

Restraining arbitrary power in Thailand: the sociological approach in examining the rule of law

Author:

Coorey, Pornsakol Panikabutara

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**RESTRAINING ARBITRARY POWER IN THAILAND: THE
SOCIOLOGICAL APPROACH IN EXAMINING THE RULE OF LAW**

PORNSAKOL PANIKABUTARA COOREY

**A THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE
DEGREE OF DOCTOR OF JURIDICAL SCIENCE**

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First name: PORNSAKOL

Other name/s: PANIKABUTARA

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The primary objective of this thesis is to develop and use a *new framework* to examine the existence of the rule of law in Thailand. Many writers believe that Thailand is a nation which lacks sufficient constraint on the exercise of arbitrary power. These writers often blame the judiciary and other key institutions for not curbing corruption and other forms of abuses of power. While each writer adopts a different approach in analysing the rule of law, their views are almost always taken out of context and do not tell the entire story.

This is considered as inadequate, as these views often fail to appreciate the core sociological aspects of the rule of law. It is these core sociological aspects which are considered as essential to understanding the way the rule of law operates in Thailand. Without a proper understanding of the traditions and culture of Thailand, it is misleading to simply transplant the classic view of the rule of law and compare its key institutions in an *ad hoc* way. History has shown that more often than not the process generally does not work.

A more rigorous analysis is required. This thesis explains and adopts the *new approach* in examining the rule of law in Thailand. This approach examines the key influences of the rule of law in light of its sociological context. It looks beyond the judiciary and other independent institutions and into various areas of social science. Particularly, the level of independence and performance of each major court in Thailand is examined, followed by a comprehensive evaluation of *selected* independent constitutional institutions.

These institutions are then considered in light of other sociological influences on the rule of law in Thailand. Such influences include: social values, political culture, religion, the King and the military. Other external influences such as Asian values and globalisation are also considered. These influences are something that has never been explored before. In saying this, the *new approach – the sociological methodology* differs considerably from past attempts to analyse the existence of the rule of law in Thailand and concludes contrary to popular belief.

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ABSTRACT

The primary objective of this thesis is to develop and use a *new framework* to examine the existence of the rule of law in Thailand. Many writers believe that Thailand is a nation which lacks sufficient constraint on the exercise of arbitrary power. These writers often blame the judiciary and other key institutions for not curbing corruption and other forms of abuses of power. While each writer adopts a different approach in analysing the rule of law, their views are almost always taken out of context and do not tell the entire story.

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A more rigorous analysis is required. This thesis explains and adopts the *new approach* in examining the rule of law in Thailand. This approach examines the key influences of the rule of law in light of its sociological context. It looks beyond the judiciary and other independent institutions and into various areas of social science. Particularly, the level of independence and performance of each major court in Thailand is examined, followed by a comprehensive evaluation of *selected* independent constitutional institutions.

These institutions are then considered in light of other sociological influences on the rule of law in Thailand. Such influences include: social values, political culture, religion, the King and the military. Other external influences such as Asian values and globalisation are also considered. These influences are something that has never been explored before. In saying this, the *new approach* – *the sociological methodology* differs considerably from past attempts to analyse the existence of the rule of law in Thailand and concludes contrary to popular belief.

LIST OF SELECTED ABBREVIATIONS

ASTV	Asian Satellite Television
CPI	Corruption Perceptions Index
CDRAC	Corporate Debt Restructuring Advisory Committee
EC	Election Commission
EGAT	Electricity Generation Authority of Thailand
IMF	International Monetary Fund
NACC	National Anti-Corruption Commission
NCCC	National Counter Corruption Commission
NGO	Non-Government Organisations
NHRC	National Human Rights Commission
OAG	Office of Auditor General
UNCAC	United National Convention Against Corruption
WB	World Bank

RESTRAINING ARBITRARY POWER IN THAILAND: THE SOCIOLOGICAL APPROACH IN EXAMINING THE RULE OF LAW

PRELIMINARY

There is a surprising amount of uncertainty in rule of law literature. This is evident at almost every level of discussion. At the *academic level*, modern scholars struggle to agree on a precise definition of the concept itself. It seems that there is almost as many meanings of the rule of law as there are people discussing it. Definitions now range from a thin theory of rule of law to a thick one and from a rights-based rule of law to a rule-book theory – and the list goes on. Indeed, the divergence of definitions and disagreement on other related conceptual issues about the rule of law appear to be ever growing.

