’s speech might not be enough to respond to China’s expectation, but she has shown her good will. Beijing should consider to reciprocate the good will to restart a channel with the DPP government, and to give an opportunity to measure each other’s intentions and see whether the DPP can deliver on Tsai’s promises as she expressed her position on Cross-Strait Relations based on the R.O.C. Constitution and the Act Governing Relations between the People of the Taiwan Area and the Mainland Area that clearly spell out the One-China Principle. The real core of the question might be that Tsai is not clear enough on the 1992 Consensus and the One-China
Principle. Only two weeks after Tsai presented her new position, she created a mechanism with Japan to settle maritime disputes to resolve differences over fishing rights in the waters near the Japanese reef of Okinotori, which I object of territorial disputes between China and Japan. She also referred to herself as the Taiwan President, not President of the ROC, when she made her first state visit to Panama. Tsai is already breaking with the foreign policy of her pro-Beijing predecessor. That means, Beijing might keep lower level of its confidence on her administration.

Thus, Tsai’s government should build trust relations with China firstly and avoid pursuing independence in the international arena in order not to touch the red-line of mainland China. Secondly, if independence is pursued, it is impossible to keep peace and stability in the Taiwan straits. Thirdly, Tsai’s administration needs to keep a beneficial balance between national security and economic development. Fourth, Taiwan should consider seeking multilateral strategic cooperation with neighboring countries in Asia and the international community under the One-China perception framework as an important political goal. In the near future, the One-China policy is absolutely non-negotiable for China. Tsai’s government will face a lot of challenges and she has a big chance to change history to find a new way to address the problems during the period of power transition.
External Challenges in the Russia-South Korea Defense Relationship

Anthony V. Rinna*

Russia and the Republic of Korea have recently enjoyed an uptick in their relationship, partly as a result of the former’s “pivot to the East” strategy. Yet in the area of traditional, military-oriented security, cooperation has fallen short. This is not to say that the two states are overtly hostile to one another militarily. Rather, bilateral military relations between Moscow and Seoul have been stunted by a number of external factors. Contrary to what one may expect, it is not simply because Russia and South Korea (closely aligned with the United States) are part of opposing blocs. Rather, in Russia’s case, it is a set of security concerns directly tied to Russia’s regional interests in Northeast Asia that have complicated Russian defense relations with South Korea.

Historic Overview

Following decades of partnership with North Korea, the Soviet Union began making moves toward normalizing ties with South Korea, and established diplomatic ties with the ROK in 1990. After the fall of the USSR, the newly created Russian Federation largely turned away from its former ally North Korea in order to improve ties with the economically robust South Korea to attract hard currency investments in the Russian economy. Nevertheless, by the mid- to late-1990’s relations between the Russian Federation and North Korea normalized, with seemingly little effect on Moscow’s relations with Seoul. Russia’s respective ties with the two Koreas have even been described as embracing a policy of “equidistance”. Today, South Korea’s relationship with Russia is currently considered to be a “strategic partnership”.

As Anatoly Torkunov asserts in What is the Meaning of the Korean Question for Russia? (В чем значение корейского вопроса для России?), the Korean Peninsula is critical for both Russia’s security and economic interests. Korea constitutes the “soft underbelly” of Russia’s Far East, largely because of the tense security situation combining North Korea’s nuclear capabilities with the convergence of several regional powers, including China, Japan South Korea and the US. Furthermore, with one of the wealthiest and

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most vibrant economies in the world, South Korean investment is a major boon for the Russian Far East’s development.

**Russia’s Military Ties to North Korea**

According to Security and Cooperation in Northeast Asia, published by the Russian International Affairs Council (RIAC) and Seoul National University (SNU), it is in both Moscow’s and Seoul’s best interests to create a balanced multilateral security frame- work in Northeast Asia. Ideally, this would take the form of a concrete, multi-party security institution, yet one that falls short of being a formal alliance, similar to the Shanghai Cooperation Organization. The joint RIAC-SNU report declares that it is imperative that the region does not become enmeshed in Cold War-style security arrangements. Any such form of integration would necessitate relationship building between North Korea and old Cold War-era allies. Russia is indeed interested in expanding its defense relationship with North Korea, but not at the expense or detriment of its defense relationship with South Korea. Russia has agreements with both North and South Korea respectively to communicate with each other on defense developments and, more specifically, to prevent mishaps between Russia’s military and those of the two Korean states during drills or other operations.

Yet the Russian military finds it easier to establish a relationship with the North Korean armed forces compared with the South Korean military partly because of the latter’s strong defense ties with the United States. Russia and North Korea have taken steps to advance their military relationship, such as participating in military expositions, and the two countries have even proposed joint military exercises. Creating a blatantly anti-US bloc in Northeast Asia, however is not Russia’s primary motivation for closer defense ties with the DPRK, as doing so would only increase Russia’s vulnerability in the region. Rather, Russia’s main reason for expanding military ties with North Korea is to keep the lines of communication open between the two militaries, as well as allow Russia to continue monitoring North Korean military developments by way of confidence building. Thus, the main driver of Russian policy with North Korea is the desire for new partnerships to aid securing Russia’s Asiatic rear in a highly nuanced and tense environment.
Missile Defense

While Russia and South Korea hold in common their condemnation of the DPRK’s provocations, the issue of missile defense in Korea remains a thorny issue for Russia in the region. Russia is concerned that the THAAD (Terminal High Altitude Area Defense) deployment endangers Russian security. Washington had proposed deploying THAAD in South Korea citing North Korea’s growing offensive missile capabilities concurrent with a decline in the DPRK’s conventional military prowess. American officials have consistently stated that THAAD is not directed at Russia, although Moscow has not given credibility to Washington’s stated position.

The fallout between Russia and the United States over THAAD has brought South Korea in the diplomatic crossfire. To some extent, the South Korean government’s desire to place THAAD on its soil has led to some verbal skirmishes between Russia and South Korea. After North Korea’s orbital rocket launch in February 2016, Lee Cheolwoo, a South Korean Member of Parliament and former intelligence official, accused the Russian Federation of supplying parts necessary for the construction of the long-range rocket. His accusation was allegedly based on intelligence collected by South Korean security services. Lee’s assertion emerged during negotiations between South Korea and the US over the deployment of the Thermal High Altitude Area Defense missile system. It is possible that this was a case of the politicization of intelligence, being used to justify THAAD’s deployment, a decision that has been proven to be highly controversial in South Korea today.

Russia and South Korean disagreement over THAAD, while unfortunate for two countries that otherwise have a healthy bilateral relationship, is tied primarily to the issue of North Korean security provocations. The government in Seoul did not approve the positioning of THAAD on its territory as a specifically anti-Russian measure. Nor is this, according to American defense officials, the United States’ primary motivation for installing THAAD. Nevertheless, the realities of Russian geography have taken what was supposed to be a joined ROK-US response to developments in North Korean missile technology and caused an extra complication for Moscow and Seoul.

Conclusion

At the risk of falling into a trap of determinism, it seems that South Korea and Russia currently face difficulties in their bilateral defense relations due to external factors. In part, one could argue that this is a result of the great power interplay between Russia and the United States, especially concerning the issue of missile defense. Yet more so than that, Russia and South Korea are
locked in a difficult position because of the very real threat to both countries posed by North Korea. Russia wishes to keep a close eye on North Korea’s conventional capabilities through relationship-building. Yet the price of this is the perception, and perhaps eventual reality, that North Korea and Russia will establish a military relationship that stands in opposition to the long-standing South Korea-US defense partnership. South Korea’s vulnerability to North Korean missile capabilities has likewise led to a situation where Moscow and Seoul sharply disagree on how to best manage this aspect of the North Korean threat. In the end, it is an issue of differing approaches to an overarching threat in a tight geographic neighborhood.
Beyond the Panama Papers:Leaks Activism and the Struggle for Information Control

Arne Hintz*

The Panama Papers have brought the powerful role of whistleblowers back into the public consciousness. Several years after WikiLeaks’ Cablegate and the Snowden revelations, the next big leak has not only caused the downfall of Iceland’s prime minister (and troubles to other political elites), but has demonstrated that the practice of exposing hidden information is very much alive. The struggle over controlling this kind of information is one of the great conflicts of our times.

WikiLeaks’ publication in 2010 of the Iraq and Afghanistan war diaries and of US diplomatic cables set the stage for recent leaks journalism, and Edward Snowden’s revelations in 2013 about mass surveillance programmes by US and British intelligence services confirmed the important role of the whistleblower in contemporary public debate. In public perception these may appear as rare and singular events. However leaks have become an ongoing phenomenon and, increasingly, a source of much information that was previously hidden.

To start with, WikiLeaks has continued to expose interesting information, including files on Guantanamo Bay operations, secret drafts of the controversial TPP trade negotiations, and more recently a recording of an IMF meeting that provides significant insights into current conflicts between the IMF, the EU and the Greek government in their handling of the eurozone crisis. Traditional media organisations have developed processes to deal with anonymous data leaks, too. The New York Times, The Guardian and Al-Jazeera now use secure digital dropboxes for depositing files anonymously. Major publishers have established collaborations to share resources and expertise in order to analyse and make sense of huge amounts of data quickly and maximise international exposure. While WikiLeaks has been moved out of the public spotlight, we have seen the WikiLeaks-ization of mainstream journalism.

Beyond the major news organisations, a culture of “leaks activism” has emerged. Hacktivist groups such as Globaleaks have developed technology for secure and anonymous leaking. Local or thematically-oriented initiatives provide new opportunities for whistleblowers to expose secret information.

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Citizen Leaks in Spain, for example, acts as an intermediary that accepts leaks, reviews them, and sends them on to partner newspapers. Run by Xnet, an anti-corruption group, Citizen Leaks has helped uncover major cases of corruption in Spain that brought to court leading Spanish politicians such as former minister of the economy and chairman of Spain’s largest bank, Rodrigo Rato.

Crucially, Xnet does not limit its activities to exposing malpractice but engages in its prosecution. The group has supported court cases against Rato and others, and regards this as an integral part of its leak activism. It is convinced that the mere exposure of corruption leads to disillusionment and defeatism rather than empowerment as it simply demonstrates the power of elites. Only by acting on the knowledge exposed in leaks to generate social, political or economic change does the emancipatory potential of leak activism unfold. This view puts the widespread celebration of the Panama Papers in perspective. Will the Panama Papers kill journalism? asked Greek journalist Costas Efimeros shortly after media coverage of the leaks started. As journalism has to affect society to be relevant, he concludes that the success of the leaks has to be assessed according to its impact on regulatory frameworks, conviction of those responsible, and new rules, rather a short-lived scandal.

To that end, groups like WikiLeaks have demanded the full disclosure of all the data from the Panama Papers whereas the media organisations involved in the publication of the leaks have been highly selective in what they exposed. This has highlighted ongoing controversies over the gatekeeping role of traditional media. While journalists maintain that filtering and processing of the news is essential for responsible news coverage, activists and critics have pointed to the biases inherent in such selection. And indeed, curious choices were made in the publication of the Panama Papers. The coverage started with a focus on Vladimir Putin, even though he was not mentioned in the leaked documents, and thus seemed to respond primarily to geopolitical agendas. Despite the enormous quantity of 11.5 million files of this, supposedly, ‘biggest leak of all times’, media coverage subsided quickly and moved on to other topics.

So the ways leaks are treated differ a lot across the media sphere. This makes it even more significant that a wide range of organisations are now involved with processing and exposing leaks – from the New York Times to WikiLeaks to Citizen Leaks. As intermediaries rather than publishers, many of them remain invisible to the public, but their role is crucial to expose corruption and other wrongdoings, and they are an important feature of the changing media landscape. Following the WikiLeaks revelations in 2010-11, US scholar Yochai Benkler conceptualised this emerging news environment as a “networked fourth estate”, in which classic news organisations interact with citizen journalists, alternative and community media, online news
platforms, and new organisations such as WikiLeaks and Citizen Leaks. In
Snowden’s case, he (the whistleblower) worked with documentary filmmaker
Laura Poitras, independent journalist and former lawyer Glenn Greenwald,
and The Guardian, a traditional media organisation.

Yet as organisations become more vulnerable to leaks in the age of digitized
data, those organizations put increasing effort in data control. The Insider
Threat Program adopted for US public administrative agencies requires
employees to report to their superiors any “suspicious” behaviour by
colleagues. Under the Obama administration more whistleblowers have been
prosecuted than under all previous Presidents combined. Chelsea Manning
was sentenced to 35 years in prison, Julian Assange is holed up in the
Ecuadorean Embassy in London, and Snowden lives in exile in Russia. So as
leaks become more common, the response by states and corporations has
become harsher.

Whistleblowers and leaks activists thus occupy a key position in
contemporary information society where political and economic power rests,
not least, on the strategic use of communication and the control of information.
They possess tools to affect world politics but they are also exposed to serious
repercussions. They demonstrate the struggle over the control of information
at this present historical juncture.
In the past month, numerous Thai analysts have provided insights into why the junta’s draft constitution passed the national plebiscite, why it was rejected in certain areas of the country, and how to assess the meaning of the national vote. The United Nations has been very clear for some time, voicing concerns over the restrictive environment that framed the referendum campaign period. Through legislative acts, NCPO Orders and other measures assessed by UN experts and agencies as falling short of Thailand’s international commitments, the military government prevented a full and open national discussion on the draft constitution. In so doing, the military prevented itself from deeply understanding the needs and wishes of the Thai people. History and global experience tells us that one-sided constitutional processes fail to achieve objectives of national unity and, where often needed, reconciliation. National reconciliation remains elusive in the current environment.

