

# Plenary Session I

## **Economic Crisis and Political Crisis in Thailand: Past and Present**

**Borwornsak Uwanno\***

### ABSTRACT

*Thailand has seen a number of economic and political crises since 1932 when its political system changed from absolute monarchy to parliamentary democracy with a constitutional monarchy. This Article addresses the Constitutional reforms in light of the social and historical backgrounds of Thailand; where the turbulent social-economical landscape of Thailand led to the adaptations of the 1997 Constitution and 2007 Constitution respectively. While the economic crisis in Thailand could be attributed to worldwide economic recession, the economic downturn also triggered political crisis in Thailand where the large scale of social disruptions and coups were reported worldwide. This Article identifies the factors that trigger the Constitutional reforms, and by examining the roots and causes of political division and social instability in Thailand, the article offers solutions and possible routes of future social reforms to resolve the political divide. Moreover, the lessons from the past reforms and crisis highlight the need for an installation of acceptable and accountable democratic system, one that allows people to voice their concerns, and one that is resistant to manipulation for private gains. A comprehensive political reform is essential for a sustainable democracy, where Thailand must take into consideration of its long term interests, and how to protect people's interests across all sectors of society.*

**Keywords:** *Thailand, Constitutional Reforms, Financial Crisis, Political Crisis, Social Redistribution*

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\* Fellow of the Royal Institute, Secretary General of King Prajadhipok's Institute, Professor Emeritus of Chulalongkorn University.

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## I. INTRODUCTION

Since 1932 when its political system changed from absolute monarchy to parliamentary democracy with a constitutional monarchy, Thailand has seen a number of economic and political crises. In fact, the 1932 political change itself was also attributed to the worldwide depression after the First World War as the government of King Prajadhipok had to impose measures to cut public spending, which resulted in many bureaucrats being laid off, and other economic measures, which made a government under the absolute monarchy system unpopular.<sup>1</sup>

## II. FINANCIAL CRISIS IN 1997 AND THE CONSTITUTION

### A. *Financial Crisis*

Since 1989, the Thai economy had been experiencing continuously rapid growth averaging at 9% annually. Inflation was low at 3.4-5.7%, and the exchange rate was 25 baht per US dollar.<sup>2</sup> Domestic interest rates were relatively high, thereby attracting huge capital inflows which netted at US\$ 14.239 billion in 1995. All of these had led to Thailand's economic bubble in 1997, marked in particular by volatile speculation in the real estate sector, the price of which jumped by 395%, as well as in the stock market, which saw its overall trade volume rose by 175%.<sup>3</sup> Financial institutions—commercial banks and finance companies alike—were unscrupulously lending their money, especially to borrowers in the real estate sector, thereby accelerating the bubbling of the economy.

In May 1997, the Thai baht became a target of speculative ventures by large hedge funds, prompting the Bank of Thailand's decision to intervene to protect the value of the baht, which was fixed against the US dollar. This effort however failed. The Thai central bank had spent as much as US\$28 billion of the country's entire international reserves of US\$30 billion all in vain. Eventually, in July, the government under General Chavalit Yongchaiyudh decided to float the baht. It was rumoured that this move notwithstanding, the former prime minister, being part of the then coalition government, had benefited from inside information so that his group of companies were unscathed. On the contrary, the currency float had made him even richer.

After the float, the value of baht dropped by more than half—down to

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1. CHANWIT KASETSIRI, 1932 REVOLUTION IN SIAM (2000).

2. Narisa Laplamwanit, A Good Look at the Thai Financial Crisis in 1997-98 (1999), available at [http://www.columbia.edu/cu/thai/html/financial97\\_98.html](http://www.columbia.edu/cu/thai/html/financial97_98.html).

3. *Id.*

56 baht per US dollar in January 1998. The devaluation seriously affected financial institutions, and those private companies that borrowed from overseas saw their debts more than doubled. The problem of massive non-performing loans (NPLs) ensued as many real estate and construction companies defaulted on their debts. Over half of the existing financial institutions had to shut down their operations and went bankrupt as a result,<sup>4</sup> leading in turn to large-scale unemployment. It was said that as many as 600,000 people became unemployed.<sup>5</sup> The large outflows of foreign capital due to lack of confidence made the matter worse. The policy of maintaining high interest rates and preventing speculation on the baht did not work as intended; instead, it produced the opposite effect of exacerbating a serious economic slowdown. It was estimated that in 1998, the Thai economy might have contracted at the rate of -2%.<sup>6</sup>

Faced with such situation, the Thai government decided to resort to the support of the International Monetary Fund (IMF)<sup>7</sup> by seeking a US\$17 billion financial package while pledging to take certain actions in the form of Letters of Intent. From the Chavalit administration to that led by Chuan Leekpai, the Thai government signed altogether six Letters of Intent with the Fund and set as the performance criteria for the loan a policy to reform eleven related laws such as the bankruptcy law and legal execution process, as well as a policy to privatise state enterprises. The fifth Letter of Intent signed during the Chuan government in 1998 was used by General Chavalit and his group, after they become the opposition, in the move to seek impeachment of the government. The argument was that the government had concluded an agreement with IMF which contained a commitment to enact new laws and which, according to the Constitution, had to be approved by Parliament. This case was dealt with in the Constitutional Court's Decision No. 11/2542 (1998), which will be subsequently discussed.

On 14 August 1998, the Chuan government initiated a number of measures with a view to resolving the crisis. These included legal measures such as the issuance of six royal ordinances, or emergency decrees, under Article 218 of the 1997 Constitution,<sup>8</sup> namely, the Royal Ordinance on the

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4. On 26 June 1997, it was announced that 16 financial institutions were to temporarily suspend their operations. On 5 August 1997, 42 financial institutions were temporarily suspended and ordered to submit respective recovery plans. Only two were permitted to proceed with recovery operations. The other 56 were shut down. See <http://www.mof.go.th/fpobul/FFU001.htm> (last visited Dec. 6, 2009).

5. Yoshihiro Iwasaki, *Whither Thailand*, in *THE ASIAN FINANCIAL CRISIS: ORIGINS, IMPLICATIONS AND SOLUTIONS* 193, 193-98 (William C. Hunter et al. eds., 1999).

6. Ammar Siamwalla & Orapin Sobchokchai, *Responding to the Thai Economic Crisis*, Paper Presented at the Thailand Development Research Institute Conference, Policy Response to the Economic Crisis and Social Impact in Thailand (May 22, 1998).

7. The first Letter of Intent was for the US\$17.2 billion rescue package from the IMF.

8. CONSTITUTION OF THE KINGDOM OF THAILAND, B.E. 2540 (1997), sec. 218 (Thail.).

Reform of the Financial Institutions System, 1997, the Royal Ordinance on the Financial Institution Asset Management Corporation, 1997, the Royal Ordinance Amending the Bank of Thailand Act (No. 2), 1997, the Royal Ordinance Amending the Commercial Banking Act (No. 3), 1997, the Royal Ordinance Amending the Act on Finance Business, Securities Business and Credit Foncier Business, 1997, and the Royal Ordinance Amending the Revenue Code (No. 17), 1997. Measures were also initiated, which allowed foreigners to hold a maximum of 49% share in financial institutions for a period of 10 years without a requirement that they sell these shares after the specified period expires.

In addition, the new Bankruptcy Act became effective on 10 April 1998, and a royal ordinance was enacted to enable the Ministry of Finance to borrow US\$5 billion from overseas sources. Other royal ordinances were also enacted during 1998 to amend eight existing laws, one of which gave the Ministry of Finance the authority to borrow a sum of US\$7.5 billion in order to shore up confidence in the country's financial system.

On 10 March 1999, the Chuan government issued three additional measures with a view to borrowing 53 billion baht from Japan to stimulate the economy in accordance with the Keynesian theory, which in fact was the beginning of early populism; reducing the value added tax from 10% to 7% without amending the tax law given that Thai law specifies the ceiling of the taxes and allows the government to reduce taxes through issuance of a royal

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For the purpose of maintaining national or public safety or national economic security, or averting public calamity, the King may issue an Emergency Decree which shall have the force as an Act.

The issuance of an Emergency Decree under paragraph one shall be made only when the Council of Ministers is of the opinion that it is the case of emergency and necessary urgency which is unavoidable. In the next succeeding sitting of the National Assembly, the Council of Ministers shall submit the Emergency Decree to the National Assembly for its consideration without delay. If it is out of session and it would be a delay to wait for the opening of an ordinary session, the Council of Ministers must proceed to convoke an extraordinary session of the National Assembly in order to consider whether to approve or disapproves the emergency Decree without delay. If the House of Representatives reaffirms its approval by the votes of not more than one-half of the total number of the existing members of the House, the Emergency Decree shall lapse; provided that it shall not affect any act done during the enforcement of such Emergency Decree.

If the Emergency Decree under paragraph one has the effect of amending or repealing any provisions of any Act and such Emergency Decree has lapsed in accordance with paragraph three, the provisions of the Act in force before the amendment or repeal shall continue to be in force as from the day the disapproval of such Emergency Decree is effective.

If the House of Representatives and the Senate approve the Emergency Decree, or if the Senate disapproves it but the House of Representatives reaffirms its approval by the votes for more than one-half of the total number of the existing members of the House, such Emergency Decree shall continue to have the forces as an Act.

The Prime Minister shall cause the approval or disapproval of the emergency Decree to be published in the Government Gazette. In case of disapproval, it shall be effective as from the day following the date of its publication in the Government Gazette.

The consideration of an Emergency Decree by the Senate and the House of Representatives in case of reaffirmation of the Emergency Decree must take place at the first opportunity when such Houses hold their sittings.

decree instead of an Act which requires approval from Parliament; and reducing gasoline taxes.

Then, on 10 August 1999, the government issued four other measures without proposing any law to the National Assembly for approval. These measures were to reduce tariffs on raw materials used for exports, establish a US\$1 billion fund for private sector's debt restructuring, increase funds for small and medium enterprises (SMEs) and encourage the Government Housing Bank to extend housing loans at low interest rates.

#### B. *The Adoption of the 1997 Constitution*

Before the economic crisis erupted, there were movements among democratic activists calling for a new constitution to replace the one enacted in 1991, which was drafted by the National Peace-Keeping Council-appointed National Legislative Assembly and was therefore regarded as an authoritarian constitution.

This call bore fruit when Parliament agreed in 1996 to amend the 1991 Constitution by establishing a constitutional drafting council to prepare a new draft. The Constitutional Drafting Council, which comprised 99 members comprising 23 experts in the fields of public law, political science, administration and constitution drafting selected by both Houses of Parliament, and 76 representatives from each of the country's provinces, was to complete its work within 240 days or eight months. The Council started working in January 1997, before the economic crisis occurred, and the new Constitution entered into force on 11 October of the same year.

The constitutional drafting process included unprecedentedly broad-based public consultations, which contributed to raising Thai public's political awareness to a new height, particularly among those who shared views with the Constitutional Drafting Council, including opinion leaders in the society, academics, the media and the civil society. During the eight months' period, the work of the Council became a subject of conversations and panel discussions throughout the country. Indeed, the hope for a new constitution that would resolve the problem of corruption among political office holders, together with the hope for a stronger civil society that could help scrutinise politicians, and for a stable and efficient government under a carefully crafted check-and-balance system—which were all in the intent of the draft constitution of 1997<sup>9</sup>—had spread throughout the country and completely sidelined the anxiety and impact of the economic crisis.

Be that as it may, there were those who opposed the 1997 Constitution.

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9. ENCYCLOPEDIA OF THE CONSTITUTION OF THE KINGDOM OF THAILAND 1997 (B.E. 2540) (Borwornsak Uwanno ed., 2002).

The New Aspiration Party, which led the government at the time, and community and village chiefs, who would be prohibited by the new Constitution from holding offices in local administrative bodies, came out to oppose it using the colour yellow as their symbol. Monks, whose proposal to have the Constitution endorse Buddhism as the national religion was not accommodated, also called on Buddhists to oppose it. At the same time, those who supported the Constitution, including democratic organisations, academics, private sector and civil society, launched another movement using the colour green. Green then sprang up all over the country—in both urban and rural areas—prompting the National Assembly to approve the draft constitution, which was generally called “people’s constitution.”

The effect of this phenomenon was two-fold, namely:

1. The general public mood, which should have been one of despair and concern due to the economic crisis, was instead marked by the sense of joy and hope brought about by the people’s constitution that replaced the one originating from a *coup d’état*.

2. The use of “colour” in political campaigning has subsequently been employed by the People’s Alliance for Democracy (PAD), which has used yellow in its campaign against the government of Police Lieutenant Colonel Thaksin Shinawatra, and by the United Front for Democracy against Dictatorship (UDD), which after the coup of 2006 has been using red as a symbol in their movement against the coup and their call for justice for the former prime minister.

### C. *Constitutional and Legal Dispute over Government Interventionist Measures*

While most people were content with the 1997 Constitution and forgot the bitter lessons learned from the economic crisis that began in May 1997, those in the business sector who were directly affected by the measures implemented by the government and the opposition in the House of Representatives had used the 1997 Constitution and other laws to scrutinise the various measures which the government had taken to curb the crisis. Cases were brought before the Constitutional Court, the Court of Justice and the Administrative Court. Most of them—except the one regarding the privatisation of the Electricity Generating Authority of Thailand, in which the Supreme Administrative Court revoked the related royal decree—ended with the courts endorsing government measures as being in compliance with the Constitution and the laws. Such cases can be categorized into three groups as follows:

1. The first group comprises cases concerning the constitutionality of the exercise of executive power in issuing royal ordinances in accordance with

Sections 218-219 of the 1997 Constitution.<sup>10</sup>

According to the 1997 Constitution, enacting an Act of Parliament is the power of the King and the National Assembly. However, in cases of emergency and unavoidable necessary urgency, in order to maintain national or public safety or national economic security, or to avert public calamity, the King may, upon the advice of the Council of Ministers, issue a royal ordinance or emergency decree, which would have the force of an Act. The Council of Ministers must then without delay submit such ordinance to the House of Representatives and the Senate for their approval. In the case where it is not approved, the ordinance would lapse, but the parliamentary disapproval would not affect any act done whilst the ordinance was still in force. At the same time, Section 219 of the 1997 Constitution allowed no less than one-fifth of the total number of the existing members of the House of Representatives or of the Senate to co-sign a submission to request the Constitutional Court to rule whether there were reasonable grounds for the issuance of a royal ordinance in accordance with Section 218 paragraph one but not to examine the emergency or necessary urgency nature of such issuance (the power on which lies with the King and the Council of Ministers). Such a request, nevertheless, had to be presented to the speaker of the House of Representatives before being referred to the Court.

In the case where the Constitutional Court ruled that none of the four grounds stipulated in Section 219 were met, the royal ordinance in question would not have the force of law *ab initio*. In other words, nothing resulted from its enforcement. Such ruling must be supported by two-third of the total number of the Constitutional Court judges.

When the Chuan government enacted four royal ordinances, 90 members from the opposition co-signed a submission to the Constitutional Court in accordance with Section 219.