At the *philosophical level*, the phrase “rule of law” is much attributable to the British jurist – Albert Venn Dicey. Based on the British political system, Dicey pointed out that the rule of law consisted of three principles. First, the rule of law requires predominance of regular law as opposed to the influence of arbitrary power. Secondly, no man can be above the law; whatever his rank, he is subject to the ordinary law. Thirdly, individual right and freedoms should be formulated and safeguarded by the law courts.

If law is viewed as a system of rules, the *theoretical* view of the rule of law further demands that law must display an “inner morality”. In this spirit, Lon Fuller’s analysis of the rule of law culminates in eight imperatives of legal government. Law according to Fuller must have generality, publicity, non-retroactivity, clarity, consistency, possibility of compliance, stability, and congruence between official action and declared rule. Yet, while the rule of law is seen as a precondition of individual liberty, Joseph Raz argued that there is no inherent moral worth to the rule of law.

At the *practical level*, rule of law promoters suffer from the same fate. When asked what they think the rule of law means in reality, they often express contradictory thoughts. Despite the plethora of organisations and the vast sums of money provided for rule of law development, success in reform is seldom found. This is evident from the fact that global rule of law reform is now in its fourth wave and still struggling to achieve results. Blame for this often lies in the lack of “homework” done by the reformers and for not focusing on restructuring the key institutions to mirror Western ones’.

At the *practical level*, most rule-of-law-building programs define the rule of law by its institutional attributes. As observed by Rachel Kleinfeld, the rule of law, according to modern rule of law practitioners, contains three primary institutions: laws; a judiciary; and a force able to enforce laws. It is no surprise that most rule-of-law-building programs pay much attention to educating the judiciary; creating well-equipped courtrooms; training police and intelligence services; and drafting cooperative agreements among law enforcement bodies.

It is essential to note that no matter how differently scholars approach the rule of law, they do not challenge the basic premise that the rule of law aims to curb the “arbitrary exercise of political power”. Jeremy Farrall in *United Nations Sanctions and the Rule of Law*, considered that such basic premise explicitly or implicitly underpins the models propounded by legal theorists such as Dicey, Fuller and Raz. It is for this reason that the thesis employs the basic premise as the primary definition of the rule of law. While the thesis does not intend to deeply discuss about the competing definitions of the rule of law, how “arbitrary exercise of political power” is restrained will determine the existence of the rule of law in Thailand.

It is important also to note that the basic premise itself can be construed and applied to different scenarios. Many forms of arbitrary power are considered throughout the thesis. This is to bolster arguments and make all the case studies about the rule of law in Thailand sit coherently. For example, political corruption is heavily discussed in chapter 3 and chapter 4. Using legislated powers by government officials for illegitimate private gain is no doubt part of the exercise of arbitrary power. Politicians taking bribe and cheating during electoral process are included in chapter 3 while the examples of patronage and nepotism are demonstrated in chapter 4.

Government officials using their unfair discretion might affect fundamental rights of citizens. The exercise of arbitrary power in this scenario thus takes place in a form of human rights violation. How Thailand copes with the issues of such human rights violation is examined mainly in chapter 4 and partly in chapter 5. To nullify the unfair order of government officials, the judiciary relies on the enforcement of administrative due process. The role of the court in curbing this form of arbitrary power is assessed in chapter 3.

The fundamental objective of this thesis is to develop and use a new framework to examine the existence of the rule of law in Thailand. In setting out to achieve this objective, this thesis is concerned more with the *practical* problems that are associated with rule of law reform and less concerned with the *theoretical* issues associated with its definition. Legal theory will not provide an answer as to whether Thailand is governed by law or by men. The answer may not be found in Dicey's three classic tenets or Fuller's eight desiderata, nor will a solution be provided by constitutional theorists, such as Raz, Hayek and Thompson.

What can be learnt from these great thinkers and from other rule-book and rights-based theorists, such as Dworkin, is more about the philosophy, characterisation and reasons why we require the rule of law in society and less about how it is and should be implemented in 21st Century times. What is perhaps more useful is how these theories interact with those of social and political theorists, such as Aristotle or in more recent times, Judith Shklar. However, this analysis by itself, while useful in other respects, provides no great guidance towards a practical approach to modern rule of law reform.

This is something that has been noted before by other academics and a call for a new approach to rule of law reform is often echoed. Rule of law success is not based on a simple concoct formula which artificially transplants the mainstream view of these theories into reality. Yet, modern writers, such as Hager, continue to draw from the mainstream theorists and attempt to derive a lexicon or instruction manual for rule of law developers. These manuals are implemented without any real understanding of social science, despite there being a deeper sociological issue in play here.