The acceptance of the draft constitution by 61% of slightly more than half the eligible Thai voters who cast a ballot should not be interpreted as a mandate for the military to maintain expansive restrictions on freedoms of expression, opinion and assembly. The junta government has previously warned of the perils of first-past-the-post majoritarian rule. The August referendum’s results, a product of an unbalanced and restrictive campaign and education process, speak to a divided society more than an overwhelming mandate. The junta should move forward in a measured manner, recognizing the contributions that can be made by all Thais from across the diverse political, social and economic spectrum.

To be sure, the drafting of organic laws and other administrative measures to implement the constitution create new opportunities for Thailand to pursue a determined process of inclusive dialogue. We must not confuse dialogue with negotiation, debate or political elbowing where zero-sum strategies re-enforce hostility and confrontation. Dialogue requires credible people moving to the uncomfortable middle, encouraging an alternative to exclusion and one-sidedness as not only possible, but necessary. These people must encourage increasingly diverse voices to participate in a process of listening to better understand the Thailand that Thais want to create in future, one that respects all people’s rights, everywhere and at all time.

* Also published in CPG Online Magazine (COM) 6, 2016.
Such meaningful dialogue creates safe spaces to listen, appreciate differences and move toward a future vision of the country that truly leaves no one behind. Within these spaces, we can listen to each other deeply with intent to understand why others see things differently and, importantly, to be changed by what we learn.

Dialogue is not easy, but it is very necessary. And a constitution written and passed under conditions of non-inclusion and repression cannot achieve the longevity the country desires without a process of dialogue. Without dialogue, Thailand’s socio-political conflicts will not be resolved and the country’s growing social, political and economic inequality will not be reduced. Now is not the time for the junta to put on triumphant airs or for the opposition to block conciliatory efforts, but rather for all parties to demonstrate more humility and commitment to dialogue, to listening.

For these efforts, the United Nations stands ready to support efforts for inclusive dialogue, to bring diverse Thai voices together for the better future they can create together.

Comments on the Thai Referendum Results
Jon Ungphakorn, Executive Director of “iLaw”

The results of the Thai referendum on August 7th show that almost 60% of eligible voters participated, with 61% voting to approve the military junta’s new draft constitution (39% voting against) and 58% agreeing to the proposal to allow junta-appointed senators to join elected representatives in choosing the Prime Minister during the first five years of the new constitution (42% disagreeing). Spoilt ballots made up 3% of the total.

While there were no indications of irregularities in the vote-counting, the referendum could not be considered either “free” or “fair” for the following reasons:

1) Voters were given no indication of what would happen if there was a majority vote against the draft constitution. It could only be assumed that the junta would simply draft another constitution, not necessarily more democratic in nature, and that elections would inevitably be further delayed. So there appeared to be no real choice for voters.

2) Voters were provided with very little factual information on the content of the draft constitution by the authorities concerned. Very few voters had access to the actual draft (although it could be downloaded online). Hard copies were provided to educational institutions and libraries but not to individual voters.
Instead, each household received a pamphlet summarising the merits of the draft constitution from the point of view of the Drafting Committee.

3) The supplementary question was phrased in an indirect way, making it difficult to understand or interpret the full meaning of the question.

4) The Government assigned and trained many thousands of volunteers throughout the country to visit communities and explain only the merits of the draft constitution.

5) Campaigning against the draft constitution was not allowed. Under the Referendum Act of 2016 Section 61 it became illegal to make any public comment on the draft constitution of an “untruthful”, “abusive”, “aggressive”, “obscene”, “seditious”, or “coercive” nature “intended to influence voters to vote one way or another, or to abstain from voting”. This offence carries a prison sentence of up to ten years. In practice anyone distributing materials to the public criticising the draft constitution was liable to be arrested, and at least 42 pro-democracy activists were arrested and charged with the offence. At the same time at least 19 public meetings to discuss the draft constitution were banned or closed down by authorities.

Despite the unfairness of the referendum campaign, the overall results of the referendum were extremely disappointing and constituted a bitter blow for democracy advocates in Thailand.

In a sense, the repressive military junta itself (called the National Council for Peace and Order, or NCPO) might seem to have been validated by the majority vote, together with the draft constitution, which gives very limited political space to elected representatives from various political parties in future governments, and which ensures that the military will have a continuing grip on political power for the foreseeable future.

“Thailand Votes By Public Referendum To Make Its Government Even Less Accountable To The People”; “Standing Up for Less Democracy”; “Thailand votes to Axe democracy”; “In a ‘bizarre’ referendum, Thailand votes on a hybrid democracy” – These are examples of headlines from the international press.

I personally believe that the referendum results reflect some very serious problems that remain in Thai society:

First of all, the political divide or split within Thai society between the royalist pro-establishment and the “red-shirt” anti-establishment activists and communities continues as before, but with the latter groups now weakened by mass arrests, tight controls and the escape to exile of key leaders since the military coup in 2014.
This is reflected in the referendum results in 20 northern and north-eastern provinces where there were majority votes against both the draft constitution and the supplementary question. Nevertheless, the “no” votes in these two regions were substantially less than in the comparable 2007 referendum.

With no concessions having been made by the military and the bureaucracy to either pro-democracy or “red-shirt” sectors of society, the likelihood of future political conflict and bloodshed remains high as long as a fully democratic system of government remains out of reach.

Secondly, it cannot be denied that there is now a high level of political apathy in Thailand, especially among the younger generation of eligible voters and the professional classes. This is accompanied by declining support for democratic principles and even substantial support for what the military junta has been doing. The junta’s constant propaganda war against “corrupt” politicians seems to have been quite effective, paving the way for General Prayuth Chan-Ocha to remain Prime Minister even after the elections. This situation is the polar opposite of the situation in May 1992 when there was a successful mass uprising led by students, intellectuals and the business sector against attempts by General Suchinda Kraprayoon, the military strongman, to gain nomination as Prime Minister after the democratic elections that took place following the 1991 military coup.

While the future for democracy may look bleak following the referendum results, the future for the military itself, if it takes a leading role in future governments as expected, does not look so rosy either.

Even with strong support from the bureaucracy and pro-establishment sectors of society, any future coalition government led by General Prayuth will inevitably face increasing internal conflicts and public discontent if it continues with present NCPO policies.

For a start the “anti-populist” policies of the military will inevitably result in a deterioration or dismantling of state welfare programmes, especially the extremely popular universal health insurance program introduced by exiled former prime minister Thaksin Shinawatra, the hero of the “red-shirt” movement and nemesis of the present military establishment. This will lead to widespread discontent and protests.

Secondly, present policies of evicting communities from state-owned land, and for supporting new mega projects in rural communities (such as coal-fired power plants) against local opposition will inevitable increase discontent and opposition from rural communities and their NGO supporters. In addition, the inevitable coalition government brought about by the new constitution will force the two main rival political parties to be unwilling partners in the same government and may well lead to chronic internal conflicts. Finally, unless the next government can improve the economic situation of low-income
populations, there will be growing mass discontent with the government which cannot be controlled by present strong-arm methods.

In the end, further changes in government and a more democratic process of drafting a new constitution may become inevitable, and the military may find it safer to withdraw behind the scenes.

It is to be hoped that during future lessons learned about the consequences of the referendum results, there will be increasing recognition within Thai society that military government is not the right answer for a peaceful and just society and that a fully democratic system of government, de- spite its shortcomings, is the best system for people of different political views and economic and social interests to live together in peace.

**A view on 7 August Referendum**

*Kasit Piromya, Democrat Party politician, former Minister of Foreign Affairs of Thailand*

The positive outcome of the 7 August national referendum on the Draft Constitution and on the additional question pertaining to the ad-hoc Senate during the first 5 years after the coming into force of the Constitution must be taken within the existing political context.

The military junta was able to provide a situation of stability after a decade of upheavals. The military leadership was perceived by the public for its dedication, hard work and selflessness. The military was also successful in creating the public perception and belief that politicians were the causes of all social-ills and sources of massive corruption.

Comments and views forthcoming from political quartets were therefore perceived to be of self-serving; and outright selfish nature. There was thus no credibility to their disposition and views expressed.

The military junta held on to the banning of activities by all political parties. But even if there were to be full freedom of expression and public access, the views of political parties on the Constitution and the additional question at the end would not have had much impact or inroads into the minds and awareness of the general public because their credibility was really lost and they had not been able to recoup the reputation and reform themselves.

With political parties neutralized, the military proceeded with quiet but extensive, nation-wide “political education” to convince the public to go along with the draft constitution and the additional question.

The turnout was satisfactory. There was no coercion, no environment of fear. The positive out- come rendered legitimacy to the ruling regime and the public hope of a better future for all.
The Thai public wanted the country to move on with the leadership and stability provided by the military at least for the next five years.
It can thus be said that the Thai people are not in a hurry to return to the situation of politics as usual and are not yet inclined to take risks with politicians again and so soon.

Thailand’s Referendum Results: A Vote for (Fragile) Stability
Prajak Kongkirati, Assistant Professor at the Faculty of Political Science, Thammasat University

On 7 August, the draft of Thailand’s 20th constitution was approved in a contentious but peaceful referendum. According to the Election Commission of Thailand 16.82 million people voted in favour of the draft while 10.60 million rejected it. The turnout was relatively low with only 59.4 per cent of eligible voters casting their ballots, compared to 57.6 per cent in the 2007 referendum and 75 per cent in the 2011 General Elections.

There are two reasons for the overwhelming vote for the draft. First, the voter turnout in the North-east, stronghold of the Red Shirts and Pheu Thai party, was low. Many perceived the referendum to be unfree and unfair, and believed that the military would remain in power regardless of the outcome. Second, there was no splitting of votes among Democrat Party’s supporters despite Abhisit Vejjajiva’s, the opposition party leader, rejection of the draft. In essence it may be argued that the majority of Thais voted for the draft in hope of a return to normalcy and stability. The junta successfully persuaded voters that the military was needed to stabilise the country during this “transition period”. Voters also believed that the semi-authoritarian regime guided by the military would prevent the recurrence of street politics and violence that engulfed Thailand in recent years.

The referendum result not only endorses the constitution, but also shores up the Prayuth government’s legitimacy to rule. It demonstrates, among other things, that Thailand is still politically divided and reconciliation remains beyond reach. The Upper North, Northeast and the Deep South voted against the constitution while the rest of the country supported the junta-sponsored “political blue-print” which aims to entrench the power of the military and unelected elite at the expense of political parties and the popular will of the electorate.

In all likelihood the upcoming elections, promised to take place by late 2017 or early 2018, will see an unelected Prime Minister chosen by the military to lead an unstable and weak coalition government. Political stability
will depend upon the balance of power between the military and various political parties; a balance that may be all too easily lost.

The military’s new constitution will radicalise the democracy movement
Dr. Oliver Pye, Department of Southeast Asian Studies, Institute of Oriental and Asian Studies, Bonn University

The military’s new constitution is a blatant attempt to perpetuate their control over Thailand’s political system. Key changes compared to the 1997 “People’s Constitution” are those that increase the power of unelected bodies and that legitimate coups and other interventions against an elected government. Unelected members of the Senate will in future decide on key positions in the state, including judges on the constitutional court, and officials on the anti-corruption, election and state audit commissions. This shows two things: that the military and the forces supporting them are decidedly anti-democratic and that they are scared that if they were to allow free elections, a party representing the Thaksin camp and the aspirations of the redshirt movement would win.

The referendum, on the other hand, was held in order to shore up the legitimacy of the military regime. I would argue that while the result did not factually achieve this, it has been perceived to have done so, and so has indirectly boosted the image of the regime for the time being. Thitinan Pongsudhirak, for example, takes the 60% yes vote as proof that the Thai public endorses the military’s involvement in politics and that they “are tired of street protests.” This comfortably ignores that there was only one opinion permitted on television, in the press and in the streets: that to vote yes would be the best for Thailand. There was no free debate, campaigning was illegal and punishable with up to ten years imprisonment. A combination of one-sided propaganda, intimidation and repression only managed to deliver 60% of a 60% turn-out – not so impressive. For those opposed to the military regime and its constitution there were three possible tactics to be taken in the referendum: vote No, boycott the referendum as illegitimate or vote Yes in the hope that a return to elections would see a return of a Thaksin-near party to power and a later reform of the constitution. In fact, only 36% of the electorate voted Yes, 24% voted No and 41% didn’t vote or boycotted the referendum. If some of the Yes votes were tactical and some of the abstentions an active boycott, this would suggest that the military regime has the support of one third of the population at best.

For the pro-democracy forces and the redshirt movement, the question is now how to develop a strategy that can be successful under the new
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constitution. Before the 2014 coup, there was a division of labour whereby the redshirts would be mobilised to ensure electoral victory for the Pheu Thai Party. This strategy is now dead. In the unlikely event that a new party representing the Thaksin camp would win a new election, the government would be paralysed by the military’s grip over the state apparatus. The hopes of some commentators that a compromise could be reached between the two sides that would ensure a gradual return to “normal” democratic procedures have been dashed by the constitution. Back-door negotiations have led to nothing.

Strategy needs to be based on analysis, and a starting point is to depart from the modernisation model of democracy. In its contemporary form of “good governance, this starts with shopping list of bourgeois democracy: free elections without vote-buying; the state is a neutral executive of the legislative which is counter-checked by the judicative; the military should be “professional” and not get involved in politics; courts should be independent and politically neutral; the media should be independent and politically neutral etc. This is seen as the norm, to which modern states are either evolving or towards which they need to be nudged. In this model, Thailand is an aberration from this everlasting and true model of democracy. This is usually explained in cultural terms: for the right wing as a justification (“Thais love their King”, “Thais don’t yet understand democracy fully”) or for liberal democrats as an explanation (“endemic corruption”, “pre-modern continuities”).

But what if Thailand is not an aberration? What can Thailand tell us about the state, the relation of democracy to economic development and class formation, about political movements, about strategy and tactics, about bourgeois democracy in general?