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10. CONSTITUTION OF THE KINGDOM OF THAILAND, B.E. 2540 (1997), sec. 219 (Thail.).

Before the House of Representatives or the Senate approves an Emergency Decree under section 218 paragraph three, members of the House of Representatives or senators of not less than one-fifth of the total number of the existing members of each House have the right to submit an opinion to the President of the House of which they are members that the Emergency Decree is not in accordance with section 218 paragraph one, and the President of the House who receives such opinion shall then refer it to the Constitutional Court for decision. After the Constitutional Court has given a decision thereon, it shall notify its decision to the President of the House referring such opinion.

When the President of the House of Representatives or the President of the Senate has received the opinion from members of the House of Representatives or senators under paragraph one, the consideration of such Emergency Decree shall be deferred until the decision of the Constitutional Court under paragraph one has been notified.

In the case where the Constitutional Court decides that any Emergency Decree is not in accordance with section 218 paragraph one, such Emergency Decree shall not have the force of law *ab initio*.

The decision of the Constitutional Court that an Emergency Decree is not in accordance with section 218 paragraph one must be given by votes of not less than two thirds of the total number of members of the Constitutional Court.



In its first decision, namely Decision No. 1/2541 (1999),<sup>11</sup> the Constitutional Court ruled that it did not have jurisdiction to determine whether the royal ordinances were “cases of emergency and unavoidable necessary urgency” as stated in Section 218 paragraph two, and that it had jurisdiction only to address Section 218 paragraph one. After considering the rationale annexed to the four royal ordinances, the Court was of the view that there were grounds in maintaining national economic security.

An interesting point in this decision is that the Court had gone beyond what was submitted to it (*ultra petita*). The plaintiff merely requested the Court to consider whether there was a necessary urgency in accordance with Section 218 paragraph two. What the Court did, though, was also to consider and rule that there were reasonable grounds for the enactment of the ordinances in accordance with Section 218 paragraph one—the issue not asked of in the submission.

It should also be noted that the afore-mentioned submission to the Constitutional Court under Section 219 was for the purpose of determining the constitutionality of **the rationale for the enactment of royal ordinances** in accordance with the four grounds stated in Section 218 paragraph one, not whether any of the **substance** of such ordinances was inconsistent with the Constitution. In this connection, the fact that the Constitutional Court ruled that there were grounds for the royal ordinances did not prevent those affected from raising with the Court<sup>12</sup> or the Ombudsman<sup>13</sup> the question whether the ordinances contained any substance or provision that was unconstitutional.

2. The second group comprises cases concerning the substance of the 14 royal ordinances enacted to address the economic crisis, i.e., whether certain

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11. Decision No. 1/2541 (1999) (Const. Ct.) (Thail.), The Constitutional Court Ruling 1998-2002, 2003(A).

12. CONSTITUTION OF THE KINGDOM OF THAILAND, B.E. 2540 (1997), sec. 264 (Thail.).  
In the application of the provisions of any law to any case, if the Court by itself is of the opinion that, or a party to the case raises an objection that, the provisions of such law fall within the provisions of section 6 and there has not yet been a decision of the Constitutional Court on such provisions, the Court shall stay its trial and adjudication of the case and submit, in the course of official service, its opinion to the Constitutional Court for consideration and decision.

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

The decision of the Constitutional Court shall apply to all case but shall not effect final judgements of the Courts.

13. CONSTITUTION OF THE KINGDOM OF THAILAND, B.E. 2540 (1997), sec. 198 (Thail.).  
In the case where the Ombudsman is of the opinion that the provisions of the law, rules, regulations or any act of any person under section 197(1) begs the question of the constitutionality, the Ombudsman shall submit the case and the opinion to the Constitutional Court or Administrative Court for decision in accordance with the procedure of Constitutional Court or the law on the procedure of the Administrative Court, as the case may be.

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

ordinances contained provisions which were inconsistent with the Constitution. There are 8 decisions by the Constitutional Court related to these cases, all of which ruled that the ordinances did not contravene the Constitution, namely, Decision No. 9-10/2544 (2001), Decision No. 16/2544 (2001), Decision No. 33/2544 (2001), Decision No. 40-49/2544 (2001), Decision No. 19-22/2545 (2002), Decision No. 26-34/2545 (2002), Decision No. 30/2546 (2003) and Decision No. 29-30/2547 (2004).<sup>14</sup>

3. The third group comprises cases in which the opposition co-signed a submission to impeach then Prime Minister Chuan Leekpai and Finance Minister Tarin Nimmanheminda on the charge that their conduct indicated that they intentionally used their powers in contravention with the Constitution by signing the fifth Letter of Intent with the IMF to seek the Fund's assistance and make a commitment to amend 11 different laws, such as those related to bankruptcy and legal execution process, and privatisation of state enterprises, while regarding amendment of such laws as performance criteria, without seeking approval from the National Assembly in accordance with Section 114 paragraph two of the 1997 Constitution, which stated that "A treaty which provides for a change in the Thai territories or extraterritorial areas over which the Kingdom has the sovereign rights or any jurisdiction, or which requires the enactment of an Act for its implementation shall be approved by the National Assembly."

In Decision No. 11/2542 (1999), the Constitutional Court ruled that the fifth Letter of Intent was not a treaty under the definition of the Vienna Convention on the Law of Treaties, 1969, because it was done unilaterally in an exercise of the right to utilise resources of the IMF in accordance with Article 5, Section 3B of the "Agreement on the International Monetary Fund," and the performance criteria outlined by the Thai government were merely an elaboration of grounds for its unilateral request, not an agreement. Hence, the approval need not be sought from the National Assembly.<sup>15</sup>

In addition to the above, there are two related cases under Decision No. 50/2542 (1999), in which the opposition argued that the government-proposed State Enterprise Corporatisation Bill contained certain provisions deemed to be unconstitutional. Specifically, the cabinet's resolution to convert the capital in a state enterprise into shares and establish a public company to hold such shares, to issue a royal decree to dissolve such state enterprise within a specified period of time and to consider the

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14. Decision No. 9-10/2544 (2001) (Const. Ct.) (Thail.), Decision No. 16/2544 (2001) (Const. Ct.) (Thail.), Decision No. 33/2544 (2001) (Const. Ct.) (Thail.), Decision No. 40-49/2544 (2001) (Const. Ct.) (Thail.), Decision No. 19-22/2545 (2002) (Const. Ct.) (Thail.), Decision No. 26-34/2545 (2002) (Const. Ct.) (Thail.), Decision No. 30/2546 (2003) (Const. Ct.) (Thail.), and Decision No. 29-30/2547 (2004) (Const. Ct.) (Thail.).

15. Decision No. 11/2542 (1999) (Const. Ct.) (Thail.), The Constitutional Court Ruling 1998-2002, 2003(B).

Public Enterprises Establishment Act revoked was inconsistent with the Constitution because a royal decree was inferior to and therefore could not supersede an Act. In this case, the Constitutional Court ruled that the said Bill did not contravene the Constitution because the Public Enterprises Establishment Act was superseded by the State Enterprise Corporatisation Act, not by the royal decree which stipulated only on the time-frame.<sup>16</sup> To propose a bill, which was substantive, warranted a lot of debate, so that its consideration could not be done within a short period of time. Some bills might require more than a year of deliberation. In other words, if the Senate made amendments to the draft, with which the House of Representatives did not agree, a joint committee had to be set up; and for this, the Constitution did not stipulate on the time-frame.<sup>17</sup> In this connection, had the government not issued a royal decree but had chosen to propose a bill instead, it might not have been timely to address the economic crisis.

Another reason why most governments opted not to present bills could be that in the past, the elected governments in Thailand were coalition governments. If the National Assembly did not pass any important bill the government proposed, that government would have to take responsibility by resigning or dissolving the House of Representatives. By not submitting a bill for parliamentary deliberation, the government would reduce the risk of internal rift within its coalition.

Be that as it may, such practice has later become problematic when the government under Samak Sundaravej from the People Power Party (formerly the Thai Rak Thai Party led by Police Lieutenant Colonel Thaksin Shinawatra) did not submit the Thai-Cambodia Joint Communiqué regarding the designation of Pra Viharn Temple as a World Heritage Site for approval by the National Assembly in accordance with Section 190 of the present Constitution (2007). In this case, the Ministry of Foreign Affairs was of the view that the Joint Communiqué was not a treaty, whereas the Constitutional Court in its Decision No. 6-7/2551 (2008) ruled that it was a treaty which required parliamentary approval. As a result, charges have been filed against the entire Samak cabinet for intentionally abusing its power in violation of Section 190 of the Constitution by not submitting the matter to the National Assembly for approval. The cases now rest with the National Anti-Corruption Commission.

In fact, successive Thai governments had long been avoiding submitting important treaties for parliamentary consideration, including controversial agreements like the Thailand-Australia Free Trade Agreement (2005), the

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16. Decision No. 50/2542 (1999) (Const. Ct.) (Thail.), The Constitutional Court Ruling 1998-2002, 2003(C).

17. See CONSTITUTION OF THE KINGDOM OF THAILAND, B.E. 2540 (1997), art. 175 (Thail.), and CONSTITUTION OF THE KINGDOM OF THAILAND, B.E. 2550 (2007), sec. 147.

Thailand-New Zealand Closer Economic Partnership Agreement (TNZ-CEP) (2005), the Framework Agreement for Establishing Free Trade Area between Thailand and India (2003), the Early Harvest Programme for accelerated tariff reduction on vegetable and fruit products between Thailand and the People's Republic of China (2003) under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations (ASEAN) and the People's Republic of China (2002). All of these were concluded during the Thaksin administration without consulting or seeking views from members of parliament, as would have been done in other countries where convention dictates that such matters be submitted to Parliament, even if this is not provided for in any provision of their respective constitutions.

Consequently, when the 2007 Constitution was drafted, provisions were proposed stipulating in detail on the procedures regarding treaty making while also adding categories of treaty which require parliamentary approval from three to five. Two of these have proved to be most problematic, namely, "a treaty which has a vast impact on the country's economic and social stability" and "a treaty which has a significant binding effect upon the trade, investment or budget of the country."<sup>18</sup> Given the broad wording and the use of such terms as "impact" and "binding" which might have economic, social, trade, investment or budgetary implications, the provisions under this

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18. CONSTITUTION OF THE KINGDOM OF THAILAND, B.E. 2550 (2007), sec. 190 (Thail.).

The King has the prerogative to conclude a peace treaty, armistice and other treaties with other countries or international organizations.

Any treaty, which provides for a change in the Thai territories or extraterritorial areas in which the Kingdom has the sovereign rights or any jurisdiction through treaty or enact an Act for implementation of the treaty or has a vast impact on the country's economic and social stability, or has a significant binding effect upon the trade, investment or budget of the country, it shall be approved by the National Assembly. The National Assembly shall finish the consideration thereof within sixty days as from the date it receives the matter.

Prior to action taken for the conclusion of a treaty to be made with other countries or international organizations under paragraph two, the Council of Ministers shall publicize relevant information, make arrangement for a clarification of such a treaty to the National Assembly. In this regard, the Council of Ministers shall also propose the scope of negotiation to the National Assembly for approval.

After the signing of a treaty under paragraph two and before an expression of intention to bring the binding effect is made, the Council of Ministers shall provide the public with an access to the details of the treaty. In the case where the implementation of such a treaty will affect the people or the small and the medium entrepreneurs, the Council of Ministers shall take actions to provide corrections or remedies to the affected individuals in an expeditious, suitable, and fair manner.

There shall be a law governing the setting of the stages and procedure for making a treaty which has a vast impact on the economic and social stability of the country or has a significant binding effect upon the trade or investment of the country, and the corrections or remedies given to the individuals affected by the implementation of such a treaty, keeping in mind the impartiality between the benefited individuals and the affected individuals from such an implementation as well as the public.

In the case where there is a problem under paragraph two, it shall be under the jurisdiction of the Constitutional Court for its decision and the provisions of Article 154(1) shall apply to the referring of the matter to the Constitutional Court *mutatis mutandis*.

Section have put considerable constraints on the work of the executive branch. This became evident with the Constitutional Court's ruling in 2008 that the Thai-Cambodian Joint Communiqué had "immense social implications" as demonstrated by the widespread protests against the document, even though such implications did not, or could not be expected to, take place when the Communiqué was signed; it was only after its signing that the implications occurred. The then government was accused of intentionally abusing its powers in violation of the Constitution. As a consequence, even in cases of agreements which, in the past, would not have entailed any problem, later governments dare not decide whether to submit them to the National Assembly and have chosen to seek views from the Council of State first. This applies even to the deals to sell rice and cassava to foreign governments, which—being state contracts under private international law—do not require parliamentary approval.

Article 190 of the present Constitution also stipulates in detail a three-step procedure for treaty making. As the first step, prior to undertaking action to conclude a treaty of the five specified categories, the government has to publicize relevant information and seek opinions from the public, as well as propose the negotiation framework for such a treaty for parliamentary approval. Then, once the treaty is concluded, it must be submitted to the National Assembly for approval. Finally, after signing but before giving consent to be bound by that treaty, the cabinet must provide the public with access to its details and provide remedies to those affected by it in an expeditious, suitable, and fair manner.

Meanwhile, although Section 190 paragraph five states that there shall be a law on the procedures for concluding a treaty of the two problematic categories, such a law has not yet been enacted. Hence, if a case is submitted to the Constitutional Court in accordance with the last paragraph of Section 190, the Court will be the one to make a decision on the basis of the facts of each case, as with its Decision No. 6-7/2551 (2008).

At present, a proposal has been put forward to amend and clarify Section 190 of the Constitution.

### III. GLOBAL ECONOMIC CRISIS AND POLITICAL CONFLICT 2008 AND BEYOND

#### A. *Contested Legitimacy from 2005-2009*

8 years 11 months and 8 days after the 1997 Constitution took effect, on 19 September 2006, the Council for Democratic Reform (CDR) staged a coup.

The coup was a result of political conflict and was about the legitimacy of the government under the leadership of Police Lieutenant Colonel Thaksin

Shinawatra. His Thai Rak Thai (TRT) Party, for the first time in Thai political history, commanded an absolute majority, having claimed victory in the general elections in 2001 and 2005 largely by employing its populist policies. In 2001, the TRT Party merged into its fold the other coalition parties, namely, the New Aspiration Party, Seritham Party, Social Action Party, Chartpattana Party and Solidarity Party. For four years, this merger effectively placed the prime minister above any scrutiny by the Democrat Party-led opposition, making Mr. Thaksin the first Thai prime minister ever to complete a four-year term without having to resign or dissolve the House of Representatives. Then, in 2005, the TRT Party won more than half of the seats in the House of Representatives (375 out of 500). This ruled out any possibility that the opposition—which comprised three political parties with a combined strength of just 125 MPs—could lodge a no-confidence motion against the prime minister. The government appeared to be very popular among the people, particularly those in the North and Northeast thanks to its populist policy initiatives, including the village fund (1 million baht per village), the 30-baht health care scheme, and the provincial development budget scheme (allocated on the basis of the number of members of parliament (MPs) in each province at the ratio of 100 million baht per one MP).