Carothers aptly remarks that while rule of law reformers do succeed in helping produce change in *some* specific areas, they often do not really know what effects those changes will have on the development of the rule of law in the country. To help fill the gap in knowledge, this thesis contributes to this debate, by advocating and adopting a *new approach* in examining the rule of law. In an attempt to overcome the obstacles to knowledge, the *new approach* looks beyond the judiciary and other key institutions and into the uncharted area of social science and how this area integrates with those institutions.

In other words, the *new approach* examines the key influences on the rule of law in light of its sociological context. The independence and performance of the

judiciary and other key institutions, such as constitutional watchdogs, are only part of the picture. How people interact, perceive and respond to those institutions is another. Indeed, there are many areas of legal studies and sociology that need to be explored. What is explored for one nation will no doubt differ to another. Each nation is not similar and therefore, it would be expected that different factors would influence the rule of law.

The task is not only to select the key influences of the rule of law for each nation, but also to understand how they integrate with each other. Lawyers must work together with sociologists to achieve this. Understanding how these areas interact with each other is fundamental to any rule of law reform. This is an approach that is similar to what has been ritually advocated by Martin Krygier and other academics in previous times. Yet, until this thesis, there appears to be no real attempt to apply the *new approach* in examining and/or reforming the rule of law in a particular nation, including Thailand.

In saying this, the *new approach* adopted in this thesis is the first real attempt to provide a holistic examination of the independence and performance of the judiciary and other key institutions in Thailand in light of their sociological context. In fact, the first academic references to the rule of law in Thailand can be traced as far back as to only 1965, where the International Commission of Jurists held a conference on the *Dynamic Aspects of the Rule of law in the Modern Age* in Bangkok. Since then there has been a slow, but growing amount of academic and non-academic literature on the rule of law in Thailand.

Included in the relatively short list of literature are writers from both Thailand and abroad. Notably, these writers can be placed into two main categories. In the first category, are the national writers, such as Vitit Muntarbhorn, who have focused their discussion on human rights issues in relation to the rule of

law in Thailand. International writers, such as Duncan McCargo and Randall Peerenboom, have also made separate contributions to particular areas, including a recent appraisal of the insurgency problems in the southern part of Thailand and the controversial laws and responses by the Thai government.

Also evident from the literature is a second category of writers, who have tended to focus their rule of law analysis on the judiciary and/or other independent institutions in Thailand. Two authors that have made substantial contributions to this institutional area are, Peter Leyland and James Klein. While all of these contributions are welcomed, and have no doubt provided valuable information and insight into Thailand's rule of law, none of them appear to have written about Thailand in light of its sociological context. In fact, there is a notable lack of literature which actually discusses this issue.

Initially, rule of law reform in Thailand centred on the alterations of the banking and finance law in response to the economic crisis in 1997. Later, further amendments were made to the Thai Civil Procedural Code, Criminal Code, Criminal Procedural Code, human rights legislation, and the Constitution. These amendments were prompted by the will to reform politics and the growing concerns of human rights violations in Thailand. No doubt the media and non-academic literature also played a crucial role in pushing for these changes. However, when corruption and human rights violations are published in local newspapers, broadcasted on television or radio, it appears that more often than not, there is a reference to Thailand not being governed by the rule of law.

This thesis, through adopting the *new approach* in examining the rule of law, attempts to prove otherwise. In carrying out the research using the sociological approach, a legal concept is investigated by taking into account

social structures, social process and interest groups. It begins by identifying a number of misconceptions with the current approach to rule of law reform, followed by a discussion of some of the main criticisms in Thailand. Amongst the misconceptions examined, is the classic view that the rule of law is something that is capable of export. Tied closely to this misconception is another that key institutions, such as the judiciary, should be the focus of rule of law reform, so they will work similarly to those in Western nations.

Both misconceptions and others are not considered as appropriate ways to examine or reform the rule of law in Thailand. For it is misleading to simply transplant the classic view of the rule of law and compare its institutions in an *ad hoc* way. The rule of law is a concept not capable of export. History has shown more often than not that it is impractical to replace key institutions with foreign ones. In saying this, the *new approach* adopted in this thesis abandons the past scattered attempts to analyse and reform the rule of law in Thailand and applies a more comprehensive analysis.