According to mainstream commentators, the state should be neutral. Thailand shows us that it is not. The last ten years have seen a struggle by opposing power blocks over key sections of the state: police versus military, different factions within the military, the judiciary, the fight over who controls the royal institution etc. Thaksin, starting from a position of economic power (Shin Corp) and legislative power (control of parliament and government) attempted to translate his democratic mandate into securing key positions in other parts of the state apparatus. The non-elected “network monarchy” wanted to prevent this. It is no coincidence that interventions by the monarchy and the military started or became more strident as Thaksin intervened in the promotion politics of the military itself, advancing key allies at the expense of other factions. The Thai experience shows that real democracy cannot ignore the nature of the state, nor the power of the military and the question of what to do about it.

The new constitution does not mean that a thorough democratisation of Thai society is impossible. Three major events in Thai history led to
democratic reform: the 1932 revolution, the 1973 uprising and the 1992 democracy movement. In each, mass movements changed the balance of forces and so could change the political “Überbau,” including the constitution. These movements were not restricted by electoral politics, but combined political aims with social demands. The democracy movement in Thailand will need to do the same again.

In the current hyper-royalist frenzy after the death of King Bhumibol, intimidation and repression, particularly the widespread use of Lèse Majesté, will more likely than not pre-empt open political resistance for the time being. In the longer term, however, several factors suggest that a mass movement for democracy could again be successful. The first is that millions of people have developed a thirst for democracy that is directly related to demands for social reforms. Thaksin’s popularity was founded on him delivering on these social aspirations, particularly the 30 Baht health scheme, credit for rural communities, the minimum wage etc. They have also learnt in practice that the state, the monarchy and the military are not neutral. Secondly, while on a high now, royalist ideology is waning. A future King Vijaralongkorn will not have the same mass appeal as his father, and looks likely to be a liability for a military regime that uses the monarchy for its legitimisation. Thirdly, Thai capital is still divided, and only one faction supports the military.

The new constitution, by precluding the electoral strategy, will radicalise the democracy movement. The movement would have to address the undemocratic nature of the state, the control of the media, corporate power and, particularly, the military. A lot will depend on the political leadership that will now emerge under conditions of military dictatorship.

The August 7, 2016 Referendum: Legitimizing the Junta

Dr. Paul Chambers, Institute of South East Asian Affairs, Chiang Mai University

It has become fashionable for military juntas seeking domestic and international legitimacy to use the tool of “constitutional referendum” to demonstrate that they have popular support for their prior and future actions. Examples include the referendums applied by military regimes in 2008 Myanmar and 2014 Egypt respectively, both of which legitimised a legal role for the military in politics while enhancing their powers.

Thai juntas have also utilized referendums to oxymoronically demonstrate their democratic character. In August, 2007, a military junta which had ousted a democratically elected government put forward a referendum vote on a
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junta-endorsed charter. With the regime refusing to allow any campaigns against the vote and many Thais unsure what exactly the charter contained, the referendum passed 57.81 percent to 42.19 percent. Junta leaders then used the referendum to legitimize the 2006 coup, given that they could argue that most Thais had accepted a constitution through referendum which the military had backed. But such reasoning was turned on its head four months later when the pro-Thaksin People’s Power Party won a landslide electoral victory.

Fast forward nine years to the August 7, 2016 charter referendum. For months prior to the vote, the National Council for Peace and Order (NCPO) junta led a one-sided campaign indirectly in favor of the constitutional draft. Demonstrating draft opponents were invited to “attitude adjustment” or simply jailed. Contrary to junta pundits, there were in fact allegations of referendum vote buying. However, such claims were not investigated given that the junta refused to allow any independent election monitor. In the end, on the day of the referendum, many Thais who voted “yes” simply wanted a return to democracy no matter how defective it would be. The outcome saw the referendum pass slightly higher than the 2007 percentage: 61.35% to 38.65%. On the question of whether a non-elected Prime Minister could be selected by parliament (inserted into the referendum ballot at the last minute), 58.07 percent of votes were in the affirmative as opposed to 41.93%.

Since the referendum, many academics and journalists (domestic and international) have claimed that the vote shows that the junta must indeed have acquired popular support and that perhaps many Thais who once supported Thaksin and Yingluck Shinawatra no longer do so. But these are mere guesses substantiated only by and based upon the adequacy of a junta-directed referendum with no independent monitoring whatsoever. Indeed, civil society groups who reluctantly agree with the referendum’s results do Thai democracy a disservice by refusing to demand a review of the vote by an independent agency or ignoring that this was a military junta which went all out against the constitutional draft’s opponents prior to the August referendum.

As for the 2016 referendum’s consequences for Thai democracy in the future, it will assuredly give legitimacy to a leading opponent of pluralism, Thailand’s coup-happy military. As with the 2007 referendum, the 2016 referendum appears to vindicate the 2014 military coup in retrospect and, since the new constitutional draft enhances military prerogatives, it facilitates the entrenching of the military across Thai politics for years to come.

Ultimately, Thailand’s 2016 military-implemented referendum joins its earlier 2007 referendum and the referendums in Myanmar and Egypt as strategies designed to use voting by the people to both condone military seizures of power and also camouflage the extension of military incursions across democracy. The message is clear: Thailand’s military intends to stay in the spotlight of Thai politics.
Whither Rights?

Dr. Tyrell Haberkorn, Fellow in Political and Social Change at the Australian National

On 7 August 2016, the constitution drafted by the Constitution Drafting Committee (CDC) appointed by the National Council for Peace and Order (NCPO) was passed in a referendum vote in which approximately 60% of the electorate voted. Although the voting on the day appeared to take place without overt interference by the junta, the stringent prohibition on civilian debate on the lengthy and complicated draft, which has 279 sections, means that the referendum cannot be understood as free and fair. The prohibition was enforced by a series of arrests of student activists, journalists and human rights defenders who dared to try to make the content of the constitution accessible, distribute flyers or hold events for citizens to exchange ideas about the draft.

But why wouldn’t the CDC and the NCPO want citizens to talk about the constitution? If, as General Prayuth claims, the new constitution is the first step on the path back to democracy, wouldn’t public participation be of value?

There are perhaps many reasons why not, but one key reason is that this constitution is an instrument that rather than protecting the rights of citizens, provides a legal and constitutional gloss under which they can be stripped away. Dispossession of rights is woven across many of the articles, but the most important is in the final section of the constitution. Article 279 stipulates that “All announcements, orders and acts, including the performance of the National Council for Peace and Order or of the Head of the National Council for Peace and Order already in force prior to the date of promulgation of this Constitution or will come into force in accordance with Section 265 Paragraph Two, irrespective of their constitutional, legislative, executive or judicial force, shall be considered constitutional and lawful and shall continue to be in force under this Constitution. Repeal or amendment of such any announcement or order shall be made by an Act, except in case of the announcements or orders of the exercise of executive power in nature, the repeal or amendment shall be made by an order of the Prime Minister or a resolution of the Council of Ministers, as the case may be.”

In other words, the Orders and Announcements of the NCPO issued under martial law and the Orders of the Head of the NCPO issued under Article 44 of the 2014 Interim Constitution remain in place. These measures variously allow for arbitrary detention, trial of civilians in military courts, the establishment of secret prisons inside military bases, forced evictions and
many other kinds of rights violations. They were issued at the executive discretion of General Prayuth and other members of the NCPO, and with the passage of the new constitution, they both remain in force and have been given an additional layer of legality and constitutionality.

What effect does the retention of orders drafted, debated and promulgated by a military junta have on the prospects of democracy? What does the retention of these orders do to the rights provisions present in the constitution? Do such orders have any place in a democracy? And if the answer is no, then is the constitution really a step on the path towards democracy, or merely one more way in which the NCPO aims to hold onto dictatorial power?

Avoiding these questions is precisely what the NCPO needed to prevent in the lead up to the referendum. This is not because they worried about the constitution draft not being passed, but because these questions go much deeper to the very legitimacy of the regime, or the lack thereof.

The Risks and Opportunities of Fragile Mandates

James Ockey, Associate Professor and Honours Coordinator, University of Canterbury

On August 7, 2016, the authoritarian military government held the long promised referendum on a new constitution. Despite intensive efforts by the government to get out the vote, turnout was less than sixty percent. Although the referendum passed, with some sixty-one percent voting in favor, in all, less than thirty-four percent of eligible voters supported it, due to the low turnout. Even more alarming, from a military government point of view, the opponents outnumbered supporters in the Northeast, the most populous region of Thailand, and in the South, where government legitimacy is a key to winning the battle against a separatist insurgency.[1] In addition, the leaders of both major political parties, the nearest thing to elected leaders under the coup government, made public their opposition to the draft, and immediately on passage, the courts deemed the constitution deficient, insisting on changes to a key section.[2] In short, while the military government may have a mandate for its constitution, it is a very fragile mandate, at best.

A fragile mandate, of course, is easily lost, putting the roadmap at risk, and potentially under- mining attempts at reconciliation and at defeating the insurgency in the South. On the other hand, a fragile mandate can be preserved, even strengthened, if care is taken as the country moves along the mapped out return to democracy. Indeed, attempts to strengthen the mandate if undertaken
with care, could facilitate reconciliation and improve the chances for successful democratization.

Between now and the 2017 election, the government will be writing a series of organic laws that will set important conditions for democratic institutions, including the political parties. That can be done aggressively, seeking to undermine existing political parties, their organizations and their memberships, and in the process undermining the fragile mandate. Or it can be done in cooperation with political party leaders, beginning the important process of rebuilding positive relationships with party leaders. Joint meetings between government and party leaders can also begin building reconciliation among competing parties. Consultation with local politicians and opinion leaders in any reorganization of local government would enhance cooperation and strengthen the fragile mandate at a wider level, and further encourage reconciliation. Beginning the process of strengthening cooperation, consultation, and reconciliation is crucial to developing habits that will lead to successful democratization.

Striving to strengthen the mandate is also important to civil-military relations, and to the security of Thailand. In a thesis written at the National Defense College, General Prayuth Chan-o-cha rightly noted the rising importance of “MOOTW”, military operations other than warfare, for the Thai military in an era of rapid globalization.[3] Such operations include counterinsurgency, development and humanitarian assistance, and disaster relief. Success in MOOTW depends on good relationships with politicians and ordinary people. Thus developing habits of cooperation also provides direct benefits to the military in carrying out future missions.

A fragile mandate presents both risk and opportunity. In a time when reconciliation is also fragile, the risk is great, with an outbreak of violence possible. Rebuilding relationships is challenging. It may be much easier to proclaim a mandate and simply proceed without consultation. In the short term, it may also be more efficient. Yet short term challenges must be undertaken to engrain the habits of consultation and cooperation necessary to maximize the chances of long term success. Stepan and Linz [4] argued that democracy is only consolidated when “actors in the polity become habituated to the fact that political conflict within the state will be resolved according to established norms.” Beginning that habituation process immediately will both preserve the fragile mandate and enhance the chances of a successful transition.

[3] Prayut Chan-o-cha, “Kanprap botbat khong kongthap Thai phua rongrap phaikhuk khwamrupbaebmai” [Roles and Responsibilities Reform of the
Royal Thai Armed Forced Against the Non-traditional Threats [sic]]. Bangkok: National Defense College, 2007


Can a referendum under military rule be democratically acceptable?

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In his standard introductory text on elections and referendums, Michael Gallagher writes that scholars “analyze the referendum as an institution within the framework of representative democracy”. [1] Yet, Thailand has conducted only two referendums in her history, both of which took place when military dictators were in power and wanted to “legitimise” the constitutions drafted under their tutelage. As one could expect, the first referendum in 2007, following on the coup of 2006, was neither free nor fair. [2] Yet, the current military rulers outperformed their predecessors by a large margin. They systematically suppressed any possibility for anti-constitution information to reach remotely significant numbers of voters. At the same time, the military government used all its powers and administrative mechanisms to propagate the virtues of the draft constitution prepared by the Constitution Drafting Committee. When a member of the formally “independent” Election Commission (EC) suggested that they could print a brochure outlining both the positive and the negative aspects of the draft, he was swiftly reprimanded. Afterwards, the EC supplied all households of voters with yet another booklet praising the draft constitution, while it failed to print and distribute the critical views produced by the New Democracy Movement, the Nitirat group of Thammasat University law lecturers, or the NGO iLaw. Therefore, Forbes headlining an article “Thailand’s Military Junta Rigs Constitutional Referendum”, [3] or Asia Sentinel [4] calling the referendum “farcical” were quite accurate assessments of the referendum procedure.

Given that this procedure bizarrely deviated from what one would normally expect from such an exercise in direct democracy, one could perhaps have assumed that the result would meet with universal rejection by all political groups in Thailand, except for the power holders, and those who voted “Yes,” obviously. Yet, this did not happen. Even prominent activists, such as Sombat Boonngamanong, were so stunned by the clear result in favor of the constitution that they rather wondered why it was so different from what they had expected. Sombat was quoted as having said, “I was astounded. … I didn’t
think it would come into effect so I hadn’t really paid attention to it. Now, I’m seriously studying the draft”. [5] Sombat was certainly not alone in his flawed prediction. Nirmal Gosh noted that, “Most political insiders on the eve of the election, believed the draft constitution would be narrowly rejected”. [6] Piyaporn Wongruang, writing in The Nation newspaper, then demanded that the “pro-democracy sup-porters” should demonstrate their democratic minds by accepting the result of a referendum that took place in the most undemocratic circumstances imposed by a military dictatorship. These “pro-democracy supporters” should respect “the vote in a spirit of tolerance”, [7] although this tolerance had been entirely absent during the referendum period, which saw a sustained crackdown on almost all public utterances against the draft constitution.