**Result of the General Election in 2005 (by political parties)**

(Seats)	Political Party	North	Northeast	Central	South Bangkok	Party List	Total
	Thai Rak Thai (TRT)	126(+42)	79(+35)	1(NC)	32(+4)	67(+19)	<b>375(+126)</b>
	Democrat (DP)	2(-3)	8(-12)	52(+4)	4(-5)	25(-6)	<b>96(-34)</b>
	Chartpattana (NP)	6(-5)	11(-8)	1(+1)	1(+1)	8(+2)	<b>26(-13)</b>
	Mahachon Party	2(N/A)	0(N/A)	0(N/A)	0(N/A)	0(N/A)	<b>3(N/A)</b>
	<b>Total</b>	<b>136</b>	<b>97</b>	<b>54</b>	<b>37</b>	<b>100</b>	<b>500</b>

*The above numbers also include the results of by-elections held in October 2005.*

*The numbers in (...) reflect the increase or decrease in seats as compared to the elections in 2001.*

*(www.ect.go.th)*

On the positive side, the TRT government brought stability to Thai politics. In contrast to earlier governments which had an average life expectancy of no more than one year and two months, it completed its first term (2001-2005) and looked set to remain in power for eight years by

completing its second. The results of the 2005 elections, the government's stability together with Thaksin's leadership, his clear economic policy and direction, which had generated high economic growth rates, as well as his bold international initiatives such as Asia Bonds and the free trade agreements with Australia, New Zealand, China and India—all contributed to Thailand's international standing—so much so that the prime minister announced his plan to buy a leading English Premier League team Liverpool and invite the Thai public to join him in the venture, creating quite a stir internationally. Meanwhile, Thaksin's initiatives at bureaucratic and legal reform also resonated well with the private sector.

With a strong and stable elected government under the 1997 Constitution, itself praised for progressiveness, Thai democracy appeared stronger, its government efficient and equipped with a clear economic policy, while its economy looked better. All these made Thailand attractive as an investment destination and better known internationally.<sup>19</sup>

On the other hand, some time after the TRT-dominated House took on the administration of the country, many of its policies came under fire and the personality and behaviour of its political leader were called into question—be they the “War on Drugs” policy, which had led to extrajudicial executions of more than 3,000 deaths and brought about widespread criticisms from human rights organisations such as Human Rights Watch in 2004 and the Asian Center for Human Rights in 2005 as well as Thai human rights organisations,<sup>20</sup> the interference with the media through commercial means whereby businesspeople with government connection would refuse to place advertisements in newspapers that criticised the government, the use of the Money Laundering Act to investigate the leading editor of *The Nation* and radio programme host Sutthichai Yoon,<sup>21</sup> or the orders to have certain programmes taken off the schedules of radio and television stations, most of which were owned by the state or government agencies. Taken off the air in September 2005 was the weekly talk show hosted by Sondhi Limthongkul, owner of ASTV and *Manager Daily*, which had been broadcast on Channel 9 of the Mass Communications Organization of Thailand (MCOT). The show continued as an outdoor programme at Lumpini Park. It was the starting point of what would become the People's Alliance for Democracy when those who opposed Mr. Thaksin joined force with Mr. Sondhi after the former prime minister sold his shares in Shin Corporation for 73 billion baht without paying taxes.

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19. Thitinan Pongsudhirak, *Thailand Since the Coup*, 19(4) J. DEMOCRACY 140, 140-51 (2008).

20. Bertil Lintner, *The Battle for Thailand: Can Democracy Survive?*, 88(4) FOREIGN AFFAIRS 109 (2009).

21. Neawna, NACC investigated Thaksin government intervene medias in Thailand (Apr. 3, 2008), <http://www.naewna.com/news.asp?ID=98369>.

The Thaksin government policy towards the Southern Border Provinces was also heavily criticized, particularly concerning the Takbai and Krue Se incidents, in which many Thai Muslims lost their lives.

Furthermore, the scrutinising mechanisms and processes set up pursuant to the 1997 Constitution, particularly independent bodies such as the Constitutional Court, the National Counter-Corruption Commission and the Election Commission, had come to be viewed with suspicion and dislike by the public as being tampered with. In one instance, the former prime minister was accused of failing to submit the account of the millions of shares he held to the National Counter-Corruption Commission, claiming this “honest negligence” on his part. In the Constitutional Court’s Decision No. 20/2544 (2001), eight judges ruled in his favour while the other seven found his failure to submit the account intentional. With other cases like this one, the legitimacy of the scrutinising bodies under the Constitution had been tarnished in the eye of the public and the media.

The Senate, which was constitutionally intended to be politically neutral, had also been under the government’s influence. Hence, the exercise of its power to appoint members of independent bodies and its check-and-balance role as envisaged by the 1997 Constitution became virtually ineffective vis-à-vis the government. In all, the TRT government was able to manipulate and control almost all constitutional mechanisms, with the exception of the Court of Justice and the Administrative Court.

There were also accusations of “policy corruption” by the Thaksin administration, such as those involving the passage of emergency decrees amending the Excise Tax Rates Act to allow telecommunications companies, including those affiliated with the prime minister to convert the concession fee to be paid to the Telephone Organization of Thailand into excise tax, the authorization of loans from a state-owned bank to a neighbouring country in order for the latter to purchase telecommunications equipment from companies affiliated with Shin Corporation, the bidding by his wife to purchase land from the Bank of Thailand’s Financial Institutions Development Fund, and the Revenue Department’s ruling that the transfer of shares among the Shinawatra clan was done “as a gift” and hence was not subject to any taxes. What shocked most people, however, was the sale of the entire shares in Shin Corporation, worth US\$73 billion baht or US\$1.9 billion, held by Mr. Thaksin’s son and daughters without paying taxes (Lintner, 2009). The sale prompted the transformation of Sondhi Limthongkul’s outdoor talk show into the “People’s Alliance for Democracy” (PAD), which from September 2005 till January 2006 had been vehemently campaigning for Mr. Thaksin’s removal. In February 2006, Mr. Thaksin decided to dissolve the House of Representatives to open the way for new elections to be held on 2 April 2006.



During their campaign for Thaksin's removal, the PAD and some academics lodged a petition seeking His Majesty the King's intervention in conferring a new prime minister under Section 7 of the 1997 Constitution, which stated merely that "Whenever no provision under this Constitution is applicable to any case, it shall be decided in accordance with the convention of the Constitution in the democratic regime of government with the King as Head of State." To this, His Majesty gave his opinion in his remarks on 25 April 2006 after the dissolution of the House of Representatives as follows: "I affirm that Section 7 does not empower the King to make a unilateral decision. It talks about the Constitutional Monarchy but does not give the King power to do anything he wishes. If the King did so, he would overstep his duty. I have never overstepped this duty. Doing so would be undemocratic."<sup>22</sup>

In the run-up to the said elections, the opposition parties, namely, the Democrat Party, Chartthai Party and the Mahacon Party, proposed a joint undertaking towards political reform and expressed their readiness to work with the Thai Rak Thai Party in this regard. The latter however wanted to include other political parties, which—while being more than the opposition parties in terms of number—did not have any elected MPs. The opposition parties subsequently decided to withdraw from the 2 April 2006 elections. As a result, many electoral districts saw only candidates from the TRT Party. There were also candidates from small parties which had never fielded any candidate before. Their so doing had the effect of circumventing the election law which stipulated that where there was only one candidate in an electoral district, such candidate must receive support from more than 20% of all those casting votes in that district in order to get elected. This would later become the grounds for the accusation against the TRT Party for paying small political parties to field candidates, particularly in the southern provinces which traditionally are the Democrat Party's constituencies, leading eventually to the Constitutional Tribunal's order to dissolve the TRT Party.

The 2 April elections were a confusing event. In more than half of the electoral districts, there were candidates only from one party. There were some 9 million no-vote ballots and 5 million invalid ballots whereas the TRT Party claimed 13 million votes overall. Facing such situation, Mr. Thaksin announced his temporary break from politics while his party would be working to form a new government which would be in power for a year to undertake political reform. Meanwhile, the Democrat Party moved to submit to the Election Commission the evidence that the TRT Party had paid small

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22. BORWORN SAK UWANNO, TEN PRINCIPLES OF THE RIGHTEOUS KING AND THE KING OF THAILAND 55-58 (2008).

political parties to field candidates in the elections, a prelude to the Constitutional Tribunal's decision to dissolve the concerned parties.

On 25 April 2006, His Majesty the King said in his remarks to the President of the Administrative Court and the President of the Supreme Court respectively that the request for him to confer a prime minister could not be done because it was unconstitutional. The King further noted that the elections did not look right and might be undemocratic. He beseeched the three courts (the Constitutional Court included) to take this matter into consideration.<sup>23</sup> Subsequently, the Constitutional Court pronounced the 2 April elections unconstitutional, so that fresh elections had to be held, which the Election Commission set for 15 October 2006. In the meantime, Mr. Thaksin announced his return as caretaking prime minister, prompting a protest that it was illegal given that the Cabinet had already approved his leave of absence.

In its decision 9/2549 (2006), following the submission by the Ombudsman on whether the elections on 2 April 2009 were constitutional, the Constitutional Court ruled that dissolution of the House of Representatives was an act of government, which was not for the Court to consider, but that the scheduling of the elections and the proceedings of the elections were within the Court's jurisdiction. The Constitutional Court was of the opinion that the scheduling of general elections only 37 days after the dissolution of the House had led the opposition parties to decide not to participate, and that the fact that the elections saw as many as 14 millions invalid or no-vote ballots demonstrated that the elections were not fair. The Court also found that the positioning of the booths in such a way that people outside might see which candidates the persons inside had chosen rendered the ballot not secret. "*The elections yielded results which are unfair and undemocratic, and are therefore unconstitutional, being inconsistent with Sections 2, 3, 104 paragraph three and 144, from the beginning of the election process, i.e., from the scheduling of the elections, the application of candidates and the ballot, to the counting of ballots and the announcement of the election results.*"<sup>24</sup>

Afterwards, on 16 May 2006 the Administrative Court issued its Decision No. 607-608/2549 which reaffirmed that the elections on 2 April 2009 were unconstitutional because "*the positioning of ballot booths, which used to be in such a way that a voter's back faced a wall or a blind, has been changed to making the voter face the wall or the blind. This change rendered the ballot not secret in actuality as well as in the perception of those who cast ballots.*"<sup>25</sup> The Administrative Court thus ruled the entire elections on 2

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23. *Id.* at 55-58.

24. Decision No. 9/2549 (2006) (Const. Ct.) (Thail.).

25. Decision No. 607-608/2549 (2006) (Admin. Ct.) (Thail.).

April 2006 null and void and annulled any act which resulted from the elections.

In view of the new elections set to be held, the opposition and the PAD demanded the resignation of the members of the Election Commission at the time because they did not trust that the Commission would carry out their duties with fairness. Charges were also lodged with the Criminal Court against three Election Commissioners, who on 25 July 2006 were sentenced to imprisonment without bail and thus lost their positions.

*B. The Coup of 19 September 2006*

The political situation in Thailand was gloomy and wrought with uncertainty. When Mr. Thaksin departed the country to attend the United Nations General Assembly in New York, a group of military officers under the name of the Council for Democratic Reform (CDR), led by General Sonthi Boonyaratglin, seized power and abrogated the 1997 Constitution. The CDR governed without any constitution for 12 days until the Interim Constitution was promulgated on 1 October 2006.

In the absence of any constitution, the CDR issued a number of announcements and orders, which had the force of law. Two of these were of particular importance.

The first was the CDR Announcement No. 30 setting up the Assets Examination Committee (AEC) which comprised 11 members. The AEC was tasked with scrutinising corruption allegations against the Thaksin government and had the power to investigate and submit charges to the court. The establishment of the AEC with only investigative power, nevertheless, deviated from past practice of the coup leaders which usually gave such body also the power to seize assets suspected of being acquired through corrupt means and put the burden of proof on the suspects if they wished to get back those assets, as seen when the National Peace-Keeping Council (NPKC) seized the assets of the cabinet members of General Chartchai Choonhavan's government in February 1993. The AEC lodged a number of cases against Mr. Thaksin and his cabinet with the Supreme Court's Criminal Division for Political Office Holders. Some of these had already become final and judgment passed, such as the case regarding the purchase of land on Radchadapisek Road by Khunying Potjaman Shinawatra, the former prime minister's wife, from the Financial Institutions Development Fund, in which the Court found Mr. Thaksin guilty under the Organic Act on Counter Corruption and sentenced him to two years' imprisonment. Some will soon be adjudicated, such as the alleged corruption in the purchase of rubber saplings and in the issuance of two- and three-digit lottery tickets by the Government Lottery Bureau, while others are under the

Court's consideration, such as the allegation against Mr. Thaksin of being unusually wealthy and seizure of his assets worth 73 billion baht.

The second was the CDR Announcement No. 27, Article 3, which increase the penalty of the revocation of the electoral rights of the executives of the dissolved political parties. It stated that "in the case where the Constitutional Court, or another body which act as the Constitutional Court, orders the dissolution of any political party for committing acts prohibited by the Organic Act on Political Parties, 1998, the electoral rights of the executives of such political party shall be revoked for 5 years as from the date the dissolution order is made." It was this Announcement which would later served as the basis for the dissolution of the TRT Party which was accused of paying small political parties to run in the general elections on 2 April 2006.

On 1 October 2006, the Interim Constitution 2006 was promulgated. Significantly, this Constitution provided for amnesty for the coup leaders and for the establishment of a Constitution Drafting Committee, comprising 100 members, to be charged with drafting a permanent constitution. The Committee was given 240 days to complete its work. The coup leaders also appointed General Surayud Chulanont, a former privy councillor, as prime minister.

On 20 May 2007, the Constitutional Tribunal—which comprised the President of the Supreme Court, the President of the Supreme Administrative Court, five Supreme Court judges elected by the assembly of Supreme Court judges, and two Supreme Administrative Court judges elected by the assembly of Administrative Court judges—issued Decision No. 3-5/2550 ordering the dissolution of the TRT Party and revoked the electoral rights of its executives for a period of 5 years.