Pragmatic authors not suspected of having pro-coup leanings, of course, were not prepared to reject the result either. Thitinan Pongsudhirak, for example, stated that “pro-democracy” groups must heed the result, though he did also say, “This referendum was not free and fair”. [8] His argument in favor of accepting the result, it seemed, rested on the assumption that any substantial anti-draft campaign would have done nothing significantly to change the outcome of the referendum. This was so because the 50 million “eligible voters knew enough about what the polls stood for,” simply because they had lived under military rule for more than two years already, and thus had taken in a sufficient amount of information about what was at stake. Thus, the great majority of voters who went to the polls (in contrast to the number of eligible voters), “approve[d] a military-inspired constitution that codifies longer-term military supervision of Thai politics” (ibid.). “Thai voters are not ignorant imbeciles lacking education who cannot see and speak for themselves. Thai voters may know exactly what they are doing” (ibid.). As a “Bangkok businesswoman told The New York Times, ‘It is better than politicians running the country. It’s good to have the military babysitting the government for the next five years’”. [9]

In sum, among the Thai population, there currently is no active majority for a democratic form of government. What we have witnessed in the referendum vote, instead, is a conscious consolidation of authoritarian structures, an acceptance by a majority of citizens of their disempowerment, including a substantive reduction of their role as the genuine sovereign of the Thai political order. Panat Tasneeyanond put it aptly when he spoke of a “system of elite rule with elections” (Prachatai, 2 March 2016). This is what the active part of the Thai voters in their majority wanted, and it is what the 2016 Constitution gives them. It is thus not an exaggeration to say that the referendum result represents a “historic defeat” [10] of Thai democratic political culture in general and of democratic political forces in particular.
The Constitutional Referendum 7 August 2016 in Thailand

Translation: Thai Constitutional Court Ruling
No. 18-22/2555 (2012)

Ruling No. 18-22/2555

Case No. 18-22/2553

In the Name of His Majesty the King

The Constitutional Court

Dated 13th July B.E. 2555 (2012)

General Somjet Boonthanom and others, 1st
Mr. Wanthongchai Chamnankij, 2nd
Mr. Wirat Kanlayasiri, 3rd
Mr. Warin Thiemjaras, 4th
and Mr. Boworn Yasintorn and others, 5th

Applicants

v.

President of the National Assembly
on behalf of the National Assembly, 1st
The Council of Ministers, 2nd, Pheu Thai Party, 3rd
Chart Thai Pattana Party, 4th
Mr. Sunai Julapongsatorn and others, 5th
and Mr. Paradorn Prissananantakul and others, 6th

Respondents

Re: Application for a Constitutional Court Ruling under Section 68 of the Constitution

General Somjet Boonthanom and others, Mr. Wanthongchai Chamnankij, Mr. Wirat Kanlayasiri, Mr. Warin Thiemjaras and Mr. Boworn Yasintorn and others submitted a total of five applications to the Constitutional Court for a ruling under section 68 of the Constitution.

The Constitutional Court found that all five applications related to the same issues. The Constitutional Court therefore ordered the consolidation of the cases, namely Case No. 18/2555, Case No. 19/2555, Case No. 20/2555, Case No. 21/2555 and Case No. 22/2555, into one trial for the benefit of the proceedings. General Somjet
Boonthanom and others were designated as the 1st applicant, Mr. Wanthongchai Channankij as the 2nd applicant, Mr. Wirat Kanlayasiri as the 3rd applicant, Mr. Warin Thiemjaras as the 4th applicant and Mr. Boworn Yasintorn and others as the 5th applicant, while the President of the National Assembly, on behalf of the National Assembly, was designated as the 1st respondent, the Council of Ministers as the 2nd respondent, Pheu Thai Party as the 3rd respondent, Chart Pattana Party as the 4th respondent, Mr. Sunai Julapongsatorn and others as the 5th respondent and Mr. Paradorn Prissananantakul and others as the 6th respondent.

The facts and supporting documents in the five applications may be summarised as follows.

**First Application** (Case No. 18/2555)

The 1st applicant claimed that the 2nd respondent, 3rd respondent and 4th respondent submitted motions to amend the Constitution of the Kingdom of Thailand B.E. 2550 (2007) pursuant to section 291 of the Constitution to the 1st respondent. The 1st applicant was of the opinion that section 291 of the Constitution was a provision relating to rules and procedures on constitutional amendment, not rules and procedures on the annulment of the entire Constitution. Therefore, the proposal made by the three respondents to amend the Constitution would pave the way for rewriting a new Constitution that would result in the overthrowing of the democratic form of government with the King as Head of State under this Constitution. Such an act was inconsistent with section 68 of the Constitution. In addition, the constitutional amendment process fell within the powers and duties of the National Assembly which consisted of Members of the House of Representatives and Senators. The Draft Constitutional Amendment submitted to the National Assembly for approval in the second reading, however, provided for the establishment of a Constituent Assembly to rewrite a new Constitution without the need to resubmit to the National Assembly for endorsement. This constituted a transfer of powers and duties to the Constituent Assembly and would result in the Constituent Assembly and Council of Ministers constituted subsequent to the completion of the new constitution acquiring national administration powers by means not provided under the Constitution. The act was thus inconsistent with section 291 of the Constitution. The 1st applicant had already submitted the matter to the Attorney-General for factual inquiry. The following rulings and orders of the Constitutional Court were therefore petitioned:
(1) an order that the 1st respondent and 2nd respondent cease all acts in relation to the amendment of the Constitution of the Kingdom of Thailand B.E. 2550 (2007);

(2) an order to dissolve the 3rd respondent political party and 4th respondent political party, the proposers of the amendment to the Constitution of the Kingdom of Thailand B.E. 2550 (2007);

(3) an order to revoke the election rights of party leaders and executive officers of the 3rd respondent political party and 4th respondent political party for a period of five years as from the day of Constitutional Court order.

Second Application (Case No. 19/2555)

The 2nd applicant claimed that the 1st respondent, 2nd respondent and 3rd respondent exercised rights and liberties under the Constitution to overthrow the democratic form of government with the King as Head of State. The 2nd respondent and 3rd respondent prepared Draft Constitutional Amendment (No. ...) B.E. ...., the essential substance of which paved the way for the rewriting of a new Constitution by adding provisions to Chapter 16 Drafting of a New Constitution, section 291/1 to section 291/16 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The new provisions stipulated the establishment of a Constituent Assembly to perform the duties of drafting a new Constitution. The 2nd applicant was of the opinion that such an act constituted an overthrowing or annulment of the entire Constitution, inconsistent with the principle of constitutional amendment. The act could result in a change of organs of administration under the democratic form of government with the King as Head of State, including section 2 which stated that Thailand was governed under the democratic form of government with the King as Head of State. The annulment of the entire Constitution therefore obliterated the fundamental principles safeguarded by the Constitution and was inconsistent with section 68. In addition, section 291 of the Constitution was a provision which enabled the amendment of the Constitution on an issue-specific basis and was not intended to allow the establishment of a Constituent Assembly constituted by a majority representation. Any person or political party which sought to overthrow or annul the entire Constitution of the Kingdom of Thailand B.E. 2550 (2007) by any means therefore constituted a threat to the Constitution. A member of the public who witnessed such a conduct had the right to protect the Constitution by submitting the matter to the
Attorney-General. The applicant had exercised the right to submit such an opinion to the Attorney-General since 23rd February B.E. 2555 (2012) but had not yet been informed of the outcome. On 14th May B.E. 2555 (2012), the 1st respondent passed a resolution by a majority vote of the National Assembly to approve Constitutional Amendment (No. ..) B.E. …. proposed by the 2nd and 3rd respondents, section-by-section, in the second reading. The 1st respondent scheduled a sitting for votes in the third reading on 5th June B.E. 2555 (2012). If the Draft Constitution was approved by the National Assembly in the third reading and presented to His Majesty the King for Royal Assent, the matter could no longer be submitted to the Constitutional Court for a ruling. The 2nd applicant was of the opinion that section 68 paragraph two of the Constitution stipulated that the 2nd applicant, as a person who had witnessed a prohibited act, had the right to submit the matter to the Attorney-General for a factual inquiry as well as the right to concurrently submit an application to the Constitutional Court for a ruling and order to restrain such act. Since the Attorney-General failed to act on the 2nd applicant’s submission, the 2nd applicant thus found it necessary to exercise the right to protect the Constitution as provided under section 68 by submitting an application to the Constitution Court to petition for the following rulings and orders:

(1) a ruling and order that the 2nd and 3rd respondents withdraw Draft Constitutional Amendment (No. ..) B.E. … from the deliberations of the 1st respondent;
(2) a ruling and order that the 1st respondent refrain from voting in the third reading on 5th June B.E. 2555 (2012).

Third Application (Case No. 20/2555)

The 3rd applicant claimed that the 2nd respondent and Members of the House of Representatives from the 3rd respondent party had proposed Draft Constitutional Amendment (No. ..) B.E. …. Subsequently, the sitting of the National Assembly passed a majority resolution to adopt the Draft’s principle in the first reading, and passed a majority resolution to approve the second reading of Draft Constitutional Amendment (No. ..) B.E. …. The National Assembly was scheduled to carry out the third reading of the Draft on 5th June B.E. 2555 (2012). The 3rd applicant was of the opinion that the acts of all three respondents in submitting a motion to amend the Constitution by providing for the establishment of a Constituent Assembly to rewrite the entire Constitution without reservation of any section opened a
channel for a group of persons to annul the entire Constitution and amounted to overthrowing the democratic form of government with the King as Head of State. This act constituted an overthrowing of the democratic form of government with the King as Head of State. Hence, the acts of the 2nd and 3rd respondents in proposing such Constitutional Amendment were acts inconsistent with section 68 and section 291 of the Constitution and not in accordance with the rules and procedures for Constitutional Amendment as provided under section 291 in conjunction with section 136(16) of the Constitution. Section 291 of the Constitution was not intended to allow the establishment of a Constituent Assembly and the annulment of the entire Constitution. It was intended, however, to provide an opportunity to amend the Constitution on specific issues, which did not imply that the Constitution could be amended in every section or any case. The assignment to the Constituent Assembly to rewrite the entire Constitution was therefore inconsistent with the Constitution. Even though the National Assembly had the power to amend the Constitution, the National Assembly could only undertake a Constitutional Amendment within the constitutional framework. As section 291 in conjunction with section 136(16) of the Constitution provided that Constitutional Amendments were the exclusive powers of the National Assembly. The appointment or assignment of powers to a Constituent Assembly to rewrite the Constitution was therefore forbidden as such an act exceeded the restraints provided under section 291 of the Constitution. Moreover, a body with the authority to rewrite the Constitution had to be one which was vested with the powers to promulgate a Constitution, not a body delegated by the Constitution as was the National Assembly. Once the National Assembly did not have the power to rewrite a new Constitution, it followed that the National Assembly did not have the ability to transfer this function or assign any person to rewrite the Constitution. As a consequence, the acts of the 2nd and 3rd respondents in proposing the Constitutional Amendment and the provision for the establishment of a Constituent Assembly to rewrite a new Constitution on behalf of the National Assembly were acts which were inconsistent with section 136 and section 291 of the Constitution. The 3rd applicant therefore was of the opinion that the acts of the 2nd and 3rd respondents in proposing the Constitutional Amendment and the act of the 1st respondent in deliberating the Draft Constitutional Amendment constituted exercises of rights under the Constitution to overthrow the democratic form of government with the King as Head of State or to acquire national governing powers by means which were not in accordance with the provisions of this
Constitution. These acts were deemed inconsistent with section 68, section 136 and section 291 of the Constitution. The 3rd applicant had already submitted the matter to the Attorney-General for a factual inquiry. A petition was therefore made to the Constitutional Court for the following rulings and orders:

(1) a ruling that the motion to propose a Draft Constitutional Amendment by the 2nd and 3rd respondents and the deliberations of the Draft Constitutional Amendment were inconsistent with the Constitution of the Kingdom of Thailand B.E. 2550 (2007) and that such Draft Constitutional Amendment should lapse;
(2) a ruling and order that the 2nd and 3rd respondents withdraw the Draft Constitutional Amendment from the deliberations of the 1st respondent;
(3) a ruling and order that the 1st respondent refrain from calling a vote in the third reading on 5th June B.E. 2555 (2012).

Fourth Application (Case No. 21/2555)

The 4th applicant claimed that persons, groups of persons, the Council of Ministers and political parties had submitted a motion along with a Draft Constitutional Amendment to amend section 291 of the Constitution with the intent of creating a group of persons to perform the task of amending the Constitution. Such an act was deemed as an attempt to alter a fundamental principle in national administration under the democratic form of government with the King as Head of State and an act to overthrow the Constitution as prohibited under section 68 and section 291 of the Constitution. An amendment of the Constitution was the exclusive power of the National Assembly. The establishment of a group of persons to rewrite the entire Constitution was inconsistent with the principle provided by the Constitution. The 4th applicant had submitted the matter to the Attorney-General for a factual inquiry on 16th March B.E. 2555 (2012) but had not yet been informed of any outcome. A petition was therefore submitted to the Constitutional Court to admit the application for trial and to issue an interlocutory injunction to restrain the National Assembly from amending section 291 of the Constitution.