In this Decision, the Constitutional Tribunal clearly accepted the authority of the coup leaders, noting that "*Later on 19 September 2006, while the three respondents in this case were in the process of submitting their clarifications on the charges, the CDR seized state power and issued the CDR Announcement No. 3 dated 19 September 2009, Article 1 of which abolished the 1997 Constitution and Article 2 of which abolished the Constitutional Court. The Constitutional Court thus ceased to exist as from 19 September 2006,*" and "*given that the Interim Constitution of 2006 Section 35 paragraph 1 states that there shall be a Constitutional Tribunal and Section 35 paragraph 4 states that all cases pending with the Constitutional Court prior to its abolition shall be transferred to the competence of the Constitutional Tribunal, the Constitutional Tribunal therefore has the authority to adjudicate on this case, regardless of whether*

*the Tribunal is a court or a body using the power of the judiciary.*<sup>26</sup>

The submissions seeking dissolution of five political parties were categorized into two groups. The first group comprised the TRT Party and three other small political parties, all of which were accused of colluding in the paying of small parties to run in the general elections on 2 April 2006. The Tribunal found the accusation to be true and ordered the TRT Party and the other three small parties dissolved. The Tribunal, however, acquitted the charges filed against the Democrat Party for wrongfully accusing the TRT Party of paying others to run in the elections, for obstructing the application of candidates during the elections, and for making wrongful accusation against Mr. Thaksin. The Constitutional Tribunal applied the CDR Announcement No. 27 Article 3 to revoke the electoral rights of the executives of the dissolved parties for 5 years, even though the said Announcement was issued after the commission of the acts which were grounds for those parties' dissolution. The Tribunal reasoned that "*the principle prohibiting retroactive enforcement of law that will cause adverse effect on individuals emanates from the 'no punishment without law' principle; however, such principle applies only to criminal acts*" and that "*the revocation of electoral rights is not a criminal sanction but it is a legal measure which resulted from the laws empowering such parties' dissolution.*"<sup>27</sup> The Announcement could therefore be applied retroactively (*ex post facto*). Three Supreme Court judges disagreed. The decision to dissolve the TRT and other parties was thus supported by six out of nine judges. The Tribunal's decision resulted in the revocation of the electoral rights of Mr. Thaksin and the other 110 executives of the TRT Party for five years, thereby preventing them from running in elections during that whole period.

C. *The 2007 Constitution and the Efforts to Resolve Problems Associated with the "Thaksin Regime"*

The authoritarian use of power by Police Lieutenant Colonel Thaksin Shinawatra was known among Thai academics as the "Thaksin regime," and the 2007 Constitution was drafted with the aim of preventing the return of that regime.

A comparison between the 1997 Constitution and the 2007 Constitution shows that with regard to the provisions related to the rights and freedoms of the people, public political participation and scrutinisation of state power, the 2007 Constitution took its 1997 predecessor as a model with a few

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26. Decision No. 3-5/2550 (2007) (Const. Trib.) (Thail.).

27. *Id.*

improvements, for example, by adding new rights and freedoms, making the exercise of political rights easier such as by reducing the number of signatures required to propose a law from 50,000 to 10,000, as well as improving the selection process for check-and-balance organs established pursuant to the Constitution.

The major difference between the two lies in the provisions concerning the political institutions. The drafters of the 2007 Constitution intended to prevent the executive branch from monopolising power in such a way that it would become difficult to scrutinise. They therefore brought back the pre-1997 election system whereby one electoral district can have up to three representatives, and the proportional system with eight electoral districts. In the past, this system had proved to produce multi-party coalition governments, not a strong single-party government as under the 1997 Constitution.

In addition, the 2007 Constitution stipulates that the prime minister shall not hold office for more than two consecutive terms or eight years.<sup>28</sup> It also makes it easier to submit a motion for a no-confidence debate by requiring one-fifth of the total number of the existing members of the House of Representatives (96 out of 480).<sup>29</sup> In the case where the opposition has less than one-fifth of the total membership, the Constitution allows more than one-half of the existing members of the House to submit a motion for a no-confidence vote against the prime minister if the government has been in power for more than two years.<sup>30</sup> These are measures to prevent the merger of political parties as the Thaksin government had done, which reduced the number of House members to the level that it was not sufficient to make a no-confidence motion in accordance with the 1997 Constitution.

The drafters' distrust towards the government and politicians are also reflected in other provisions unusual for government in the parliamentary system. For instance, while members of the House of Representatives can serve as cabinet ministers, they are prohibited from being junior ministers in the government.<sup>31</sup> Members of the House and of the Senate are also

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28. CONSTITUTION OF THE KINGDOM OF THAILAND, B.E. 2550 (2007), sec. 171, para. 4 (Thail.).

29. *Id.* sec. 158.

30. *Id.* sec. 160.

31. *Id.* sec. 265.

A member of the House of Representatives and a member of the Senate shall not:

- (1) Hold any position or have any duty in any Government agency, State agency or State enterprise; or hold a position of member of a local assembly, local administrator or local government official;
- (2) Receive, interfere, or intervene any concession from the State, a Government agency, State agency or State enterprise; or become a party to a contract of the nature of economic monopoly with the State, a State agency or State enterprise; or be a partner or shareholder in a partnership or company receiving such concession or be a party to the contract of such nature, either directly or indirectly;
- (3) Receive any special money or benefit from any Government agency, State agency or State enterprise apart from that the given by the Government agency, State agency or State enterprise to other persons in the ordinary course of business;

prohibited from interfering or intervening in the conduct of official duties by government officials and employees so that they are unable to bring people's distress to the attention of state agencies for fear of violating Section 266 of the Constitution<sup>32</sup> and losing their office. They are also prohibited from holding shares in companies which are engaged in state concession or have monopoly contracts with the government, and in media companies. These prohibitions also extend to their spouses, children and nominees. If any of these prohibitions is violated, the concerned member of the House or of the Senate will lose their position. Currently, more than 40 members of the House and of the Senate are being accused of violating this provision of the Constitution by holding shares traded in the stock market.

The prerogatives of the executive branch have also been significantly curbed. For instance, to conclude an agreement which has a vast impact on the country's economic and social stability or which has a significant binding effect upon the trade, investment or budget of the country, the government has to seek approval from the National Assembly twice,<sup>33</sup> as discussed above. In addition, whereas under the 1997 Constitution, the Council of Ministers could issue royal ordinances or emergency decrees in cases of emergency or necessary urgency and the Constitutional Court did not have the jurisdiction to question such decision, the present Constitution gives the

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(4) Carry on other acts under the prohibitions under Article 48.

The provisions of this Article shall not apply in the case where a member of the House of Representatives or a member of the Senate receives military pensions, retirement compensation, pensions, annuities of members of the Grand Royal Families or any other form of payment of the same nature and shall not apply in the case where a member of the House of Representatives or a member of the Senate accepts or holds a position of committee member of the National Assembly, the House of Representatives or the Senate, or committee member appointed in the course of the administration of State affairs.

The provisions in (2), (3) and (4) shall apply to the spouse and offspring of a member of the House of Representatives or a member of the Senate or to other persons who are not the spouse or offspring of such member of the House of Representatives or such member of the Senate, who act as employee, collaborator, or assignee of the House of Representatives or the member of the Senate.

32. CONSTITUTION OF THE KINGDOM OF THAILAND, B.E. 2550 (2007), sec. 266 (Thail.).

A member of the House of Representative or a member of the Senate shall not, directly or indirectly, through the status or position of member of the House of Representatives or member of the Senate, to interfere or intervene for his or her personal benefits or those of other or a political party, in the following matters:

- (1) Performance off civil service, or performance of regular duties of a civil servant, officer or employee of a Government agency, State agency, State enterprise, any business in which the State holds a majority share, or local government organization;
- (2) Recruitment, appointment, reshuffle, transfer, promotion, and elevation on the salary scale of a Government official holding a permanent position, receiving salary and not being a political official, an official or employee of a Government agency, State agency, State enterprise, any business in which the State hold a majority share, or local government organization; or

Removal from office of a Government official holding a permanent position, receiving salary and not being a political official, an official or employee of a Government agency, State agency, State enterprise, any business in which the State holds a majority share, or local government organization.

33. *Id.* sec. 190 (Thail.).

Constitutional Court the power to consider both the rationale and the emergency or urgent nature of such issuance.<sup>34</sup> Furthermore, the powers of a caretaking government, which is to carry out duties when the House of Representatives lapses or is dissolved, have been significantly reduced, particularly with regard to the appointment of officials and the approval for the disbursement of reserved budget in case of an emergency or other necessity. To do all these, it has to seek prior approval from the Election Commission.<sup>35</sup>

The point where the 2007 Constitution is most criticised, though, is the judicialization of politics. Under the 1997 Constitution, the courts were little involved in political matters. The exceptions were the Constitutional Court which might have to adjudicate on political cases, and the Presidents of the Supreme Court, the Constitutional Court and the Supreme Administrative Court who had a role in selecting members of independent bodies such as the National Counter-Corruption Commission but were nevertheless the minority in the process vis-à-vis seven university rectors and five representatives of the political parties.

Under the 2007 Constitution, however, judges are given a role in the selection process of 74 members of the Senate which is a political body (while the other 76 senators come from elections, one per province). The senate members selection committee comprises seven members, which—in addition to the presidents of four other organs—include the President of the Constitutional Court, one Supreme Court judge and one Administrative Court judge selected by the general meetings of judges of the respective courts. The role of the courts in the selection of members of the Senate has in fact been criticised as inappropriate even by representatives of the courts themselves, as it draws the judiciary, which must be politically neutral, into

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34. CONSTITUTION OF THE KINGDOM OF THAILAND, B.E. 2540 (1997), sec. 185 (Thail.).

35. CONSTITUTION OF THE KINGDOM OF THAILAND, B.E. 2550 (2007), sec. 181 (Thail.).

The outgoing Council of Minister shall remain in office for carrying out duties until newly appointed Council of Ministers takes office but, in the case of the vacation of office under Article 180(2), the Council of Ministers and its Ministers are allowed to perform their duties as far as it is necessary under the following conditions:

- (1) They shall not exercise its power to appoint or transfer a Government official holding a permanent position or receiving a regular salary or an official of a State agency, State enterprise or any enterprise which the State is the major shareholder, or remove him or her from duties or vacate his or her office, or replace his or her office with the replacing person, except with the prior approval of the Election Commission;
- (2) They shall not take any action with an effect of giving approval to the disbursement of a reserved budget in case of an emergency or other necessity, except with the prior approval of the Election Commission;
- (3) They shall not take any action with an effect of giving approval to any work or project or may cause the next Council of Ministers binding obligations;

They shall not use the State's resources or manpower to carry out an act which has impacts on the results of the election and shall not carry out an action which is contrary to the rules and regulations prescribed by the Election Commission.



politics.<sup>36</sup>

The judiciary also has a greater role in the selection process for independent bodies as evident in the composition of the selection committee for the members of the National Anti-Corruption Commission (NACC) (formerly the National Counter Corruption Commission), which consists of five persons—the Presidents of the three courts with the President of the House of Representatives and the opposition leader in the House on the minority side.<sup>37</sup> Meanwhile, the selection committees for the Ombudsman, State Audit Commissioners and National Human Rights Commissioners all have seven members, with five coming from the judiciary, namely the Presidents of the three courts, one Supreme Court judge and one Supreme Administrative Court judge, and the President of the House and the opposition leader on the other side. More importantly, these selection committees<sup>38</sup> have substantial power as they can nominate the exact number of candidates as required to be appointed to independent bodies (whereas under the 1997 Constitution, they had to nominate twice as many as the number needed to fill the vacancies), and the Senate simply has the power to **either endorse or not endorse** the persons nominated by the selection committees, not to make its own selection as under the 1997 Constitution. In the case where the Senate does not endorse the nomination, the selection committees can reaffirm their position, and if such reaffirmation is unanimous, they need not seek endorsement from the Senate again, and the names can be submitted to the King for formal appointment.<sup>39</sup> The selection committees' power therefore is not simply to nominate candidates for independent bodies but to choose them.

Also interesting is the fact that the 2007 Constitution allows the courts and independent bodies to propose organic bills and laws, of which the Presidents of the three courts serve as depositories, directly to the House of Representatives,<sup>40</sup> while other laws must be proposed by 20 or more members of the House, or by the Council of Ministers. In the event that the budget allocated to them is not sufficient, the courts and independent bodies concerned may also file a motion to the House to request additional budget<sup>41</sup> without having to seek prior approval from the Prime Minister. All of these have changed the balance of power in the Thai parliamentary system as can hardly be found in other countries.

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36. Constitution 2007 Lack of Reform Process, Interview with Sarawudh Benjakul, Dailynews (May 28, 2006).

37. See CONSTITUTION OF THE KINGDOM OF THAILAND, B.E. 2550 (2007), sec. 246, para. 3 (Thail.) (at Appendix).

38. See *id.* secs. 243, 243 para. 3, 256.

39. See *id.* secs. 206, 243, 246, 252, 256.

40. See *id.* secs. 139(3), 142(3).

41. See *id.* sec. 168, para. 9.

Most notable, though, is Article 237<sup>42</sup> which stipulates on the dissolution of political parties, members of which commit election fraud, and on the revocation of the electoral rights of the leaders or executives of such political parties, who know of the fraud, neglect or fail to take action, for five years. This Section is the source of the dissolution of the People Power Party and the Chartthai Party later on.

The draft of the 2007 Constitution was the first to be put to a national referendum on 19 August 2007. The result was that 14,727,306 people, or 57.81% of the total turnout of 25,978,954, supported it while 10,747,441, or 42.19%, did not. (The turnout was 57.16% of all eligible voters; 42.39% did not exercise their right.) The draft Constitution was thus submitted to His Majesty the King for his assent on 24 August 2009 and has since been put into force.

#### D. *The Twin Crises—Political and Economic Crises*

While other countries have been faced with the repercussions of the U.S. financial crisis alone, Thailand has had to deal with two crises simultaneously. Its domestic political crisis has continued since 2005 and shown no sign of dissipating, when in 2008 came the economic crisis.

##### 1. *Protracted Political Crisis After the Enforcement of the 2007 Constitution*

The general elections of 23 December 2007 were the first under the 2007 Constitution. As things turned out, the People Power Party (PPP), a successor of the TRT Party and supporter of Police Lieutenant Colonel Thaksin, came first with 233 seats. It joined with the Chartthai Party, the Phue Phandin Party, the Ruem Jai Thai Chart Pattana Party, the Matchimathipataya Party and the Pracharaj Party in forming a coalition with a total of 315 members of the House. Mr. Samak Sundaravej, the PPP leader,

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42. *Id.* sec. 237.

Any election candidate who acts or causes or support other to act in violation of organic law on the election of members of the House of Representatives and the source of senators, or Rules or Notifications of the Elections Commission, which results in the elections to be in dishonest and unfair manner, the elections right of such a candidate shall be revoked under the House of Representatives and the source of senators.

Pertaining to the act of such a person under paragraph one, if convincing evidence has appeared that any leader or member of executive committee of a political party connived the incident to ensure the honest and fair election, if shall be deemed that such political party acted to acquire the ruling power over the country through means not in accordance with the way prescribed in this Constitution under Article 68. In the case where the Constitutional Court orders to dissolve that political party, the leader and members of executive committee of such political party shall be revoked their electoral right for a period of five years as from the date the order dissolving the party is effective.

became prime minister.

However, on 26 February 2008, the Election Commission voted three out of five (with one abstention) to annul the election of Yongyuth Tiypairat, Deputy Leader of the PPP and then President of the House of Representatives and of the National Assembly, for committing election fraud in Chiang Ria Province. The Commission submitted its opinion to the Supreme Court's Criminal Division for Political Office Holders seeking the revocation of his electoral rights. On 8 July 2008, the Court reaffirmed the Commission's decision and revoked Mr. Yongyuth's electoral rights for five years. While the Commission was working to forward the case to the Attorney-General to submit to the Constitutional Court seeking the dissolution of the PPP, Mr. Yongyuth resigned.