Fifth Application (Case No. 22/2555)

The 5th applicant claimed that on 25th February B.E. 2555 (2012) the
National Assembly passed a resolution to adopt in principle all 3 Draft Constitutional Amendment (No. ..) B.E. .... proposed by the 2nd, 5th and 6th respondents. The 5th applicant was of the opinion that such exercise of rights and liberties by the respondents to amend section 291 of the Constitution pursuant to the Draft submitted to the 1st respondent prejudiced the rights and liberties, as well as the human dignity, of the Thai people. The Draft Constitutional Amendment sought to amend section 291, which was not a motion to amend the current Constitution as provided under section 291 since there was no motion to amend a constitutional provision where a cause had to be presented on the impracticability or problems associated with the enforcement of a particular section. Also, as the current Constitution was a product of a referendum, an amendment of section 291 of the Constitution to enable the establishment of a Constituent Assembly also required a referendum. Moreover, whereas the Draft Constitutional Amendment provided for the establishment of a Constituent Assembly vested with special powers to overthrow the current Constitution by rewriting a new Constitution, and granted powers to the National Assembly to select a group of persons to constitute a Constituent Assembly, it was viewed that the acts of the Council of Ministers, Members of the House of Representatives or Members of the National Assembly to annul the current Constitution and rewrite a new Constitution constituted acts in violation of the Constitution. The 5th applicant had submitted the matter to the Attorney-General for a factual inquiry on 6th March B.E. 2555 (2012) but has not yet been informed of any outcome. A petition was therefore made to the Constitutional Court to admit the application for trial and to conduct an emergency inquiry before the National Assembly vote in the third reading of the Constitutional Amendment.

The preliminary issue considered by the Constitutional Court was whether or not the applications made by all five applicants were consistent with the rules under section 68 of the Constitution.

Section 68 paragraph one of the Constitution provided that “a person shall not exercise rights and liberties under this Constitution to overthrow the democratic system of government with the King as Head of State or to acquire national administration powers by means not provided under this Constitution.” Paragraph two provided that “in the case where a person or political party commits an act under paragraph one, a person who becomes aware of such an act shall have the right to submit the matter to the Attorney-General to conduct a factual inquiry and submit an application to the Constitutional Court for an order to cease such an act, but in any event shall not prejudice criminal proceedings against such committer.”
The Constitutional Court found that section 68 paragraph two was a provision which granted a right to a person who had become aware of an act committed by a person or political party under section 68 paragraph one to instigate an examination of such act by two channels. Firstly, the matter could be submitted to the Attorney-General for a factual inquiry. Secondly, an application could be submitted to the Constitutional Court for an order to cease such an act. The powers and duties to conduct an inquiry and issue an order in the event that a person exercised the right to protect the Constitution under section 68 paragraph two were the responsibilities of the Constitutional Court. The Attorney-General merely had the duty to conduct a preliminary factual inquiry and submit an application to the Constitutional Court. The applicants were by no means disentitled from making a direct application to the Constitutional Court. As the applicants had already submitted the matter to the Attorney-General for a factual inquiry and had not yet received a satisfactory outcome, they were entitled to exercise the second right to submit an application to the Constitutional Court. The Constitutional Court therefore ordered the acceptance of all five applications for trial and adjudication pursuant to section 68 of the Constitution and clause 17(2) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007) and all six respondents were served with a notice to submit a reply to the allegations within fifteen days as from the receipt of the copy of the applications.

The six respondents submitted replies to the allegations and supporting documents which could be summarised as follows.

The 1st respondent replied that the amendment of the Constitution was an exercise of National Assembly powers pursuant to section 291 of the Constitution, which was neither an exercise of rights and liberties to overthrow the democratic form of government with the King as Head of State nor to acquire national administration powers by means not provided by the Constitution. All three Draft Constitutional Amendments had been examined and determined as not having any characteristic or resulted in a change of the democratic form of government with the King as Head of State or any change in the form of the state. Moreover, the National Assembly’s Constitutional Amendment did not constitute an act inconsistent with section 291 of the Constitution. The motion to propose the Constitutional Amendment was thus included in the agenda for the joint sitting of the National Assembly. In the first reading to give approval in principle, members of the National Assembly gave speeches to express their views without any domination on the exercise
of functions by those members of the National Assembly. The joint sitting of the National Assembly subsequently passed a resolution to adopt the principles of all three Draft Constitutional Amendments and passed a resolution to establish a committee. The committee was to use the Draft Constitutional Amendment proposed by the Council of Ministers as the basis for its deliberations. In the second reading, the President of the National Assembly performed the duty of chairing the sitting impartially and allowed members of the National Assembly to deliver speeches for a period of up to fifteen days and imposed another fifteen day period prior to voting in the third reading as provided under the Constitution. In addition, even though the Draft Constitutional Amendment vested powers in the President of the National Assembly to determine whether the Draft Constitution prepared by the Constituent Assembly contained provisions which would lead to a change in the democratic form of government with the King as Head of State or a change in the form of the state, the President of the National Assembly had clearly expressed his position that a committee consisting of impartial persons would be established to examine the Draft Constitution prepared by the Constituent Assembly on such issues. It was therefore discernible that the President of the National Assembly had every intent to protect the democratic form of government with the King as Head of State and had exercised duties pursuant to the Constitution and Rules of the National Assembly B.E. 2553 (2010). In any event, there was a convention in Thailand where a Constitution had been drafted by a Constituent Assembly pursuant to Constitutional Amendment (No. 6) B.E. 2539 (1996).

As for the case where the Constitutional Court issued an order to the Secretary-General of the House of Representatives to notify the President of the National Assembly, on behalf of the National Assembly, to stay proceedings relating to the Constitutional Amendment until a ruling is made, the 1st respondent found that such an order could prejudice the exercise of legislative powers by the National Assembly to amend the Constitution. However, to ensure circumspection, it was deemed appropriate to hear the opinions of members of the National Assembly first. Thus, an order was made to postpone the joint sitting of the National Assembly to vote on the Draft Constitutional Amendment in the third reading on Tuesday, 5th June B.E. 2555 (2012), and to call a joint sitting of the National Assembly on Friday, 8th June B.E. 2555 (2012) instead. A majority of the members of the National Assembly were of the opinion that the sitting was able to vote in the third reading. Nevertheless, the President of the National Assembly pursued a policy of reconciliation and therefore
exercised his discretion to postpone voting in the third reading.

For the foregoing reasons, it was perceptible that the Constitutional Amendment was constitutional and in accordance with the Rules of the National Assembly B.E. 2553 (2010). Also, the Constitutional Amendment was an exercise of legislative powers by the National Assembly pursuant to section 291 and section 122 of the Constitution. It was not an exercise of rights and liberties of a person or political party as provided under section 68 of the Constitution. The Constitutional Court was therefore requested to dismiss all five applications.

The 2nd respondent gave a reply to three issues which could be summarised as follows.

Firstly, the Draft Constitution proposed by the 2nd respondent to the National Assembly did not constitute an exercise of rights and liberties under section 68 because the 2nd respondent was an organ which exercised governing powers under the Constitution. The proposal of a Draft Constitutional Amendment to the National Assembly was made pursuant to the provisions of section 291(1) of the Constitution. In addition, the substance of the Draft Constitutional Amendment did not contain any provision which showed a characteristic under section 68. Also, the consideration and approval of the Constitutional Amendment was an exercise of powers by the National Assembly in accordance with the procedures provided under the Constitution. The Draft Constitutional Amendment was not proposed to overthrow the democratic form of government with the King as Head of State or to change the form of the state or to acquire national governing powers by means not provided under this Constitution. Draft section 291/11 paragraph five provided sufficient safeguarding principles which prevented the Constituent Assembly from drafting a Constitution which would be contrary to such a principle. If the Draft Constitution was not in accordance with the prescribed principle, the Draft proposed by the Constituent Assembly would lapse. The establishment of a Constituent Assembly was identical to the Constituent Assembly established under the Constitution of the Kingdom of Thailand B.E. 2534 (1991) as amended by Constitutional Amendment (No. 6) B.E. 2539 (1996), consisting of 99 members, 77 of whom would be elected, one from each province, and 22 members would be selected by the National Assembly. The 2nd respondent did not have any role in the selection of members of the Constituent Assembly. It followed that the Draft Constitutional Amendment proposed by the 2nd respondent did not exhibit any principle or substance that would imply or indicate that the 2nd respondent had drafted this Constitutional Amendment to
acquire national governing powers by means which were not provided by the Constitution as stated under section 68.

On the second issue, the Draft Constitutional Amendment proposed by the 2\textsuperscript{nd} respondent was not in any way inconsistent with section 291 of the Constitution since it was the exercise of powers and duties of the Council of Ministers as provided under section 291(1) in adhering to the highest principles of national government. In other words, any change in the democratic form of government with the King as Head of State or change in the form of the state under section 291(1) paragraph two was strictly prohibited. Also the Draft Constitutional Amendment proposed by the 2\textsuperscript{nd} respondent did not amount to an annulment of the whole of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The Draft provided for the addition of Chapter 16 Drafting of a New Constitution, which established a Constituent Assembly to perform the task of drafting a new Constitution. Whether or not the current Constitution would be repealed was a matter for the future that would be in the hands of the Constituent Assembly, which could not have the characteristics under section 291/11 paragraph five of the Draft Constitution. Such a process was an approach which had already been undertaken on prior occasions under the Constitution of the Kingdom of Thailand, namely the Constitution of the Kingdom of Thailand (Interim) B.E. 2490 (1947) as amended by the Constitution of the Kingdom of Thailand (Interim) Amendment (No. 2) B.E. 2491 (1948), and the Constitution of the Kingdom of Thailand, as amended by Constitution of the Kingdom of Thailand Amendment (No. 6) B.E. 2539 (1996).

On the third issue, the Draft Constitutional Amendment proposed by the 2\textsuperscript{nd} respondent which provided for the duty of the National Assembly to establish a Constituent Assembly to draft a new Constitution was not in any way inconsistent with the principles of democracy through the people’s representatives as provided under section 291 of the Constitution. The Constituent Assembly was established to study the benefits and drawbacks, as well as problems arising from the application of various provisions under previous Constitutions. Upon completion, the Draft Constitution would be submitted for a referendum vote. The referral of a Draft Constitution to the people, as holders of sovereign powers, without submission to the people’s representatives was a democratic principle recognized by civilized nations.

The proposal of the Draft Constitutional Amendment by the 2\textsuperscript{nd} respondent was an implementation of the Council of Minister’s policy that had been declared to the National Assembly pursuant to section
176 of the Constitution. The Council of Ministers was under an obligation to implement the declared policies and the 2nd respondent’s proposal of Draft Constitutional Amendment was merely a proposal of a conceptual framework to involve public participation in the drafting of a Constitution. Upon the National Assembly’s approval in principle and implementation of the constitutional provisions, the duties of the 2nd respondent would have been fulfilled. The 2nd respondent’s proposal of the Draft Constitutional Amendment was therefore properly undertaken in accordance with the process stipulated under section 291 of the Constitution.

The 3rd respondent gave a reply which could be summarised as follows. All five applicants did not have the right to submit an application to the Constitutional Court for a ruling under section 68 paragraph two since the five applicants had already exercised the right to refer the matter to the Attorney-General for a factual inquiry and final opinion. The five applicants’ exercise of right to submit a direct application to the Constitutional Court for consideration on the same matter was therefore improper. The Constitutional Court’s acceptance of all five applications for consideration constituted proceedings in violation of the rules. The Constitutional Court had no jurisdiction over the constitutional review of the Draft Constitutional Amendment (No. ..) B.E. .... The constitutional amendment was not a legislative power, but powers under section 291 of the Constitution, which provided for processes and procedures distinct from the general legislative process. The power to amend the Constitution was thus not the power to amend a law, but the power to promulgate a Constitution, which was at a higher hierarchy than the legislative, executive and judicial powers. The Constitutional Court only had the jurisdiction to determine the constitutionality of laws. The Constitutional Court did not have the jurisdiction to conduct a constitutional review of a constitutional amendment. Furthermore, the constitutional amendment was not an exercise of rights and liberties of a person as provided under section 68 paragraph one since section 291 of the Constitution was a provision on rules and procedures for constitutional amendment, and not provisions on rights and liberties. The constitutional amendment proposal was thus an exercise of duties by the National Assembly and the Council of Ministers. Upon inclusion of the motion to amend the Constitution in the sitting of the National Assembly, the proceedings became part of the National Assembly process and no longer constituted acts of the proposer of the Draft Constitutional Amendment. Moreover, these proceedings did not constitute the National Assembly’s exercise of rights and liberties, since rights and liberties
recognized by the Constitution had the be the instances stated under Chapter 3, Part 1 to Part 12. A broad interpretation could not be made to incorporate the actions of constitutional organs in pursuance of powers and duties provided under the Constitution. The powers and duties of the National Assembly were in accordance with the provisions of the Constitution and the law. The 3rd respondent was of the opinion that since the constitutional amendment could not be associated with the exercise of rights and liberties under section 68, the Constitutional Court therefore did not have review jurisdiction. The intent of section 68 of the Constitution was to prevent the exercise of rights or liberties, or the use of force to overthrow the administration, such as by a coup d’état. Hence, the Constitution provided the Constitutional Court with the power to order the cessation of such an act. The constitutional amendment could not be compared with a coup d’état because it is the act of the National Assembly. If the conditions were satisfied and there were no violations of the prohibitions against change in form of government or change in form of the state, a constitutional amendment should be deemed as the absolute power of the National Assembly. Any other organ, including the Constitutional Court, did not have the power to conduct a review.