When the PPP was elected to form a government, several PPP leaders made it publicly clear that they would amend Sections 237 and 309 of the Constitution and find ways to bring Mr. Thaksin back to Thailand. Such a position provoked immediate opposition from the "yellow shirts." On 25 May 2008, the PAD resumed its first big rallies in two years, starting from the Democracy Monument before moving to blockade Rajadamnoen Nok Avenue, to oppose constitutional amendment and denounce the Joint Communiqué between Thailand and Cambodia on the designation of Phra Viharn Temple as a World Heritage Site.

Then on 26 August 2008, the PAD launched its so-called "Thai Ku Fah" operations and declared its "highest degree of civil disobedience" by sending a group of armed men to besiege the NBT Television Station, claiming that its operation was "to reclaim national assets from the government". The PAD demonstrators also blockaded the Ministry of Finance, the Ministry of Agriculture and Cooperatives and the Ministry of Transport before moving back to take siege of the Government House, where they stayed for over three months.

On 9 September 2008, the Constitutional Court issued its Decision No. 12-13/2551, which stated that Mr. Samak Sundaravej, by accepting to be an honorary host in a TV culinary show in return for remuneration from the programme production company, had committed an act prohibited under Section 267<sup>43</sup> of the Constitution, i.e., by being an "employee" of the company. Mr. Samak thus lost his prime ministership.

Mr. Somchai Wongsawat, Deputy Leader of the PPP, was subsequently elected prime minister by the House of Representatives. Before assuming

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43. *Id.* sec. 267 (Thail.).

The provisions of section 265 shall apply to the Prime Minister and Ministers except for holding a position or performing duties in accordance with the provisions of the law. The Prime Minister or Ministers are prohibited to hold a position in a partnership, company, or business enterprise pursuing profits or income to be shared, or be an employee of any person.

their duties, Mr. Somchai and his cabinet had to deliver a policy statement before the National Assembly on 7 October 2008. That morning, the PAD rallied in front of the parliament building to prevent the cabinet from delivering its policy statement. At around 06:20 hrs., police officers fired tear-gas to disperse the crowds, injuring many demonstrators, some of whom lost their limbs. At around 17:00 hrs. till 19:00 hrs., the police fired another round of tear-gas into the crowds, resulting in deaths and loss of limbs among the demonstrators. Following these incidents, as of 12:00 hrs. on 8 October, 443 people were injured and two dead. General Chavalit Yongchaiyudh resigned as deputy prime minister to accept responsibility.

On 21 October 2008, the Supreme Court's Criminal Division for Political Office Holders issued its Decision No. 1/2550 on the case against Khunying Potjaman Shinawatra, Mr. Thaksin's wife regarding the purchase of 33 rais of land worth 772 million baht (US\$ around 22.7 million) from the Financial Institutions Development Fund. The Court found Khunying Potjaman's act as an act committed by Mr. Thaksin and deemed that Mr. Thaksin had committed an act of conflict of interests because as prime minister, he oversaw the Financial Institutions Development Fund. Mr. Thaksin thus violated Section 100(1) paragraph three and Section 122 paragraph one of the Organic Act on Counter Corruption 1999. He was sentenced to two years' imprisonment.

On 25 November 2008, as Prime Minister Somchai was returning from overseas, the PAD moved to Suvarnabhumi International Airport to pressure him to resign. As more and more people assembled at the airport, the Airports of Thailand Public Company Limited announced its shutdown.

Then on 2 December 2008, the Constitutional Court issued its Decision No. 18-20/2551 ordering the dissolution of the PPP as a result of the election fraud committed by Mr. Yongyuth. Mr. Somchai, as the party leader, and many other cabinet minister had their electoral rights revoked and lost their ministership.

On 15 December 2008, small political parties which used to support the PPP and the political group called "Friends of Newin," a former PPP member, switched their support in favour of the Democrat Party to form a government and voted Mr. Abhisit Vejjajiva Thailand's fifth prime minister in two years.

Since the Surayud administration, groups of people which oppose the coup and support Mr. Thaksin, wearing red shirts as their symbol, have been gathering to oppose the coup makers and General Prem Tinsulanonda, President of the Privy Council and Statesman, who they claim was behind the coup. There were some clashes between these groups and the yellow shirts. Also, on many occasions, the red shirts and the yellow shirts staged concurrent rallies but at different locations, causing political tension

throughout 2008.

When the Abhisit government took office, the PAD stopped their rallies, only to be replaced by the red shirts, who accuse the Abhisit government of lacking legitimacy as it was formed through the intervention by the military, and being a puppet government under the control of the military and the yellow shirts. The demonstrations reached a boiling point in April when Mr. Thaksin publicly called for a people's revolution against the elites who, he claimed, controlled the government. The protests by the red shirts led by the United Front for Democracy against Dictatorship (UDD) obstructed the convening of the ASEAN Summit in Pattaya. Clashes ensued between the red shirts and a group of blue shirts who supported the government, with the latter reportedly throwing grenades at the former. These events led to the cancellation of the Summit. Mr. Abhisit had to declare an emergency situation in Pattaya and other areas in Chonburi Province on 12 April 2009.

Violent incidents took place in Bangkok during the Songkran holidays as the red shirts took siege of the Victory Monument, seized and burned buses to block roads, and seized an LPG truck. The government decided to declare a severe emergency situation and brought in military officers to disperse the crowds. During the whole incidents, more than 120 people were injured and one lost his life. The incidents made news worldwide.

## 2. *Global Financial Crisis on Top of the Political Crisis*

The sub-prime crisis, or the so-called "Hamburger Crisis," which started in the United States and spread all over the world, hit Thailand at the end of 2008. Given the political turmoil, the Somchai government at the time did not do much to resolve the problems, except for implementation of some measures exempting low-income earners from paying their utilities bills and public transport services.

Thailand Development Research Institute (TDRI) reported that Thailand's exports and its economy were facing serious difficulties. During the first to third quarters of 2008, exports grew by over 20% but it contracted by 9.4% in the fourth quarter, while the country's growth domestic product (GDP) registered a -4.2%, bringing the overall economic growth rate for the year down to 2.6%, which was lower than estimated. The damage became more marked during the first quarter of 2009 when exports fell by 20% and GDP contracted by 7.1%, which was close to the level seen during the period after the financial crisis of 1997 (TDRI, 2009). Nevertheless, this time around the country's financial institutions, which were at the root cause of the crisis of 1997, have been stronger and not much affected, thanks to stringent supervision by the Bank of Thailand and—importantly—to the fact that, unlike financial institutions in other countries, they did not invest in

derivatives linked to the sub-prime mortgage.

The Abhisit government has launched a number of measures to address the crisis, as follows:

(a) Fiscal Measures

At the beginning of 2009, the government enacted a law allocating an additional budget for the fiscal year 2009 totalling 1.167 trillion baht to be spent, including the funds to be injected into the economic system as a direct support for the people. These are, among others, the one-time hand-out of 2,000 baht for low-income employees whose salary is less than 15,000 baht and the 500-baht monthly subsistence allowance for the elderly.<sup>44</sup>

(b) Tax Measures

The government has implemented several tax measures, including tax exemption for new homeowners, tax reduction for small and medium enterprises and community enterprises, and fee waiver for property transfers.

(c) Financial Measures

On 3 December 2008, the Monetary Policy Committee decided to cut the policy interest rate by 1% per annum, from 3.75% to 2.75% per annum. Up until the end of May 2008, the central bank cut the policy interest rate three times, or a reduction of 1.5%, in order to help the export sector.

(d) Long-term Measures

With a view to stimulating the economy, the Abhisit government launched the “Thailand from Strength to Strength 2012” project, as the second phase of its economic stimulus programme. This project involves the total investments of 1.43 trillion baht from 2009 to 2012 and is expected to create 1.6-2 million jobs and boost competitiveness of the private sector in the long term. Investments will be made in such areas as:

(i) transportation/logistics (571,523 million baht);

(ii) water resources and agriculture (238,515 million baht);

(iii) education (137,975 million baht);

(iv) public health (99,399 million baht) to reform the quality of the public health system;

(v) tourism infrastructure improvement (18,537 million baht).<sup>45</sup>

The afore-mentioned measures are the use of public spending to stimulate the economy along the line of Lord Keynes’ theory. In order to spend such money, the government has to not only implement a deficit budget policy but also borrow money for investment. To do so, the Abhisit government enacted a law—an emergency decree authorizing the Ministry of Finance to borrow funds by 31 December 2009, the disbursement of

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44. TDRI, HAMBURGER CRISIS AND THE REFORM OF ECONOMIC STRUCTURE OF THAILAND (2009).

45 . TKK2555, [http://www.tkk2555.com/online/index.php?page\\_id=4](http://www.tkk2555.com/online/index.php?page_id=4) (last visited Sept. 18, 2009).

which would not have to follow the normal budgetary procedure. The government also proposed to the National Assembly a bill authorizing the Ministry of Finance to borrow 400 billion baht for economic recovery until 31 December 2011. The reason why the government proposed two separate laws was the different degrees of their urgency. The first sum which is to be borrowed for spending by 2010 was considered urgent in accordance with the conditions for enacting an emergency decree under Section 184 of the 2007 Constitution. The second sum to be borrowed by end of 2011 was not so urgent as to require issuance of an emergency decree. The government thus could submit a bill for parliamentary consideration.

The above notwithstanding, the opposition decided to exercise its right under Section 185 of the Constitution to submit the matter to the Constitutional Court, arguing that there were neither grounds nor necessary urgency for issuing the said emergency decree to maintain national economic security. The Constitutional Court issued its decision on 3 June 2009 stating that borrowing measures were aimed at resolving the economic crisis so that the economy would not contract further. There were therefore grounds for the issuance of the emergency decree. The government also had a case of emergency or necessary urgency in accordance with the Constitution, and there was nothing which demonstrated that the issuance of the said emergency decree was done in dishonesty, or based on any distortion of constitutional principles. The Court thus ruled unanimously that the issuance of the emergency decree was constitutional.<sup>46</sup>

It is interesting that the government's implementation of these measures, by and large, have not been much criticised, as the on-going political problems have overshadowed the importance of resolving the economic ones. The major concern of foreign businesspeople and investors seem to be that the unsettling political situation would affect the government's effort to resolve economic problems by delaying such effort and impacting on the confidence of foreign investors in Thailand's bonds, stock markets as well as tourism.<sup>47</sup>

#### IV. WHAT NEXT?

While people all over the world are worried about the economic crisis, the general Thai public seems more concerned over the protracted and at

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46. Constitutional Court's News, No. 10/2552 (June 3, 2009), available at <http://www.concourt.or.th>.

47. Bettina Wassener, *Political Crisis Ripples Across Thai Economy*, N.Y. TIMES, Nov. 1, 2008, [http://www.nytimes.com/2008/12/01/world/asia/01iht-fly.1.18287294.html?\\_r=1&scp=1&sq=Political%20crisis%20ripples%20across%20Thai%20economy&st=cse](http://www.nytimes.com/2008/12/01/world/asia/01iht-fly.1.18287294.html?_r=1&scp=1&sq=Political%20crisis%20ripples%20across%20Thai%20economy&st=cse); World Bank: Thai Economy to Drop sharpest Among Neighbors in 2009 (2009), available at [www.moneychanneltv.com/Menu8/SETToday/tabid/.../Default.aspx](http://www.moneychanneltv.com/Menu8/SETToday/tabid/.../Default.aspx).

times violent domestic political crisis. Of their particular concern was that violence might occur, which could lead to injury, loss of life and deep division among Thai people, which—if left unattended—would be difficult to heal and bring back to the pre-crisis situation.

The first question that comes to mind is what lessons we have learned from the political crisis.

#### A. *Lessons and Implications*

The protracted political conflict should give Thailand and Thai people the following lessons:

##### 1. *Crisis of Legitimacy*

During the past four years, Thailand has seen five prime ministers, and every government of this period had a legitimacy issue. The Thaksin, Samak and Somchai governments were opposed to and rallied against by the PAD and the yellow shirts, while the Abhisit government faced a similar situation with the UDD and the red shirts. What all this entails is that the legitimacy to govern has been shaken and trust in the government has become problematic.<sup>48</sup> The problem has also spread to affecting the highest institution of the country as never before.

The rule by the military and bureaucrats has been challenged, while the democratic rule with elections marked by vote buying has been opposed. This legitimacy crisis has deepened to such a degree that differences of views have emerged regarding the country's political foundation, the meaning of democracy and the fundamental concept of the Thai society about "nation, religion, king." This, some academics such as Chris Baker and Pasuk Pongpajit believe, is rooted in the conflict between the old elites and the new elites which has taken place since the political change in 1932.<sup>49</sup>

The differences which have turned into a deep division have not only led to violence due to different opinions and clashes between two opposing sides, but have also been regionalised. People from the North and Northeast are often categorised as being red shirts and supporters of Mr. Thaksin and the populist policy, while people from the South are seen as being yellow shirts and supporters of the PAD and the Democrat Party. With this, some even fear that the situation could lead to secession!

The legitimacy crisis has also spread to the National Assembly which is no longer regarded as "Grand Forum of the Realm" that could help resolve

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48. L. DHIRAVEGIN, *ROOT OF THE PROBLEM: THE INABILITY OR REFUSAL TO ADOPT* (2009).

49. CHRIS BAKER & PASUK PHONGPAICHT, *A HISTORY OF THAILAND* (2005).



political problems. Street demonstrations by both the yellow shirts and the red shirts over the past four years have become an expression of “civic politics” that only serves to prove people’s lack of faith in the National Assembly.

The courts and independent bodies have all been criticised openly and with distrust.

In such a situation, what government can ever administer the country effectively and efficiently?

The ineffectiveness and inefficiency of the government and the National Assembly was clearly demonstrated throughout 2008. The Thai Parliament passed less than ten laws, while the bureaucracy abstained from doing their duties for fear of being scrutinised and accused of political partiality.<sup>50</sup> A general feeling was that government officials were in “neutral gear,” thereby causing the administration of the country to slow down significantly.

## 2. *The Role of the Law*

The law, which is the main pillar of the rule of law, has come under question as being a “tool” used to eliminate the Thaksin regime. Starting from the Constitution, itself has been denounced as being drafted by the coup makers or under their supervision to legitimise the coup and their subsequent action. Most criticised is the last provision in the Transitory Provisions—Article 309.<sup>51</sup> According to one lawyer, “Article 309 is the ugliest provision in Thailand’s constitutional history, second only to Section 17 of the governing charter during the rule of Field Marshall Sarit Thanarat. This is because Section 309 makes the orders and announcements of the CDR, and the implementation thereof—whether in the past, present or future, whether truly lawful and constitutional—fully legitimate under the

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50. For example, the Director-General of the Revenue Department and four other officials were charged in a criminal case for neglecting to collect taxes from the transfer of 4.5 million shares worth 738 million baht between the wife of the former prime minister and her step-brother. The Criminal Court acquitted them (Case No. 534/2552 (2009)), but the Director-General of the Criminal Court made a dissenting view. On 13 January 2009, the National Anti-Corruption Commission (NACC) ruled that the Permanent Secretary of the Ministry of Finance, who had made unlawful appointments of officials and was removed by the Administrative Court, committed a wrongful act which was a criminal offence and a serious disciplinary misconduct and had to be dismissed. In September 2009, the NACC ruled that in dispersing the political demonstrators on 7 October 2008, the Prime Minister (Somchai Wongsawat), General Chavalit Yongchaiyudh, Police General Patcharawat Wongsuwan and another police officer committed an act constituting unlawful negligence of their duties, which was a criminal offences and a serious disciplinary misconduct, and the two state officials must be dismissed.