The motion of the 3rd respondent and members of the House of Representatives to amend the Constitution, including the deliberations on the constitutional amendment by the National Assembly, were conducted in accordance with section 291 of the Constitution. The provisions of section 291 of the Constitution were complied with. As for the substance of the Draft Constitutional Amendment, there was no provision which stipulated a change in the democratic form of government with the King as Head of State or a change in the form of the state. The essence of the amendment was the addition of Chapter 16 Rewriting of the Constitution, which did not cause the immediate overthrow or annulment of the entire Constitution. The subsequent establishment of a Constituent Assembly and deliberations on the Draft Constitution would proceed in accordance with the applicable constitutional provisions. Furthermore, all three Draft Constitutional Amendments and the Draft Constitutional Amendment adopted by the National Assembly in the second reading contained a provision which prohibited any change in the democratic form of government with the King as Head of State or change in the form of the state, or change to the provisions on the King. Therefore, the proposal of this Constitutional Amendment or establishment of a Constituent Assembly would not result in such a change. Hence, those acts were not prohibited under section 68 of the Constitution.
The process of rewriting a new Constitution neither resulted in the overthrow of the democratic system of government with the King as Head of State, nor exhibited the characteristics of the acquisition of national governing powers by means not provided by the Constitution. The rules under the Draft Constitutional Amendment provided for direct public participation through the election of members of the Constituent Assembly and a referendum vote, and the National Assembly participated by selecting 22 members of the Constituent Assembly. When drafting the Constitution, the Constituent Assembly was obligated to carry out public hearings in all regions throughout the country. The Constituent Assembly was thus independent and not dominated by the government or the National Assembly, and the King retained the royal prerogative to grant a Constitution that had been approved by referendum of the people. Moreover, members of the Constituent Assembly were elected from people throughout the country. Qualifications of candidates were wide open to allow qualified persons to apply for election candidacy. As for members of the Constituent Assembly selected by the National Assembly, the government or government members of the House of Representatives were not at liberty to determine specific persons since nominations were made by the prescribed institutions or organisations. As a consequence, it was not possible for any person or group of persons to dominate ideas in such a way that would allow members of the Constituent Assembly to draft a Constitution that would meet the demands of certain factions. The process was also not an acquisition of national governing powers by means which were not provided by the Constitution as the constitutional provisions in force had to be complied with. There had to be an election by the people. This was not a case where the 2nd respondent would acquire national governing powers immediately upon the promulgation of the Constitution.

The 3rd respondent was a political party which strictly adhered to the democratic form of government with the King as Head of State at all times as explicitly stipulated under the party rules. Therefore, it was implausible that there would be any concept which sought to overthrow the democratic form of government with the King as Head of State. The information presented to the Constitutional Court was entirely the fruits of the applicants’ imagination. Furthermore, the proposal of the Draft Constitutional Amendment was an act of members of the House of Representatives and the Council of Ministers, political activities which were distinct from the 3rd respondent since the relationship between the political party and members of the House of Representatives as governed by section 122 of the Constitution
stated that members of the House of Representatives were not bound by any mandate, delegation or authorisation and the constitutional and legal status and relationships between the 3rd respondent party and the 2nd respondent were deemed as having distinct roles and duties. In regard to the proposal of the Draft Constitutional Amendment by the members of the House of Representatives, the party had not adopted any resolution or ordered any mandate. There were only party policies propagated during the election campaign. The Draft Constitutional Amendment proposed by the 2nd respondent was also made pursuant to the policies declared to the National Assembly. The 3rd respondent therefore motioned the Constitutional Court for a ruling or order to dismiss all applications.

The 4th respondent gave a reply which could be summarised as follows. The party had never convened a meeting of the party executives or a meeting under the Chart Thai Pattana Party Rules, as amended by Amendment (No. 2) B.E. 2554 (2011), to adopt a resolution to act on the alleged matter. The acts of party members in jointly submitting a motion with members of other political parties to amend the Constitution were performances of duties in their capacities as members of the House of Representatives pursuant to section 122 of the Constitution. Moreover, the party’s Members of the House of Representatives were not sufficient for a motion to amend the Constitution. The 4th respondent was not linked to such acts. The 4th respondent further found that the acts of the party members in jointly submitting a motion to amend the Constitution did not prejudice the democratic form of government with the King as Head of State and the form of the state. Moreover, the proposal to amend the Constitution by establishing a Constituent Assembly was in line with a constitutional precedent which could be deemed as a convention under the democratic form of government with the King as Head of State. The substances of the amendment were also entirely complementary to the democratic form of government with the King as Head of State, in particular, the provision which stated that the King should appoint a President and Vice-President of the Constituent Assembly, and that the Constituent Assembly could adopt any prior Constitution which was deemed as most democratic as the initial draft for deliberations. It was thus discernible that the motion to amend the Constitution did not contain any substance which defied the democratic form of government as stated under section 68 of the Constitution. The exercises of rights by the five applicants were not in good faith since the motion to amend the Constitution did not prejudice the rights and liberties of the five applicants. It was therefore requested that the
Constitutional Court dismiss the application with respect to the 4th respondent.

Mr. Samart Kaewmeechai, a member of the 5th respondent’s group, gave a reply which could be summarised as follows. The five applicants did not have the right to file an application in the Constitutional Court. Section 68 of the Constitution did not provide the people with the right to file a direct application to the Constitutional Court. On the contrary, the provision stated that a person who had acquired knowledge of an act under paragraph one must submit the matter to the Attorney-General for a factual inquiry and submission of an application to the Constitutional Court for a ruling. The Constitutional Court order to accept the application for trial was therefore unconstitutional. Moreover, the constitutional amendment did not constitute an exercise of rights and liberty which would entitle the five applicants to file an application in the Constitutional Court for a review under section 68 of the Constitution. The constitutional amendment was within the powers and duties of the National Assembly to consider and act under section 291 of the Constitution, not the enactment of a law by the legislature which would be subject to a constitutional review by the Constitutional Court. As the constitutional amendment was not an instance involving the exercise of rights and liberties under section 68, the five applicants therefore did not have the right to file an application in the Constitutional Court. Also, the constitutional amendment had proceeded in accordance with all rules and procedures under section 291 of the Constitution. There was neither any intent to overthrow the democratic form of government with the King as Head of State nor to acquire national governing powers by means which were not provided under the Constitution. The process of drafting the new Constitution was democratic and consistent with the fundamental principles of the democratic form of government with the King as Head of State as it is performed by a Constituent Assembly elected by the people as representatives of each province, and another 22 members selected by the National Assembly. The Constituent Assembly was thus independent from politics and was able to draft a Constitution without influence or domination. A public hearing had to be held and the Draft Constitution had to pass the scrutiny of the President of the National Assembly in regard to whether or not it possessed a prohibited quality as provided under section 291/11 paragraph five. If there was a prohibited quality and the National Assembly found that such a prohibited quality did exist, the Draft Constitution would lapse. The Constitutional Court was therefore requested to reach a decision that
the motion to amend the Constitution submitted by members of the House of Representatives and the Council of Ministers, as well as the deliberations of the National Assembly pertaining to the constitutional amendment, were not instances relevant to section 68 of the Constitution, and that the application of all five applicants be dismissed.

The 6th respondent gave a reply which could be summarised as follows. The motion to amend section 291 of the Constitution submitted by the 6th respondent and others constituted performances of duties in the capacities of members of the House of Representatives and members of the National Assembly. The substance of the amendment did not in any way prejudice the democratic form of government with the King as Head of State or the form of the state. The establishment of a Constituent Assembly was an approach consistent with and not prohibited by the Constitution since the Constitution had previously been amended to establish a Constituent Assembly to prepare a draft which culminated in the Constitution of the Kingdom of Thailand B.E. 2540 (1997). Also, as regards the issue raised in these applications, the State Attorney had given the preliminary opinion on the facts that the motion to amend the Constitution had proceeded in accordance with the rules and procedures provided under section 291 of the Constitution. Moreover, the motion to amend the Constitution had already been adopted by resolution of the National Assembly. This showed that the motion to amend the Constitution did not contain any substance which was contrary to the democratic form of government under section 68 of the Constitution, and neither resulted in a change in the democratic form of government with the King as Head of State nor a change in the form of the state. Hence, the constitutional amendment was consistent with section 291(1) paragraph two of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The five applicants’ exercises of rights to request the Constitutional Court to rule that Chart Thai Pattana Party had violated section 68 of the Constitution were therefore not made in good faith. It was thus requested that the Constitutional Court dismiss the application.

The Constitutional Court examined the applications and reply statements and found that the following issues required rulings.

The first issue was whether or not the Constitutional Court had the power to accept the applications for consideration as provided under section 68 of the Constitution.

The second issue was whether or not a constitutional amendment under section 291 of the Constitution could result in the entire Constitution being rewritten.
The third issue was whether or not the acts of the respondent constituted an overthrowing of the democratic form of government with the King as Head of State under this Constitution or an acquisition of national governing powers by means which were not provided under this Constitution as provided under section 68 paragraph one of the Constitution.

The fourth issue was whether or not if the acts were within the ambit of section 68 paragraph one, those acts could be deemed as causes for the Constitutional Court to order the dissolution of political parties and the revocation of election rights of the leaders and executives of political parties.

The Constitutional Court determined that the five applicants should present evidence first, followed by the six respondents.

The Court heard evidence presented by the applicants on 5th July B.E. 2555 (2012), from a total of 7 witnesses, namely, General Somjet Boonthonom, Mr. Dej-Udom Krairit, Mr. Wanthongchai Channankij, Mr. Wirat Kanlayasiri, Mr. Suraphol Nitikraipot, Mr. Warin Thiemjaras and Mr. Boworn Yasintorn, which could be summarised as follows.

The applicants had the right to file an application in the Constitutional Court under section 68 paragraph two of the Constitution. This proposition was supported by the academic reasoning that the Court had the power to determine the provisions of law that could be interpreted and the determination of the Constitutional Court in this case was not a determination of whether or not these acts were unconstitutional. The Court was only required to make a preliminary review of whether or not these acts infringed the principle under section 68 of the Constitution in such a way which was contrary to the Constitution. In any event section 291 of the Constitution was intended for the amendment of the Constitution on specific issues or on a section-by-section basis, not an amendment which would lead to the annulment of the entire Constitution. The respondents’ claim that the amendment of the Constitution to enable the redrafting of a new Constitution had been undertaken on a prior occasion was untenable due to differing social contexts. The Constitution of the Kingdom of Thailand B.E. 2550 (2007) was adopted by a referendum, a direct exercise of sovereignty rights by the people en masse. Therefore, an amendment of the Constitution by members of the National Assembly as representatives of the people in such a way that would be contrary to the intent of the people en masse, i.e. the annulment of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) and redrafting of a new Constitution, would require a
referendum of the all the people in the country. This was in accordance with the theory that the exercise of delegated power could not override the acts or powers of the holders of the power to directly promulgate the Constitution. The respondents were therefore not able to amend the Constitution in a way which would lead to the redrafting of a new Constitution to annul the previous Constitution as such an act was contrary to the constitutional promulgation powers of the people.

In addition, the provision in draft section 291/11 paragraph five which stipulated that the President of the National Assembly and the National Assembly would determine whether the Draft Constitution drafted by the Constituent Assembly would result in a change in the democratic form of government with the King as Head of State or a change in the form of the state was an unreliable safeguard since under section 291/13 paragraph two the President of the National Assembly could solely determined that the Draft Constitution did not raise an issue under section 291/11 paragraph five which would then result in the Draft Constitution being forwarded to the Election Commission for proposal in a national referendum without an opportunity for review by any other agency. Although draft section 291/11 paragraph five of the Constitution provided a prohibition against any amendment to Chapter 2 on the King, there were still also royal prerogatives in other chapters of the Constitution.

The Court heard evidence of the respondents on 6th July B.E. 2555 (2012) from 7 witnesses, namely, Mr. Pokin Polakul, Mr. Udomdej Ratanasatien, Mr. Chumphon Silpa-aracha, Mr. Somsak Kiatsuranon, Mr. Yongyuth Wichaidit, Mr. Paradorn Prisananantakul and Mr. Achporn Charuchinda. Their testimonies could be summarised as follows.

An application under section 68 paragraph one of the Constitution must be submitted to the Attorney-General for a factual inquiry and determination of the existence of grounds for submission to the Constitutional Court. Section 63 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) previously provided a similar principle to section 68 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), i.e. the only channel for submitting an application was through the Attorney-General, details of which could be found in academic publications of the Constitutional Court and the Constitutional Court website, including in Constitutional Court Order No. 12/2549.

An amendment of the Constitution in this manner was acceptable as it was within the framework of the Constitution, regardless of whether the amendment pertained to particular issues in each section or in several sections concurrently, e.g. the amendment to the Constitution
of the Kingdom of Thailand B.E. 2534 (1991), or the amendment to any section which would lead to the redrafting of a new Constitution was also within the meaning of a constitutional amendment. In any event, however, there should be no amendment to the matter prohibited by the Constitution. Moreover, Thailand had previously established Constituent Assemblies on up to three occasions, i.e. the Constituent Assembly commissioned to draft of the Constitution of the Kingdom of Thailand B.E. 2492 (1949), the Constituent Assembly under Amendment of the Constitution of the Kingdom of Thailand (No. 6) B.E. 2539 (1996) commissioned to draft the Constitution of the Kingdom of Thailand B.E. 2540 (1997) and the Constituent Assembly under the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) commissioned to draft a new Constitution on this occasion. This process was democratic. Members of the Constituent Assembly were independent and free from domination by political factions. There was no provision governing the procedure for drafting a new Constitution by the establishment of a Constituent Assembly which opened an opportunity for overthrowing or changing the democratic form of government with the King as Head of State as this was explicitly prohibited under section 291(1) paragraph two of the current Constitution and section 291/11 paragraph five of the Draft Constitutional Amendment. For these reasons, the new Constitution still retained the existing form of government and form of state since the amendment could only be made within the scope of authority granted by this Draft Constitutional Amendment. If the facts were considered, it was only conclusive that this Draft Constitution constituted only a draft that had been adopted by the second ready. No amendment to the Constitution has yet been made. However, it was imagined that there would be an amendment one way or another, which only meant that those imagined scenarios were being applied to decisions on the current facts. The proceedings to amend section 291 of the Constitution in the past had opened opportunities for debate and motions. This Constitutional Amendment was consistent with the policies of the Council of Ministers that had been declared to the National Assembly prior to taking office. The Council of Ministers was bound to implement those policies pursuant to section 176 of the Constitution and would be held accountable under section 178 of the Constitution.

The President of the National Assembly affirmed that upon the completion of a new Draft Constitution by the Constituent Assembly, a committee composed of impartial persons would be established to review the Draft Constitution prepared by the Constituent Assembly to
determine whether it had the effect of changing democratic form of government with the King as Head of State, amending the chapter on the King, or changing the form of the state. The President of the National Assembly would not exercise his discretion solely.

The Draft Constitutional Amendment proposed by the 6th respondent, however, differed from the Draft Constitutional Amendment proposed by the 2nd and 5th respondents. In other words, upon the completion of the Draft Constitution by the Constituent Assembly, it had to be resubmitted to the National Assembly. Also, in the past, a motion to amend the Constitution had been proposed to establish a Constituent Assembly in B.E. 2539 (1996) in order to prepare the Constitution of the Kingdom of Thailand B.E. 2540 (1997). Hence, this Draft Constitutional Amendment could be deemed as consistent with the conventions under the democratic form of government with the King as Head of State.

Moreover, the actions taken by the 5th and 6th respondents and other members of their respective political parties were acting independently in their capacities as members of the House of Representatives, which were not binding on the 3rd and 4th respondent political parties.

The Constitutional Court examined the evidence from both sides and determined the case on the prescribed issues.

The first issue was whether or not the Constitutional Court had the power to accept the application for a ruling under section 68 of the Constitution.

The issue raised by the Pheu Thai Party, the 3rd respondent, in the application for Constitutional Court ruling on a legal question was whether or not the Constitutional Court had the power to accept the five applications for a ruling under section 68 paragraph two of the Constitution.

Section 68 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) provided that “a person shall not exercise rights and liberties under this Constitution to overthrow the democratic form of government with the King as Head of State as provided under this Constitution, or to acquire national administration powers by means which are not consistent with the provisions of this Constitution.” Paragraph two provided that “in the case where a person or political party commits an act under paragraph one, a person who has knowledge of such an act shall have the right to submit the matter to the Attorney-General for factual inquiry and to submit an application to the Constitutional Court for an order to cease such an act without prejudice to criminal proceedings against such person.”

The Constitutional Court found that section 68 paragraph two was
a provision which granted a right to a person who had knowledge of a violation of the prohibition under section 68 paragraph one to call for the instigation of an inquiry of such an act. There were two rights granted. Firstly, there was the right to submit the matter to the Attorney-General for a factual inquiry and submission of an application to the Constitutional Court. Secondly, there was the right to submit an application for a Constitutional Court order to cease such an act. These powers and duties to examine and adjudicate in the case where an applicant exercised the right to protect the Constitution as provided under section 68 paragraph two were the powers and duties of the Constitutional Court. The Attorney-General merely had the duty to conduct a preliminary factual inquiry and to submit an application to the Constitutional Court. The applicant was not deprived of the right to submit a direct application to the Constitutional Court. Even if the applicant had already submitted the matter to the Attorney-General for inquiry, the applicant was not deprived of the right to submit an application to the Constitutional Court. Such an interpretation was consistent with the intent of section 68 as provided in the Constitution and reaffirms the right to protect the Constitution as provided under section 69, i.e. “a person shall have the right to protest peacefully against any act to acquire national administration powers by means which are not consistent with the provisions of this Constitution.” The Constitutional Court could issue an order to cease the act which could amount to an exercise of rights and liberties under this Constitution to overthrow the democratic form of government with the King as Head of State or to acquire national administration powers by means which were not consistent with the provisions of this Constitution, the act had to be continuing and not yet fruitful. It was only in such a case that the Constitutional Court could give an order to cease the act. Otherwise, a ruling of the Constitutional Court under section 68 paragraph two would be of no consequence and unenforceable. Furthermore, the right to protect the Constitution as provided under section 68 contained a key principle with the purpose of allowing all Thai people to participate in the protection and safeguard of the democratic form of government with the King as Head of State and the acquisition of national administration powers should be consistent with the means provided under the Constitution from being overthrown. By nature, these provisions were preventive measures to allow an inquiry and ruling to cease the act which could endanger the form of government and overthrowing of the Constitution. If the serious detriment was inflicted on the Constitution and the form of government, restoration would no longer be possible. In this light, a person who became aware
of a cause under section 68 paragraph two was able to submit a direct application to the Constitutional Court so as to entitle the people to exercise their individual rights to combat such an act peacefully.

This section of the Constitution was not intended only to impose criminal sanctions or constitutional sanctions by way of political party dissolution, but also for the restraining of acts which contravened section 68 paragraph one before those actions could take effect. The raison d’être for the existence of section 68 and section 69 of this Constitution was to safeguard or protect the Constitution itself, as well as the principles recognized or laid out by the Constitution as the key spirits of national politics, i.e. the democratic form of government with the King as Head of State, and the prevention of the acquisition of national administration powers by means which were not consistent with the constitutional provisions. The constitutional purpose in this regard was the fundamental intent of the Constitution that had to be upheld, more so than the intents of the constitutional drafters which although could be used as tools for the search of the constitutional intent, the opinion of any one constitutional drafter could not be regarded as the intent of the entire Constitution. Nevertheless, if the minutes of the Constituent Assembly sittings were to be examined, both for the Constitution of the Kingdom of Thailand B.E. 2540 (1997) and the Constitution of the Kingdom of Thailand B.E. 2550 (2007), it could be found that the essence of debates showed a mutual intent to allow the people to exercise the right to protect the Constitution through the mechanism of the Constitutional Court under this section. This essential principle was more significant than the person who had the right to submit an application. The interpretation on the standing of a person to submit an application to the Constitutional Court should therefore lean towards the recognition of right, rather than the limitation of right. This approach would allow the Thai people and the Constitutional Court to examine acts which could potentially raise problems under section 68 paragraph one, and in the consequence to protect the Constitution in line with the intent of such provisions.

In the case where the Attorney-General had already conducted a factual inquiry pursuant to section 68 paragraph two but had not yet issued an order, if the voting process in the third reading was allowed to proceed, even if the Attorney-General subsequently submitted an application to the Constitutional Court for a ruling that the constitutional amendment process was inconsistent with section 68 paragraph one and that the acts should cease, any order would be rendered unenforceable. Also, the status quo could no longer be restored after such act had taken effect.
The Constitutional Court therefore had the power to accept the applications for trial and adjudication as provided under section 68 paragraph two.

The second issue was whether or not a constitutional amendment under section 291 of the Constitution could lead to the rewriting of the entire Constitution.

On the issue of whether or not an amendment to section 291 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) could lead to the revision of all provisions of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), the Constitutional Court found that the power to establish the highest political institutions or the power to promulgate the Constitution rested in the hands of the people who constitute the direct source of authority for the birth of the Constitution. These powers, which were deemed to be above the Constitution, established both the legal system and all organs exercising political and administrative powers. Since the established organs possessed only the powers granted by the Constitution and were subject to the Constitution, it was thus not possible for such an organ to exercise the powers granted under the Constitution to amend the Constitution in the same way as the power to amend regular legislation. Thailand was a country ruled under the democratic form of government with the King as Head of State. The country applied the code law system which adhered to the supremacy of the Constitution, and that the Constitution had to prescribe procedures or processes for constitutional amendments which were specifically different from general legislation.

The Constitution of the Kingdom of Thailand B.E. 2550 (2007) had been promulgated after receiving approval in a direct referendum vote by the people who were the holders of sovereign power. It was therefore the people who inaugurated this Constitution. Therefore, even though a constitutional amendment under section 291 of the Constitution was the power of the National Assembly, a constitutional amendment which sought to rewrite the entire Constitution was not consistent with the intent of section 291 of the Constitution as this Constitution had been obtained through a referendum of the people. It was thus fitting that the people, holders of the power to inaugurate the Constitution, voted in a referendum to determine whether or not a new Constitution was desired. Otherwise, the National Assembly could exercise powers to amend the Constitution on a section-by-section basis as appropriate, which was within the powers of the National Assembly and consistent with the intent of section 291 of the Constitution.

The third issue was whether or not the acts of the respondents
constituted acts to overthrow the democratic form of government with
the King as Head of State as provided under this Constitution, or to
acquire national administration powers by means which were not
provided under this Constitution, pursuant to section 68 paragraph one
of the Constitution.

After deliberation, the Constitutional Court found that section 291
of the Constitution was intended to provide a means for amending the
Constitution in particular sections in order to implement political
reform and revise the political structure to ensure greater stability and
efficiency. These powers were granted by the Constitution of the
Kingdom of Thailand B.E. 2550 (2007) as a channel for remedying
problems arising from defects in the Constitution or problems arising
from political facts which should be systematically and consistently
resolved on the same occasion. The Draft Constitutional Amendment
(No. ..) B.E. .... was therefore a result of section 291 of the
Constitution of the Kingdom of Thailand B.E. 2550 (2007), and thus
deemed as derived from the current Constitution. Upon an
examination of the Draft Constitutional Amendment (No. ..) B.E. ....,
which had resulted from section 291 of the Constitution, provided for
the establishment of a Constituent Assembly to perform the task of
drafting a new Constitution and to set out a process for drafting a new
Constitution, as adopted by the National Assembly after the second
reading and awaiting introduction to the third reading, it could be seen
that such actions did not contain sufficient facts for a finding of an act
to overthrow the democratic form of government with the King as
Head of State as provided under the Constitution as alleged by the
applicants. Moreover, the process for establishing a Constituent
Assembly was not yet concrete. The claims asserted by the applicants
were therefore predictions which had not yet taken effect. Furthermore,
section 291(1) paragraph two of the Constitution provided a limitation
on amendments to the Constitution of the Kingdom of Thailand B.E.
2550 (2007), clearly stating that “a motion to amend the Constitution
which caused a change in the democratic form of government with the
King as Head of State or a change in the form of the state could not be
introduced.” When viewed together with the memorandum of
principles and reasons for the Draft Constitutional Amendment (No. ..)
B.E. ...., which stated in its reasons that “the democratic form of
government with the King as Head of State will be maintained”, and
in the provisions of section 291/11 paragraph five of the Draft
Constitution, there were provisions which provided immunity that any
Draft Constitution would not prejudice the essence of the state, i.e. “a
Draft Constitution which causes a change in the democratic form of
government with the King as Head of State or a change in the form of the state, or a change or amendment to the provisions in the chapter on the King, is prohibited.” If a Draft Constitution possessed such characteristics under paragraph five as aforementioned, “the Draft Constitution shall lapse” pursuant to section 291/11 paragraph six.

In any event, if the Constituent Assembly prepared a Draft Constitution which had the characteristics of changing the democratic form of government with the King as Head of State or a change in the form of the state, or a change or amendment to the chapter on the King, both the President of the National Assembly and the National Assembly had the power to withhold the Draft Constitution and cause it to lapse. Also, if any person became aware of an act to overthrow the democratic form of government with the King as Head of State as provided under this Constitution, such person with knowledge of the act also had the right to submit the matter to the Attorney-General for a factual inquiry and submission of an application to the Constitutional Court for an order to cease such act at any event known by such person as long as section 68 of the Constitution remained in force. Significantly, after examination of the replies to the allegation, statements affirming facts and the court’s inquiry of the respondents, e.g. Mr. Somsak Kiatsuranon, President of the National Assembly, Mr. Achporn Charuchinda, representative of the Council of Ministers, Mr. Yongyuth Wichaidit, representative of Pheu Thai Party, Mr. Chumphon Silpa-archa, representative of Chart Thai Pattana Party, and Mr. Paradorn Prisananantakul, it was found that all the testimonies showed that the actions to achieve the rewriting of a new Constitution was not intended to overthrow the democratic form of government with the King as Head of State as provided under this Constitution. All respondents showed a firm intent to maintain and preserve the democratic form of government with the King as Head of State.

After deliberations, it was found that the facts did not lead to a finding that the acts of all six respondents constituted an overthrowing of the democratic form of government with the King as Head of State, or an acquisition of national administration powers by means which were not provided under this Constitution. All allegations were therefore merely predictions or concerns for the Royal Institution and the democratic form of government with the King as Head of State. The claimed consequences were too remote. The facts that had occurred were insufficient for a determination of an overthrowing of the democratic form of government with the King as Head of State as provided under this Constitution. As a result, the acts of all six respondents were therefore insufficient for a finding of an intent to
overthrow the democratic form of government with the King as Head of state or to acquire national administration powers by means which were not consistent with the provisions of this Constitution, as provided under section 68 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The Constitutional Court therefore dismissed the application on this issue, and with this ruling it was no longer necessary to give a ruling on the fourth issue.

By virtue of the foregoing reasons, the Constitutional Court dismissed all five applications.

Mr. Wasan Soipisut President of the Constitutional Court
Mr. Jaroon Intajarn Justice of the Constitutional Court
Mr. Chalermpol 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
Translation: Thai Constitutional Court Ruling
No. 15/2555 (2012)

Ruling No. 15/2555  Case No. 30/2553

In the Name of His Majesty the King
The Constitutional Court

Dated 13th June B.E. 2555 (2012)

Re: The Ombudsman requested for a Constitutional Court Ruling under section 245(1) of the Constitution on whether or not section 26 paragraph one (10) of the Administration of Judicial Officials of the Courts of Justice Act B.E. 2543 (2000) was inconsistent with section 30 of the Constitution.

The Ombudsman, as applicant, referred a matter to the Constitutional Court for a ruling under section 245(1) of the Constitution. The facts could be summarised as follows.