51. CONSTITUTION OF THE KINGDOM OF THAILAND, B.E. 2550 (2007), sec. 309 (Thail.).  
“Any act that its legality and constitutionality has been recognized by the Constitution of the Kingdom of Thailand (Interim), B.E. 2549, including all acts related therewith committed whether before or after the date of promulgation of this Constitution shall be deemed constitutionally under this Constitution.”

2007 Constitution.

Article 309 is an innovation by the constitution drafters to protect the coup makers, building upon Article 222 of the 1991 Constitution. Earlier constitutions by coup makers normally contained one provision to legitimize the acts they had committed. For the 1991 Constitution, the drafters added another layer of protection for the National Peace-Keeping Council (NPKC) by making its act fully constitutional. This was much criticized at the time whether it effectively placed the NPKC's action above scrutiny.<sup>52</sup>

The Constitutional Court has applied this provision when it determined that the CDR Announcement No. 30 and the Act amending the said Announcement were constitutional. This negated the argument that the said CDR Announcement and Act establishing the Assets Examination Committee to investigate corruption charges against ministers in the Thaksin government were unconstitutional on the ground that they were specifically enacted to give ordinary persons who were not judges to carry out responsibilities as judges.

### 3. *Judicialisation of Politics*

Amidst the political crisis, the courts have played greater roles than they usually do under normal circumstances. While the 1997 Constitution was in force, the Constitutional Court and Administrative Court were able to help settle by legal means political disputes which earlier had no recourse to any process to make legal determination.

After the dissolution of the House of Representatives in February 2006, the Constitutional Court, Administrative Court and Court of Justice, particularly the Supreme Court's Criminal Division for Political Office Holders, have all had increasing roles—whether in ruling that the general elections in 2009 were unconstitutional, in ordering the dissolution of the TRT Party and then the PPP, in disqualifying a prime minister for being an employee of a company by hosting a television show, or in making a ruling on the Joint Communiqué concerning the Phra Viharn Temple and sentencing Mr. Thaksin on the charge of conflict of interests.

In fact, the courts' decisions in many cases had an effect in providing way-outs to the political situation. For example, in the case of the general elections in April 2006 which the opposition parties and more than 14 million people regarded as illegitimate, the court's decision had paved the way for new and fairer elections to be held.

Still, some academics considered such action by the judiciary as “double

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52. PIYABUTR SANGKANOKKUL, *DEMOCRACY AND JUDICIARY IN THE KING'S SIGNATURE* 37 (2009).

standard.” Piyabutr Saengkanokkul made a strong criticism in this regard. “The author also views that the judicialisation phenomenon in Thailand over the past three years is neither judicial activism nor constructive interpretation of law because judicial activism means that a judge applies and interprets the law constructively in order to decide on a case with the effect of broadening the protection of people’s rights and freedoms. Judicial activism therefore is not adjudicating with a view to suppressing political enemies, ‘dismissing’ politicians, dissolving political parties, nor or interfering in international relations which are in the purview of the government.”<sup>53</sup>

However, the opinions with regard to this particular question appear to be irreconcilable if one looks towards the future and asks how the crisis would end.

Open and continuous criticisms of the judiciary come from Mr. Thaksin and the red shirts, who have been utilising every opportunity to state that they have not been given justice, and that the political crisis would not end unless justice is served. Thaksin’s reaction is understandable because a number of cases against him are under the consideration by the Supreme Court’s Criminal Division for Political Office Holders such as those concerning the issuance of two- and three-digit lottery tickets by the Government Lottery Bureau and the seizure of his assets due to the allegation of his being unusually wealthy, while others are being considered by the National Anti-Corruption Commission (NACC), such as the case regarding the provision of loans to the Government of Myanmar to purchase telecommunications equipment from Shin Corporation, and the one on the procurement of CTX explosive detection devices by the Airports of Thailand Public Company Limited.

However, a closer look would show that in many cases, those who criticise the judiciary have not taken into consideration the main basis for its decisions, particularly what is stipulated clearly in the laws. For instance, when the Constitutional Court ruled that the CDR Announcement establishing the AEC was enforceable, the Court had no other alternative but to make its determination based on Section 309 of the 2007 Constitution. When it ordered the dissolution of the PPP, the Chartthai Party and the Matchimathipataya Party due to the election fraud committed by their respective executives, the Court did not have any other choice because Sections 237 and 68 so stipulate, and the Court could not use discretion. Even when the Court sentenced Mr. Thaksin to two years’ imprisonment in the case on the purchase of land from the Financial Institutions Development Fund, it did so in accordance with Section 100 of the Counter-Corruption Act 1999.

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53. *Id.* at 45.

Be that as it may, the notion that the Court has more power than it should could lead to non-acceptance of the sanctity of the rule of law.

#### 4. *The Shaky State of the Rule of Law*

During the crisis, the rule of law has been significantly affected due to widespread abuse of power by those with State power. The seizure of power, abrogation of a constitution and enactment of laws by the coup makers, as well as the protests and occupation of important buildings and places by both the yellow shirts and the red shirts while claiming the principle of “civil disobedience” would not have taken place if both the State and the people had abided by the law and respected the sanctity of the rule of law.

When the rule of law, which is a main pillar of democracy and economic development, is shaken,<sup>54</sup> it unavoidably affects democracy and economic development themselves. For democracy and economic development to be truly back on track, it is therefore imperative to restore respect of the law on the part of both the State and the people. Particularly for the people, they need to have a correct understanding about “civic politics”, which must be exercised under the law and the Constitution, as well as about the need to abide by the rules for holding peace and unarmed gatherings, non-violence, respect for others’ rights and freedoms and the use of media, especially radio and television, in political instigation.

These problems can be resolved when the government is strong and does not have a legitimacy issue, and when the society is in a state of right conscience. But as things now stand, there has not yet been any indication that the situation is moving towards that direction. Thailand is therefore stuck in a “vicious circle” where causes and consequences of the crisis are all interlinked so that one does not know where to begin.

#### B. *What Are the Causes of the Problem and Its Solutions?*

##### 1. *Academic Analysis on Thailand’s Future*

It is generally accepted that the current conflict is rooted in the use of populist policies by Mr. Thaksin as well as the way his government exercised its power, as earlier discussed.<sup>55</sup> Yet, many academics—while agreeing that the “Thaksin regime” had harmed the democratic system in Thailand—also condemned the 2006 coup and the attempts to root out the

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54. Roberto Rigobon & Dani Rodrik, *Rule of Law, Democracy, Openness, and Income: Estimating the Interrelationships* (Nat’l Bureau of Econ. Research, Working Paper No. 10750, 2004).

55. Michael K. Connors & Kevin Hewison, *Introduction: Thailand and the Good Coup*, 38 J. CONTEMP. ASIA 1, 1-10 (2008).

“Thaksin regime” thereafter as seriously damaging to the country’s democracy and its constitutional system.<sup>56</sup> Nevertheless, some are of the view that the coup also had its upside in that it helped save Thai democracy from falling under a new form of rule which otherwise would have eroded both the constitution and democracy through the use of political power for one’s own interests and those of one’s cronies and by rendering the Constitution and the political and legal check-and-balance system ineffective, thereby trampling on the rule of law.<sup>57</sup> The new Constitution was an attempt to preserve what the 1997 Constitution had intended to achieve but been averted by the “Thaksin regime.”

### 2. *The Return to “Thai-style Democracy”*

Some academics believe in the return to the rule based on traditional Thai culture, namely “**dhammaraja**,” centred around a righteous king, rather than in the western-style democracy, arguing that in Thailand, most poor people in rural areas do not yet have the political maturity that would enable them to freely exercise their right to vote and that they are under the influence of money politics and vote buying by corrupt politicians.<sup>58</sup> The PAD and the academics who support it have argued that elections with vote buying and corruption committed by politicians, which have taken place alongside elected governments show that elections and elected politicians are not the way-out for Thailand. This is “**old politics**” and any reform must lead to “**new politics**” which does not focus on elections but on having a group of people selected by diverse professions in Parliament. The PAD proposal reminds one of the Legislative Council of the Hong Kong Special Administrative Region, which has both elected and appointed representatives.<sup>59</sup>

### 3. *The Return of “Bureaucratic Polity”*

Fred Riggs commented in 1966 that the Thai political system was a bureaucratic polity in which civilian and military officials controlled the government,<sup>60</sup> and many Thai academics, including Rungsan Thanapornpan

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56. Thitinan Pongsudhirak, Thailand’s Military Resurgence and Democratic Reversal, Paper Presented to the 10<sup>th</sup> International Conference on Thai Studies (Jan. 9-11, 2008); Ukrist Pathamanand, *A different Coup d’Etat*, 38 J. CONTEMP. ASIA 124 (2008).

57. Connors & Hewison, *supra* note 55.

58. Surin Maisirikrod, *Learning from 19 September Coup: Advancing Thai-Style Democracy*, in SOUTHEAST ASIA AFFAIRS 2007, at 340 (Daljit Singh & Lorraine C. Salazar eds., 2007).

59. PAD Statement No. 20/2008 (Sept. 8, 2008).

60. FRED W. RIGGS, THAILAND: THE MODERNIZATION OF A BUREAUCRATIC POLITY (1966).

and this author, agree.<sup>61</sup> The UDD and the red shirts also denounce bureaucratic polity, stressing that their political struggle is aimed at “**uprooting**” the bureaucratic polity which has returned to Thailand since the coup of September 2006, that they protest against the President of the Privy Council because, to them, he is “**leader of the bureaucratic polity**,” and that they call for the return to the 1997 Constitutions in order to achieve true democracy.

In its concerns, the UDD has a point. Part of the members of the Senates comes from selection process and is linked with the PAD. All independent bodies—whether the Election Commission, the NACC or the courts—are seen as using their power in order to eliminate the Thaksin regime. The judiciary has been under heavy criticism.<sup>62</sup> All of these organs are part of the State, as Riggs observes. At the same time, the armed forces have seen their role substantially increased since the coup, including in the formation of the Abhisit government and the operations to end the demonstrations in April.

#### 4. *Reform of the System of Distribution of Economic Benefits and the System of Government: Real Solution to the Problem*

In an effort to quell the political crisis and protracted differences between opposing political groups who took to the streets since last year, a process of “political reform” has been launched, which is not the first Thailand has attempted to under take. Following the Black May crisis in 1992, political reform produced the 1997 Constitution.<sup>63</sup> The present reform however is rather different in that it is driven by politicians who want to amend or even replace the 2007 Constitution, rather than in response to a mass-based movement or civil society.<sup>64</sup>

Compared with the earlier episode of political reform, which yielded a widely praised but ultimately flawed constitution, the question remains whether this process will be able to heal the rifts in Thailand’s body politic.

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61. RUNGSON THANAPORNUN, *ECONOMIC POLICY PROCESS IN THAILAND* (2003); Borwornsak Uwanno, *Dynamics of Thai Politics*, Paper Presented at Royal Thai Embassy, The United States—Thailand Relationship and Southeast Asia Seminar (May 9-10, 2007).

62. SANGKANOKKUL, *supra* note 52, at 45; Statement, Asian Human Rights Commission, Thailand: The judiciary is the real loser (May 30, 2007), available at <http://www.prachatai.com/english/node/8>.

63. See, e.g., Michael K. Connors, *Political Reform and the State in Thailand*, 29 J. CONTEMP. ASIA 202 (1999); Sombat Chantornvong, *The 1997 Constitution and the Politics of Electoral Reform*, in *REFORMING THAI POLITICS* 203 (Duncan McCargo ed., 2002).

64. Michael H. Nelson, *Political Reform in Thailand: Structural and Ideological Issues* (May 18, 2009), <http://rspas.anu.edu.au/rmap/newmandala/2009/05/18/political-reform-in-thailand-structural-and-ideological-issues/>; Prawet Wasi, *How to Prevent Political Dooms Day* (Aug. 19, 2009), <http://www.nidambe11.net/ekonomiz/2009q3/2009august19p1.htm>.

More importantly, even if the present crisis dissipates, how can Thailand ensure that a new one will not flare up in the future? We cannot resolve this political puzzle without understanding its causes.

(a) Understanding the Root Causes

On the surface, Thailand's current political divisions appear to be between Mr. Thaksin and his supporters, on the one hand, and the forces against him on the other. Put this way, the conflict can be put to an end if either side ceases its activities, as both the major opposing groups—yellow and red—have centred their respective campaigns around the former prime minister. Nevertheless, a closer look at the grievances of these groups reveals the real problem to run deeper. It is structural as well as philosophical. It is about how resources, wealth and hence power are distributed, and about different public perceptions and expectations of democracy.

Since 1961 when Thailand launched its first National Economic and Social Development Plan, successive governments adopted the import substitution and then export-oriented strategy for development. Most of the state's attention went to promoting big business and export-oriented industries. The agricultural sector—though a major source of national income—was not adequately developed and the plight of farmers—who comprised a majority of the population—not adequately addressed. Small and medium-sized enterprises also did not receive much state support.<sup>65</sup>

As a result, wealth became more highly concentrated. Distinctions among social strata became more marked and continue to this day—the “rich” and the “middle class” in urban areas who have bargaining power in the market economy and access to resources, and the “poor” in rural areas, mostly farmers, who do not. And despite the growth in average per capita income over the past four decades, the gap between the rich and the poor in Thai society has not changed much. In 1962, the richest 20% of Thai population accounted for 59.5% of the country's wealth, while the poorest 20% earned 2.9%. In 1975 the ratio was 6.05% to 49.24% and recently, In 2006, the ratio was 56.29% to 3.84%.

This socio-economic structural imbalance has affected politics. Having no bargaining power or access to resources, the poor have to depend on powerful local patrons who do. This dependency—typical of the Thai patronage system—in turn enhances the stature and influence of the rural rich, enabling them to be elected as people's representatives and attain state power as cabinet ministers. For them, political power is something to be desired when economically important national resources remain under state control, rather than subject to market forces. Political positions provide not only the power to make decisions regarding those resources but also business

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65. APICHA SATITNIRAMAI & DUANGMANEE LAOWAKUL, THAKSINOMICS (2005).