The applicant received a letter of complaint from Mr. Sirimit Boonmoon dated 18th February B.E. 2553 (2010) stating that, on 14th May B.E. 2552 (2009), Mr. Sirimit Boonmoon submitted an application to undertake a knowledge examination for the recruitment of judicial officials and appointment of judge trainees for the year 2552 (2009), class 58, and had taken a physical examination. The Judicial Commission of the Courts of Justice (JC) subsequently announced the list of eligible candidates only to discover that his name was not among those listed. The complainant thus submitted a letter requesting an explanation for the disqualification. The Office of the Judiciary replied by letter that the JC had reviewed Mr. Sirimit Boonmoon’s qualifications in the light of the requirements for undertaking the knowledge examination for the recruitment of judicial officials in the posts of judge trainees and had reached a resolution to reject the application due to unfit physical and mental conditions for the performance of judicial duties as provided under section 26 paragraph one (10) of the Administration of Judicial Officials of the Courts of Justice Act B.E. 2543 (2000).

The preliminary issue considered by the Constitutional Court was whether or not the Constitutional Court had the power to accept this application for adjudication under section 245(1) of the Constitution.
The Constitutional Court found as follows. Section 215 of the Constitution provided that in the case where the Constitutional Court found that a matter or issue submitted to the Constitutional Court for consideration was a matter or issue that had already been adjudicated by the Constitutional Court, the Constitutional Court might refuse to accept the matter or issue for further consideration. As regards the matter submitted by the applicant to the Constitutional Court for a ruling on whether or not section 26 paragraph one (10) of the Administration of Judicial Officials of the Courts of Justice Act B.E. 2543 (2000) was inconsistent with section 30 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), the Constitutional Court had already decided in Ruling No. 16/2545, dated 30th April B.E. 2545 (2002), that section 26 paragraph one (10) of the Administration of Judicial Officials of the Courts of Justice Act B.E. 2543 (2000) was not inconsistent with section 30 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997). Whilst the Constitution of the Kingdom of Thailand B.E. 2550 (2007) has continued to retain the principle of equality and unfair discrimination, being identical to the Constitution of the Kingdom of Thailand B.E. 2540 (1997), the only addition to section 30 paragraph three of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) was the term “disability”. This was an important principle aimed at preventing unfair discrimination against a person because of differences on the basis of disability. Whence the applicant submitted a matter to the Constitutional Court for a ruling on whether or not section 26 paragraph one (10) of the Administration of Judicial Officials of the Courts of Justice Act B.E. 2543 (2000) was inconsistent with the Constitution of the Kingdom of Thailand B.E. 2550 (2007), only with respect to the principle of unfair discrimination on the basis of disability under section 30 paragraph three, the case was therefore a matter or issue which the Constitutional Court had never previously adjudicated under section 215 of the Constitution. The case was thus in accordance with section 245(1) of the Constitution in conjunction with article 17(18) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007). The Constitutional Court had the power to accept the application for adjudication.

The substantive issue which then had to be adjudicated by the Constitutional Court was whether or not section 26 paragraph one (10) of the Administration of Judicial Officials of the Courts of Justice Act B.E. 2543 (2000) was inconsistent with section 30 of the Constitution.

The Constitutional Court found as follows. Section 30 of the Constitution was whether or not section 26 paragraph one (10) of the Administration of Judicial Officials of the Courts of Justice B.E. 2543 (2000) was inconsistent with section 30 of the Constitution.

The Constitutional Court found as follows. Section 30 of the Constitution was whether or not section 26 paragraph one (10) of the Administration of Judicial Officials of the Courts of Justice B.E. 2543 (2000) was inconsistent with section 30 of the Constitution. Part 2 Equality. Section 30 paragraph one provided that “persons are equal before the law and receive equal protection under the law.” Paragraph two provided that “men and women have equal rights.” Paragraph three provided that “unfair discrimination against a person due to differences in origin, race,
language, sex, age, disability, physical or health condition, personal status, economic or social standing, religious belief, education or training or political views which are not inconsistent with the provisions of this Constitution is prohibited.” And paragraph four provided that “a measure implemented by the state to eliminate obstacles or to promote the exercise of rights and liberties by a person akin to others is not regarded as an unfair discrimination under paragraph three.” The reason why section 30 paragraph three of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) added the new important principle on protecting disabled persons was to prevent unfair discrimination against a person on the basis of a “disability”, since disability was not previously included in the group “physical or health condition” where a disabled person was treated as a patient having an abnormality and required care. However, universally, it was accepted that a disability was a consequence of the relationship between a disabled person and the social environment which failed to facilitate the disabled person’s subsistence akin to other persons generally, denying the disabled person from equal access to fundamental provisions and the ability to lead a normal and peaceful life like other persons. Hence, the Constitution recognized several rights and liberties of disabled persons, e.g. a disabled or handicapped person should have the right to receive not less than twelve years of education provided by the state that was extensive and of good quality, free of charge, so as to enjoy equal education to other persons as provided under section 49; a disabled or handicapped person had the right of access to and use of public welfare facilities and proper assistance from the state as provided under section 54; and when reviewing a bill of law with an essential substance concerning disabled or handicapped persons, if the House of Representatives did not carry out deliberations by a full house committee, the House of Representatives should appoint an extraordinary committee comprising, among other members, representatives of private organisations relating to disabled or handicapped persons as provided under section 152.

Subsequent to Constitutional Court Ruling No. 16/2545 that section 26 paragraph one (10) of the Administration of Judicial Officials of the Courts of Justice Act B.E. 2543 (2000) was not inconsistent with section 30 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), Thailand ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD) on 29th July B.E. 2551 (2008). The Convention and the obligations stated therein became binding on Thailand as of 28th August B.E. 2551 (2008). The Convention stated characteristics of “disability” as well as the scope of “unfair discrimination on the basis of disability”. Thailand was therefore bound to comply with the general obligations stated in Article 4 of the Convention to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute
discrimination against persons with disabilities. In addition, Article 5, equality and non-discrimination, stated that States Parties should prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds in order to promote equality and eliminate discrimination. The Convention further provided that States Parties should take all appropriate steps to ensure that reasonable accommodation was provided. In this context, the term “person with disabilities” was defined in Article 1 as including those who had long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers might hinder their full and effective participation in society on an equal basis with others. The term “Discrimination on the basis of disability” was defined as any distinction, exclusion or restriction on the basis of disability which had the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It included all forms of discrimination, including denial of reasonable accommodation. Lastly, the term “reasonable accommodation” was defined as necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. Upon becoming a State Party to the United Nations Convention on Rights of Persons with Disabilities, state agencies therefore had the duty under Article 27(a) which prohibited discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions, and (g) which provided for the employment of persons with disabilities in the public sector. Hence, the state agency’s prescription of criteria for recruitment of a person to any position also had to take into account the aforementioned obligations under the Convention.

Section 30 of the Constitution provided the principle that all persons were equal before the law and received equal protection under the law. Unfair discrimination on the basis of a difference in terms of disability was prohibited. Section 29 of the Constitution provided the principle that the restriction of rights and liberties of a person recognized by the Constitution was prohibited except by virtue of provisions of law enacted specifically for the purpose specified by the Constitution, and only to the extent of necessity without affecting the essential substance of such rights and liberties. The Constitutional Court found further that the Promotion and Enhancement of the Quality of Lives of Persons with Disabilities Act B.E. 2550 (2007) was intended to protect disabled persons from unfair discrimination on the basis of
physical or health conditions, as well as to ensure that disabled persons had the right to receive public facilities and other public accommodation, including that the state was under an obligation to assist disabled persons in order to promote good quality of lives and self-dependency. The said Act applied to both public and private sector agencies. Section 4 of the said Act defined the term “disabled person” as a person having a visual, hearing, movement, communication, mental, emotional, behavioral, intellectual or learning impairment, or any other impairment which in interaction with various barriers might limit their performance of daily activities or participation in society, and that such person required special assistance in one form or another in order to enable performance of daily activities or participation in society on an equal basis with others, subject to the categories and rules published by the Minister of Social Development and Human Security. This definition of “disabled person” under the said Act was consistent with the United Nations Convention on Rights of Persons with Disabilities.

The Administration of Judicial Officials of the Courts of Justice was a law relating to the administration of personnel, from selection examination, recruitment, appointment, promotion, punishment to the retirement of judges. Selection of judges was provided in section 26 paragraph one, that “a selection examination candidate, knowledge examination candidate or special selection candidate for the recruitment of judicial officials and appointment to the position of judge trainees must have the qualifications and not have the disqualifications, as follows… (10) not being an incompetent person or quasi incompetent person, being insane or having a mental infirmity, or having a physical or mental condition that is unfit for a judicial official or a disease specified by regulation of the J.C.” The appointment of judges was provided in section 15, that “a person appointed to the position of a judge of the court must hold the position of a judge trainee and received training from the Office of the Judiciary for the period prescribed by the President of the Supreme Court with the approval of the J.C., which shall not be less than one year, and the training results achieved must meet the standards of the Judicial Administration Commission on honesty, knowledge and competency, responsibility and behavior which are suitable for a judge…” Finally, the retirement of a judge was provided in section 32, which essentially provided the instances when a judicial official retired from office, e.g. discharge under (6) due to failure to achieve training results in accordance with the standards of the Judicial Administration Commission or having performed duties deficiently as an official or being diminished in competency for the performance of official duties or having behaved inappropriately to remain as a judicial official, or suffering from an illness which hinders regular
performance of duties, or having a disqualification under section 26 paragraph one (1).

Section 26 paragraph one (10) of the Administration of Judicial Officials of the Courts of Justice Act B.E. 2543 (2000) provided that an selection examination candidate, knowledge examination candidate or special selection candidate for recruitment of a judicial official and appointment of judge trainee must have the qualifications and not have the disqualification of “…having a physical or mental condition that is unfit for a judicial official…” The term “physical or mental condition that is unfit” was within the scope of the definition of the term “disabled person” under the Promotion and Enhancement of the Quality of Lives of Persons with Disabilities Act B.E. 2550 (2007), which was consistent with the United Nations Convention on the Rights of Persons with Disabilities. The provisions contained a broad description of physical or mental conditions that were unfit for a judicial official without clear limits, which could lead to an exercise of discretion ultimately resulting in an unfair discrimination. A law which restricted the rights and liberties of a person must have clear limits. For example, the provision could state the extent of judicial duties hindered by the physical and mental condition in order to inform the public of the particular rights and liberties restricted by the law. The law should also be consistent with the principle of proportionality. There should be due regard to the benefits of the public and the society as a whole, rather than the benefits of the organisation. Moreover, the Administration of Judicial Officials of the Courts of Justice Act B.E. 2543 (2000) was a law enacted prior to the promulgation of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). Provisions in certain sections of the Act were therefore inconsistent with current circumstances where the Constitution aimed to protect disabled persons to ensure their entitlements and equal basis with other persons whether in terms of education, work and occupation. The provisions of section 26 paragraph one (10) of the Act opened an opportunity for the exercise of a wide discretion which was more than necessary and could result in an unfair discrimination against a disabled person. The prescription of qualifications and disqualifications which had the characteristics of an unfair discrimination against a disabled person at the application stage for selection of judicial officials by allowing the J.C. to exercise a discretion in determining whether a person should be eligible to apply for selection as a judicial official amounted to a disqualification of a disabled person from the very beginning. A disabled person was prevented from competing with other persons on an equal basis and was denied from first exhibiting his/her true knowledge and capabilities in relation to the job description. This was so despite the principal functions of a judge of the Courts of Justice being the trial and adjudication of cases in a just manner in accordance with the Constitution and laws in a properly
constituted panel. A disability was therefore not an obstacle to the performance of duties of a judicial official that would be prejudicial to fairness for the parties or interested person. The provisions of section 26 paragraph one (10) of the Administration of Judicial Officials of the Courts of Justice Act B.E. 2543 (2000) which provided that a selection examination candidate for recruitment of a judicial official must have the qualification and not have the disqualification of “a physical or mental condition that is unfit for a judicial official” was therefore inconsistent with the rights of a disabled person to engage in employment on an equal basis with other persons as provided under the United Nations Convention on the Rights of Persons with Disabilities, and constituted an unfair discrimination against a person on the basis of differences in disabilities as stated under section 30 paragraph three of the Constitution.

For the foregoing reasons, the Constitutional Court held that section 26 paragraph one (10) of the Administration of Judicial Officials of the Courts of Justice Act B.E. 2543 (2000), only in regard to the provision “…having a physical or mental condition unfit for a judicial official…” was contrary to or inconsistent with section 30 paragraph three of the Constitution.

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Mr. Jaroon Inthajarn  Justice of the Constitutional Court
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Mr. Nurak Mapraneet  Justice of the Constitutional Court
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Book release

About the book

In the past two decades specialized constitutional courts of the Continental-European type have largely prevailed over the model dominating the Anglo-Saxon legal systems. Constitutional courts in different constitutional systems across the world have been increasingly deciding questions with far-reaching political consequences. In this respect the general tendency towards the juridification of politics is embodied particularly clearly in the institution of constitutional courts. In the course of this development the role and performance of constitutional courts have been challenged in the practical debate while within the academic discourse constitutional courts have become one of the most interesting topics. Despite their common roots these courts vary in their role within the constitutional system, their functions and their performance to a significant extent. Within the frame of these aspects the contributions collected in this volume address questions such as the constitutionalization of the legal system by constitutional courts and the increasing politicalization of constitutional courts. The contributions refer to constitutional systems in Cambodia, Croatia, Germany, Indonesia, Japan, Mongolia, Poland, Spain, South Korea, Thailand and Taiwan. Among these are three contributions by incumbent or former constitutional court justices providing practice-oriented perspectives.

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