**Table 1 the distribution of income table (selected periods 1962-1990):  
percentage of national income received by income quintile**

	1962-1963	1968-1969	1971-1973	1975	1981	1986	1988	1990
The Lowest income quintile of the population (Quintile 1)	2.9	3.4	2.4	6.05	5.45	4.47	4.53	4.23
The low income quintile of the population (Quintile 2)	6.2	6.1	5.1	9.72	9.26	7.82	7.89	7.43
The average income quintile of the population (Quintile 3)	10.5	10.4	9.7	14.02	13.69	12.30	12.38	11.58
The high income quintile of the population (Quintile 4)	20.9	19.2	18.4	20.97	21.08	20.43	20.17	19.49
The Highest income quintile of the population (Quintile 5)	59.5	60.9	64.4	49.24	50.52	54.98	54.40	57.26
Gini coefficient	0.456	0.482	0.535	0.426	0.442	0.496	4.489	0.015
Ratio between the Richest and the poorest (Q5/Q1)	20.5	17.9	26.8	8.1	9.3	12.3	12.0	13.5

**Table 2 the distribution of income table (selected periods 1992-2009):  
percentage of national income received by income quintile**

	1992	1994	1996	1998	2000	2002	2004	2006
The Lowest income quintile of the population (Quintile 1)	3.98	3.97	4.16	4.27	3.89	4.23	4.54	3.84
The low income quintile of the population (Quintile 2)	6.93	7.23	7.52	7.69	7.19	7.72	8.04	7.67
The average income quintile of the population (Quintile 3)	10.96	11.61	11.78	11.91	11.39	12.07	12.41	12.12
The high income quintile of the population (Quintile 4)	18.80	19.81	19.88	19.74	19.76	20.07	20.16	20.08
The Highest income quintile of the population (Quintile 5)	59.43	57.37	56.66	56.39	57.77	55.91	54.86	56.29
Gini coefficient	0.536	0.521	0.516	0.509	0.525	0.507	0.493	0.515
Ratio between the Richest and the poorest	14.9	14.5	13.6	13.2	14.9	13.23	12.10	14.66

Sources: Medhi Krongkeaw (1979), Office of the National Economic and Social Development Board (calculated from NESDB data from each year with supplementary information of Thailand Development Research Institute). Research on households' economic and social attributes by the Community Economic Development and Income Distribution Office.



opportunities, particularly through state concessions. This allows political office holders to become markedly wealthier within a short time if they so wish. Not surprisingly, numerous corruption and malfeasance allegations plague the political decision making and electoral systems.

This structural imbalance and dependency have been inherent characteristics of Thailand's political system since 1932. The poor are "the electoral base" whose votes decide which political parties win a majority in Parliament and form a government. The middle class are "the policy base" whose voices are nevertheless louder and capable of ousting governments. The bureaucracy, both civilian and military, has continuously wrangled with political parties and elected politicians for control of policy, so that over the past 78 years as a parliamentary democracy, Thailand has seen 27 prime ministers, 59 cabinets, 18 constitutions, 12 uprisings and 12 successful coups. The simmering tensions between the rich and the middle class, on the one hand, and the majority poor, on the other, became a political powder keg.

The political reform that culminated in the 1997 Constitution, despite its many merits, including putting people at the centre of politics, did not address fully this inherent structural imbalance particularly where the distribution of national resources are concerned. Instead, the ability of a political party to exploit the Constitution's strengths while manipulating its weaknesses in effect lit the fuse on the powder keg.

(b) Conflict in Motion

The electoral system under the 1997 Constitution forced Thai political parties to adapt and compete on a new basis—policy platforms. The TRT Party, among other parties, chose to pursue a populist platform in their election campaign and became the first party in Thai history to win almost absolute majority of seats in 2001. For the first time, the majority poor began to realize the power of their votes.

Through the concrete benefits they gained from such TRT policies became increasingly aware of the correlation between a political party's policies and what they would get in return from the party they vote for. It therefore came as no surprise that the TRT Party won by a landslide in the subsequent general election in 2005 and was able to form a single-party government, the first in the history of Thai politics. Still, the populist policies were criticized for allegedly keeping the poor dependent on, and even addicted to, government handouts and benefits.

The 1997 Constitution's objective of giving Thailand a stronger, more stable government had been fulfilled, though perhaps not quite in the way the drafters intended.<sup>66</sup> Unfulfilled was the other equally important objective

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66. Pongsudhirak, *supra* note 19.

of putting in place an effective checks-and-balances system—independent bodies, civil society watchdogs—that would prevent the government from abusing its power and ensure good governance, transparency and accountability.<sup>67</sup>

It was no secret that the Thaksin-led TRT government comprised many members who were wealthy—some extremely so—and intimately linked with big business. Not long after assuming power it began implementing policies and measures that benefited, directly and indirectly, these business interests—a practice that came to be called “policy-based corruption.” Major projects were awarded to the politically connected. Many businessmen-turned-politicians in the government, along with their families and friends, became markedly richer.<sup>68</sup> To evade scrutiny, they simply used nominees to hold their assets. Overall, the rich became richer and the poor were content with government handouts, while the middle class were largely excluded from the benefits of government policy.

Meanwhile, the public failed to fully appreciate their role in keeping the government they elected in check, nor to make use of tools available in doing so. The civil society sector was weak and could not serve as an effective counterbalance to government abuse of power.

67. NITHI EAWSRIWONG, *THE CULTURE OF THAKSIN'S PEOPLE* (2006); SULAK SIVARAKSA, *A CRITIQUE OF THE THAKSIN SYSTEM AND THE THAI CONDUCT* (2007); Connors & Hewison, *supra* note 55, at 1-10.

68. Pramuan Bunkanwanicha & Yupana Wiwattanakantang, *Big Business Owners in Politics* 28 (Ctr. for Econ. Insts, Inst. of Econ. Research, Hitotsubashi Univ., CEI Working Paper Series 2008-17, 2006).

**Table 1 Characteristics of the Tycoon's Families**

(*t*-test)

The table reports characteristics of the top 100 wealthiest families in Thailand. All variables are measured at the family level as of 2000 year-end. The sample firms include the top 2,000 companies in Thailand. A tycoon's firm is the firm in which the family owns 10% or more shares. A tycoon running for top office is defined as the tycoon who ran for the January 2001 general election. Log (total assets) is the logarithm of book value of total assets. Concession revenue/total revenue is the ratio of concession revenue to total revenue. Leverage is the ratio of total debt to total assets. Profitability is the ratio of earning before interest and taxes to total assets. \*, \*\*, and \*\*\* denote statistical significance at the 10%, 5%, and 1% levels, respectively.

		Tycoons Running for Top office (N=13)	Other Tycoons (N=87)	t-statistics (t-test)	z-statistics (Wilcoxon test)
Total assets (million USD)	Mean[Median]	4,418.46 [267.03]	486.46 [105.50]	3.88***	2.18**
Log (total assets)	Mean[Median]	4.391 [4.061]	3.829 [3.658]	3.07***	2.18**
Concession revenue/total revenue	Mean[Median]	0.229 [0.000]	0.025 [0.000]	4.01***	4.33***
Profitability	Mean[Median]	0.024 [0.042]	0.028 [0.050]	-0.07	-0.36
Leverage	Mean[Median]	0.395 [0.380]	0.496 [0.470]	-1.03	-1.02

(Bunkanwanicha and Wiwattanakantang, 2006)

The check-and-balance mechanisms under the Constitution were also ineffective, their credibility and independence under question, as the government managed to interfere in the selection and appointment of people to these bodies. Even the media were intimidated into silence, threatened with withdrawal of advertising by big businesses connected to the government.

What gave Mr. Thaksin's opponents real momentum was the tax-free sale of his family's 73 billion baht worth of shares in Shin Corporation in late January 2006. Anti-Thaksin street protests grew and teetered on the brink of violence.<sup>69</sup> Then came the military coup of 19 September 2006, the promulgation of a new constitution in 2007 and then the general elections on 23 December 2007.<sup>70</sup>

Throughout, political tensions persisted. The PPP, a remnant of the TRT Party dissolved due to election fraud, won the most votes in the 23 December 2007 elections. The situation became, however, more tense, the divisions deeper. The "yellow shirts" versus "red shirts" phenomenon left its mark on the Thai political landscape as the two groups took turns staging protests against the government of the day, leading to violent clashes in October 2008 and April 2009. And even though things appear calm at the moment, it may be a matter of time before a crisis flares up again.

(c) How to Get out of this Political Quagmire

What Thailand needs now is not only a political reform process to resolve the political differences and find a democratic system acceptable to all sides, one that allows people to have their voices heard and hold those they elect accountable, and is resistant to manipulation for private gain. It needs more comprehensive reform that will correct the ingrained structural imbalances in Thai society that have prevented the majority of the people from having their fair share in national resources and wealth and effectively kept the patronage system alive. Then these people would no longer have to depend on politicians and their economic populism, which tends to involve reckless, fiscally unsustainable policies drawing on uncertain future money without thinking about long-term consequences. This must also include efforts to enhance people's awareness that their right to vote should be coupled with the responsibility and ability to hold their elected representatives accountable.

In this connection, the political reform process—envisaged by the government under Mr. Abhisit—should cover an agenda broader than the on-going deliberations by parliamentarians. Resolving problems associated

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69. Oliver Pye & Wolfram Schaffar, *The 2006 Anti-Thaksin Movement in Thailand: An Analysis*, 38 J. OF CONTEMPORARY ASIA 38, 38-61 (2008).

70. Overthrow the Government, cancel the Constitution and descend the authoritarian political power, 2008.

with politicians and the electoral system (e.g. how constituencies for elections of the House of Representatives should be divided, whether the senate should be elected or appointed, whether disqualified politicians should be exonerated, or whether a political party should be dissolved and its executives' electoral rights suspended if a member commits electoral fraud) is important. But to realise the desired goal of national reconciliation and harmony in the Thai society, the agenda should be extended to restructuring the distribution of resources and economic benefits, and the process broadened to include the public.

As far as the agenda is concerned, the following are some ideas of what should be further considered and debated.

First, the Constitution and related laws should have provisions that give the poor access to resources and economic benefits without having to wait for government handouts. Every government should be required to provide people with access to basic services, such as education, health care and skills development, and empower them to participate in the sustainable use of their local natural resources—whether land, forest or water. Government should also be obligated to enhance people's ability to benefit from the market economy, through support on know-how, logistics and marketing. Government should also support stronger bargaining power for the poor through establishment of cooperatives, farmers' organisations and small and medium-sized enterprises.

The Constitution and related laws must undertake progressive tax reform to support a comprehensive welfare system for the general population, and depend less on borrowing. Possible taxes that should be considered are inheritance and land taxes. Meanwhile, wealth that remains concentrated among the few should be better distributed through strict enforcement of legal mechanisms that prevent monopoly of resources by big conglomerates.

Through the above, the Constitution and related laws will in effect institute a "welfare state" and reduce the use of populism by any government to win votes. This change, however, should be put into effect gradually in order to avoid resistance or conflict.

Second, the afore-mentioned structural transformation requires an adjustment in the system of state administration, particularly in the interaction among the central government, local authorities, communities, business and civil society. Among others, the responsibility in managing economic activities and local resources should be decentralised to local authorities or communities, which may even be allowed to provide certain basic social services, if they prove to be more efficient than the central government. At the same time, the relationship between big business and politics should also be reconsidered to prevent the use of money to gain

political power and the use of this power for business gains. The system of making and monitoring contributions for political parties, for example, should be improved.

Third, under the bi-cameral system, the House of Representatives is key to the existence of the government, as their members are elected by the people. But to free parliamentarians from a possibly autocratic party leader, they should not be required to be members of political parties. Candidates should also have more direct contact with voters to reduce the role of canvassers. As for the Senate, given its main task of scrutinising laws and providing checks and balances, its members need not come from elections but may comprise selected members from various sectors and a broad range of professions within society. This will avert possible domination by political parties, which control votes in electoral constituencies, and allow all groups certain political roles, particularly the middle class, the bureaucracy and the military who do not want to run for seats in general elections.

Last but not least, it is important to promote actively the public's political participation at all levels—from the village, municipal, district, provincial to national levels, and instil "civic-mindedness" through civic education—with local communities playing a major role. Democracy is not only about "one man one vote" or majority rule; the general public should recognise the importance of key democratic values that make democracy sustainable, so that they can participate more actively in political life and hold their elected representatives accountable. In addition, social norms or laws should be established to ensure peaceful demonstrations.

## V. CONCLUSION

There is no turning back from democracy for Thailand. But the on-going political reform process, as it is, is just part of a comprehensive reform the country needs to make its democracy sustainable its government legitimate and its rule of law being restrained. Thailand needs to think beyond short-term interests. It needs to tackle the fundamentals of how its democratic system works and how it produces and spreads benefits to people in various sectors of the society. This will help the country overcome the haunting images of yellow-red protests and the anxiety over the possibility of a recurrence of similar events—even though these were due to the extreme views of certain groups of people and did not represent the will of the majority.

## APPENDIX

**THE CONSTITUTION OF THE KINGDOM OF THAILAND (B.E. 2540) 1997*****Section 175***

Subject to Section 180, after the Senate has finished the consideration of a bill or an organic law bill,

- (1) if it agrees with the House of Representatives, further proceedings under Section 93 shall be taken;
- (2) if it disagrees with the House of Representatives, such bill or organic law bill shall be withheld and returned to the House of Representatives;
- (3) if there is an amendment, the amended bill or the amended organic law bill shall be returned to the House of Representatives. If the House of Representatives approves such amendment, further proceedings under Section 93 shall be taken. In other cases, each House shall appoint persons, being or not being its members, in such an equal number as may be fixed by the House of Representatives, to constitute a joint committee for considering the bill or the organic law bill and the joint committee shall prepare a report thereon and submit the bill or the organic law bill which it has already considered to both Houses. If both Houses approve the bill or the organic law bill already considered by the joint committee, further proceedings under Section 93 shall be taken. If either House disapproves it, the bill or the organic law bill shall be withheld.

The joint committee has the power to demand documents from any person or summon any person to give statements of fact or opinions in respect of the consideration of the bill or the organic law bill and the privileges provided in Section 157 and Section 158 shall also extend to the person performing his or her duties under this Section.

At a meeting of the joint committee, the presence of the members of the joint committee appointed by both Houses of not less than one-half of the total number of its members is required to constitute a quorum and the provisions of Section 194 shall apply *mutatis mutandis*.

***Section 198***

In the case where the Ombudsman is of the opinion that the provisions of the law, rules, regulations or any act of any person under Section 197(1) begs the question of the constitutionality, the Ombudsman shall submit the

case and the opinion to the Constitutional Court or Administrative Court for decision in accordance with the procedure of Constitutional Court or the law on the procedure of the Administrative Court, as the case may be.

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

### ***Section 218***

For the purpose of maintaining national or public safety or national economic security, or averting public calamity, the King may issue an Emergency Decree which shall have the force as an Act.

The issuance of an Emergency Decree under paragraph one shall be made only when the Council of Ministers is of the opinion that it is the case of emergency and necessary urgency which is unavoidable.

In the next succeeding sitting of the National Assembly, the Council of Ministers shall submit the Emergency Decree to the National Assembly for its consideration without delay. If it is out of session and it would be a delay to wait for the opening of an ordinary session, the Council of Ministers must proceed to convoke an extraordinary session of the National Assembly in order to consider whether to approve or disapproves the emergency Decree without delay. If the House of Representatives reaffirms its approval by the votes of not more than one-half of the total number of the existing members of the House, the Emergency Decree shall lapse; provided that it shall not affect any act done during the enforcement of such Emergency Decree.

If the Emergency Decree under paragraph one has the effect of amending or repealing any provisions of any Act and such Emergency Decree has lapsed in accordance with paragraph three, the provisions of the Act in force before the amendment or repeal shall continue to be in force as from the day the disapproval of such Emergency Decree is effective.

If the House of Representatives and the Senate approve the Emergency Decree, or if the Senate disapproves it but the House of Representatives reaffirms its approval by the votes for more than one-half of the total number of the existing of members of the House, such Emergency Decree shall continue to have the forces as an Act.

The Prime Minister shall cause the approval or disapproval of the emergency Decree to be published in the Government Gazette. In case of disapproval, it shall be effective as from the day following the date of its publication in the Government Gazette.

The consideration of an Emergency Decree by the Senate and the House of Representatives in case of reaffirmation of the Emergency Decree must take place at the first opportunity when such Houses hold their sittings.

**Section 219**

Before the House of Representatives or the Senate approves an Emergency Decree under Section 218 paragraph three, members of the House of Representatives or senators of not less than one-fifth of the total number of the existing members of each House have the right to submit an opinion to the President of the House of which they are members that the Emergency Decree is not in accordance with Section 218 paragraph one, and the President of the House who receives such opinion shall then refer it to the Constitutional Court for decision. After the Constitutional Court has given a decision thereon, it shall notify its decision to the President of the House referring such opinion.

When the President of the House of Representatives or the President of the Senate has received the opinion from members of the House of Representatives or senators under paragraph one, the consideration of such Emergency Decree shall be deferred until the decision of the Constitutional Court under paragraph one has been notified.

In the case where the Constitutional Court decides that any Emergency Decree is not in accordance with Section 218 paragraph one, such Emergency Decree shall not have the force of law *ab initio*.

The decision of the Constitutional Court that an Emergency Decree is not in accordance with Section 218 paragraph one must be given by votes of not less than two thirds of the total number of members of the Constitutional Court.

**Section 264**

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

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

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



**THE CONSTITUTION OF THE KINGDOM OF THAILAND (B.E. 2550) 2007**

***Section 68***

In the case where the Constitutional Court orders to dissolve that political party, the leader and members of executive committee of such political party shall be revoked their electoral right for a period of five years as from the date the order dissolving the party is effective.

***Section 147***

Subject to Section 168, after the Senate has finished the consideration of a bill,

- (1) if it agrees with the House of Representatives, further proceedings under Section 150 shall be taken;
- (2) if it disagrees with the House of Representatives, such bill shall be withheld and returned to the House of Representatives;
- (3) if there is an amendment, the amended bill shall be returned to the House of Representatives. If the House of Representatives approve such amendment, further proceedings under Section 150 shall be taken. In other cases, each House shall appoint persons, being or not being its members, in such an equal number as may be fixed by the House of Representatives, to constitute a joint committee for considering the bill and the joint committee shall prepare a report thereon and submit the bill which it has already considered to both Houses. If both Houses approve the bill already considered by the joint committee, further proceedings under Section 150 shall be taken. If either House disapproves it, the bill shall be withheld.

The joint committee has the power to demand documents from any person or summon any person to give statements of fact or opinions in respect of the consideration of the bill and the privileges provided in Section 130 shall also extend to the person performing his duties under this Section.

At a meeting of the joint committee, the presence of the members of the joint committee appointed by both Houses of not less than one-half of the total number of its members is required to constitute a quorum and the provisions of Section 137 shall apply *mutatis mutandis*.

If the Senate fails to return the bill to the House of Representatives within the period under Section 146, it shall be deemed that the Senate approves such bill and further proceeding under Section 150 shall be taken.

**Section 181**

The outgoing Council of Minister shall remain in office for carrying out duties until newly appointed Council of Ministers takes office but, in the case of the vacation of office under Article 180(2), the Council of Ministers and its Ministers are allowed to perform their duties as far as it is necessary under the following conditions:

- (1) they shall not exercise its power to appoint or transfer a Government official holding a permanent position or receiving a regular salary or an official of a State agency, State enterprise or any enterprise which the State is the major shareholder, or remove him or her from duties or vacate his or her office, or replace his or her office with the replacing person, except with the prior approval of the Election Commission;
- (2) they shall not take any action with an effect of giving approval to the disbursement of a reserved budget in case of an emergency or other necessity, except with the prior approval of the Election Commission;
- (3) they shall not take any action with an effect of giving approval to any work or project or may cause the next Council of Ministers binding obligations;

They shall not use the State's resources or manpower to carry out an act which has impacts on the results of the election and shall not carry out an action which is contrary to the rules and regulations prescribed by the Election Commission.

**Section 190**

The King has the prerogative to conclude a peace treaty, armistice and other treaties with other countries or international organizations.

Any treaty, which provides for a change in the Thai territories or extraterritorial areas in which the Kingdom has the sovereign rights or any jurisdiction through treaty or enact an Act for implementation of the treaty or has a vast impact on the country's economic and social stability, or has a significant binding effect upon the trade, investment or budget of the country, it shall be approved by the National Assembly. The National Assembly shall finish the consideration thereof within sixty days as from the date it receives the matter.

Prior to action taken for the conclusion of a treaty to be made with other countries or international organizations under paragraph two, the Council of Ministers shall publicize relevant information, make arrangement for a clarification of such a treaty to the National Assembly. In this regard, the

Council of Ministers shall also propose the scope of negotiation to the National Assembly for approval.

After the signing of a treaty under paragraph two and before an expression of intention to bring the binding effect is made, the Council of Ministers shall provide the public with an access to the details of the treaty. In the case where the implementation of such a treaty will affect the people or the small and the medium entrepreneurs, the Council of Ministers shall take actions to provide corrections or remedies to the affected individuals in an expeditious, suitable, and fair manner.

There shall be a law governing the setting of the stages and procedure for making a treaty which has a vast impact on the economic and social stability of the country or has a significant binding effect upon the trade or investment of the country, and the corrections or remedies given to the individuals affected by the implementation of such a treaty, keeping in mind the impartiality between the benefited individuals and the affected individuals from such an implementation as well as the public.

In the case where there is a problem under paragraph two, it shall be under the jurisdiction of the Constitutional Court for its decision and the provisions of Article 154(1) shall apply to the referring of the matter to the Constitutional Court *mutatis mutandis*.

### **Section 206**

The selection and election of judges of the Constitutional Court under Section 204(3) and (4) shall be proceeded as follows:

- (1) there shall be a Selective Committee for Judges of the Constitutional Court consisting 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 Opposition in the House of Representatives and the President of the Constitutional independent organisations whom elected among themselves to be one in number, as members. The Selective Committee must complete the selection under Section 204(3) and (4) within thirty days as from the date a ground for the selection occurs and then nominates the selected persons, with their consents, to the President of the Senate. The selection resolution shall be by open votes and passed by the votes of not less than two-thirds of the total number of the existing members of the Selective Committee. In the case where there is no member in any position or a member is unable to perform his duty and the number of the remaining members is not less than one-half thereof, the Selective Committee shall consist of the

remaining members; provided that the provisions of Section 113 paragraph two shall apply *mutatis mutandis*;

- (2) the President of the Senate shall convoke a sitting of the Senate for the passing of approval resolution to the selected persons under (1) within thirty days as from the date of receipt of the nomination. A resolution shall be made by secret ballot. In case of approval resolution, the President of the Senate shall tender the nominated persons to the King for His appointment. In the case where the Senate disapproves the nomination, whether wholly or partly, it shall be returned to the Selective Committee for reselection. In such case, if the Selective Committee disagrees with the Senate and reaffirms its resolution unanimously, the names of the selected person shall be nominated to the President of the Senate to present to the King for His appointment, but if the reaffirmation is not passed by unanimous resolution, the reselection shall be commenced and it shall complete within thirty days as from the date a ground for the selection occurs.

If it is unable to complete the selection under (1) within the specified period by any cause, the Supreme Court of Justice shall, at its general meeting, appoint three judges of the Supreme Court of Justice holding a position of not lower than a judge of the Supreme Court of Justice and the Supreme Administrative Court shall, at its general meeting, appoint two judges of the Supreme Administrative Court to be members of the Selective Committee for the carrying out the duty under (1).

### ***Section 237***

Any election candidate who acts or causes or support other to act in violation of organic law on the election of members of the House of Representatives and the source of senators, or Rules or Notifications of the Elections Commission, which results in the elections to be in dishonest and unfair manner, the elections right of such a candidate shall be revoked under the House of Representatives and the source of senators.

Pertaining to the act of such a person under paragraph one, if convincing evidence has appeared that any leader or member of executive committee of a political party connived the incident to ensure the honest and fair election, if shall be deemed that such political party acted to acquire the ruling power over the country through means not in accordance with the way prescribed in this Constitution under Article 68. In the case where the Constitutional Court orders to dissolve that political party, the leader and members of executive committee of such political party shall be revoked their electoral right for a

period of five years as from the date the order dissolving the party is effective.

***Section 243***

The provisions of Section 206 and 207 shall apply *mutatis mutandis* to the selection and election of the Ombudsmen. In such case, there shall be a Selective Committee of seven members consisting of the President of the Supreme Court of Justice, the President of the Constitutional Court, the President of the Supreme Administrative Court, the President of the House of Representatives, the Leader of the Opposition in the House of Representatives, a person selected at a general meeting of the Supreme Court of Justice and a person selected at a general meeting of the Supreme Administrative Court and the provisions of Section 231(1) paragraph two shall apply *mutatis mutandis*.

***Section 246***

The National Counter Corruption Commission consists of the President and eight members appointed by the King with the advice of the Senate.

Members of the National Counter Corruption Commission shall be persons of apparent integrity, with qualifications and without any of the prohibitions under Section 205 and having been a Minister, an Election Commissioner, an Ombudsman, a member of the National Human Rights Commission or a member of the State Audit Commission, or having served in a position of not lower than a Director-General or a person holding an administrative position in a government agency having administrative powers equivalent to a Director-General or a person holding an academic position of not lower than Professor, or a representative of a private development organisation or a professional practitioner of a professional organisation established under the law who practices such profession for not less than thirty years whom certified and nominated to the selection by such private development organisation or professional organisation.

The provisions of Section 204 paragraph three and paragraph four, Section 206 and Section 207 shall apply *mutatis mutandis* to the selection and election of members of the National Counter Corruption Commission and, in such case, the Selective Committee shall consist of five members, *vide*, the President of the Supreme Court of Justice, the President of the Constitutional Court, the President of the Supreme Administrative Court, the President of the House of Representatives and the Leader of the Opposition in the House of Representatives.

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

There shall be a Counter Corruption Commissioner to each Changwat and its qualifications, selection and powers and duties shall be in accordance with the organic law on counter corruption.

***Section 252***

The State audit shall be carried out by the State Audit Commission that is independent and impartial.

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

The provisions of Section 204 paragraph three and paragraph four, Section 206 and Section 207 shall apply mutatis mutandis to the selection and election of members the State Audit Commission and the Auditor-General, provided that the composition of the Selective Committee shall be in accordance with Section 243.

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

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

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

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

***Section 256***

The National Human Rights Commission consists of a President and six other members appointed, by the King with the advice of the Senate, from the persons having apparent knowledge and experiences in the protection of rights and liberties of the people with due regard to the participation of representatives from private organizations in the field of human rights.

The President of the Senate shall countersign the Royal Command appointing the President and members of the National Human Rights Commission.

The qualifications, prohibitions, selection, election, removal and

determination of the remuneration of members of the National Human Rights Commission shall be as provided by law.

The members of the National Human Rights Commission shall hold office for a term of six years as from the date of their appointment by the King and shall serve for only one term.

The provisions of Section 204 paragraph three, Section 206, Section 207 and Section 209(2) shall apply *mutatis mutandis*, provided that the composition of the Selective Committee shall be in accordance with Section 243.

There shall be the Office of the National Human Rights Commission being an agency having autonomy in its personnel administration, budget and other activities as provided by law.

***Section 265***

A member of the House of Representatives and a member of the Senate shall not:

- (1) hold any position or have any duty in any Government agency, State agency or State enterprise; or hold a position of member of a local assembly, local administrator or local government official;
- (2) receive, interfere, or intervene any concession from the State, a Government agency, State agency or State enterprise; or become a party to a contract of the nature of economic monopoly with the State, a State agency or State enterprise; or be a partner or shareholder in a partnership or company receiving such concession or be a party to the contract of such nature, either directly or indirectly;
- (3) receive any special money or benefit from any Government agency, State agency or State enterprise apart from that the given by the Government agency, State agency or State enterprise to other persons in the ordinary course of business;
- (4) carry on other acts under the prohibitions under Article 48.

The provisions of this Article shall not apply in the case where a member of the House of Representatives or a member of the Senate receives military pensions, retirement compensation, pensions, annuities of members of the Grand Royal Families or any other form of payment of the same nature and shall not apply in the case where a member of the House of Representatives or a member of the Senate accepts or holds a position of committee member of the National Assembly, the House of Representatives or the Senate, or committee member appointed in the course of the

administration of State affairs.

The provisions in (2), (3) and (4) shall apply to the spouse and offspring of a member of the House of Representatives or a member of the Senate or to other persons who are not the spouse or offspring of such member of the House of Representatives or such member of the Senate, who act as employee, collaborator, or assignee of the House of Representatives or the member of the Senate.

### ***Section 266***

A member of the House of Representative or a member of the Senate shall not, directly or indirectly, through the status or position of member of the House of Representatives or member of the Senate, to interfere or intervene for his or her personal benefits or those of other or a political party, in the following matters:

- (1) performance off civil service , or performance of regular duties of a civil servant, officer or employee of a Government agency, State agency, State enterprise, any business in which the State holds a majority share, or local government organization;
- (2) recruitment, appointment, reshuffle, transfer, promotion, and elevation on the salary scale of a Government official holding a permanent position, receiving salary and not being a political official, an official or employee of a Government agency, State agency, State enterprise, any business in which the State hold a majority share, or local government organization; or
- (3) removal from office of a Government official holding a permanent position, receiving salary and not being a political official, an official or employee of a Government agency, State agency, State enterprise, any business in which the State holds a majority share, or local government organization.

### ***Section 267***

The provisions of Article 265 shall apply to the Prime Minister and Ministers except for holding a position or performing duties in accordance with the provisions of the law. The Prime Minister or Ministers are prohibited to hold a position in a partnership, company, or business enterprise pursuing profits or income to be shared, or be an employee of any person.

### ***Section 309***

Any act that its legality and constitutionality has been recognized by the Constitution of the Kingdom of Thailand (Interim), B.E. 2549, including all



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acts related therewith committed whether before or after the date of promulgation of this Constitution shall be deemed constitutionally under this Constitution.

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