The thesis is merely considered as a starting point for other writers and reformers to build upon and develop and nothing more. Of course, there is a need for more work to be done before any further rule of law reforms are attempted in Thailand. Academics must work with rule of law reformers and with other scholars of sociology to understand how the integration of the rule of law and sociology really work. In line with its fundamental objective, this thesis aims to make a valid contribution to this area of literature and hopefully fill some of its gap, while at the same time offer a better understanding of how the rule of law can be perceived and functioned in a particular society. There might be other aspects of rule of law which can specifically be interpreted in a country where democracy is not mature.

CHAPTER ONE

INTRODUCTION

1.1 PASSAGE

...[I]f sociological innocence about the rule of law is striking, so too are the immaculate conceptions of legal and political theorists, untainted as they have remained by social theory or empirical social research. That is an odd way to work. Presumably if they were confident that by prayer they could eliminate arbitrariness in the exercise of power, they would think more about prayer and less about law. Instead we are sent to particular sorts of legal arrangements which on their own, I have sought to argue, often don't amount to much. So my suggestion is that we would do well to explore a 'social science that does not quite yet exist,' the sociology of the rule of law.

Martin Krygier 2009

1.2 THE FICTION IS REALLY A FACT

Does the rule of law exist in Thailand? This is the fundamental question that will be observed by this thesis through the use of a new methodology. Admittedly, the question first arose not so much from interest in the topic of the rule of law, but more so from the ideological abuse and general overuse of the definition itself. Upon researching this thesis, it became apparently clear from the start that Thailand was routinely branded as a nation without the rule of law. This was a peculiar finding, considering the lack of attention and misunderstanding that writers often had about Thailand. Even more alarming is the fact that most, if not all, of these writers would examine the efficacy of the judiciary or other key institutions *in isolation* and then draw a broad conclusion for the entire nation.

No great effort has ever been developed to into exploring the context or other core socio-legal influences on the rule of law in Thailand. This is evident from

the lack of difficulty in finding a journal or newspaper article that has a short one page analysis and a headline with words to the effect that “Thailand does not have the rule of law”. Not surprisingly, it is even easier to stumble across a similar title on the internet. Indeed, it is remarkably simple, and yet sometimes highly effective, to point to an isolated incident of abuse of power and say *no rule of law*. With its Constitution changed seventeen times and the government overthrown on nineteen occasions by the military, it is no wonder that no one has really made an effort to challenge these writers.

These writers, who are referred to as anatomical reformers (a name borrowed from Martin Krygier in the passage above) appear to be taking the wrong approach to rule of law reform in Thailand. For it is misleading to simply transplant the classic view of the rule of law and compare its institutions in an *ad hoc* way. The rule of law is a concept not capable of export. History has shown more often than not that it is impractical to replace key institutions with foreign ones. Society generally does not adapt to the change. The analysis of this misconception and others, such as a narrow focus on the judiciary and dubious methodology, suggests that anatomical reform is generally not the right approach for rule of law reform in Thailand or for most other nations.

The problems with anatomical reform do not stop here. For example, can the massive cost of global reform be justified considering its lack of success in the past? In one decade alone, it was recorded that the World Bank spent over one billion US dollars on rule of law reform. Indeed, the costs associated with reform are not only the expense of establishing new courtrooms, libraries and legal education. It is far more. It is time. It is research. It is investment in people. It is the expense in attempting to fix what does not seem to work and more. More daunting is the possibility that anatomical reform may even cause more harm than good. By replacing informal means of social order with more

expensive formal ones, could cause irreparable damage to an already balanced system.

The primary obstacles to anatomical reform are not only technical or financial, but also of a lack of human understanding. The problem with a human understanding may in fact be a part of a suspected larger problem of anatomical thinking. It is not entirely sure whether anatomical reformers themselves actually know what to look for, what to look with and how to look. Anatomical reformers do not generally appear to be equipped for this multifunctional task. They are not sociologists, historians, or political scientists, nor do they strive to be. They do not have much interest in foreign culture, traditions and local ways of doing things. What they know often limits their foresight into acquiring what they need to know.

They think they know the key institutions and they know the law, but they do not know (and generally do not want to know) how these institutions and the law interact with citizens and society. An anatomical reformer will never really appreciate this interaction unless he or she is capable and willing to pay more attention to sociological integration. This is what the fate of any worthwhile rule of law reform depends on. For Thailand, it appears that very little attention has been given to traditions and culture and even less emphasis placed on the study of social integration. Even more surprising is the discovery that Thailand has not yet been the subject of focus of any major anatomical reform. It is not entirely clear as to why this is so.

Furthermore, the rule of law in Thailand may not be perceived as strong as those in the Western nations such as the United Kingdom or the United States. At times, the examples provided in the thesis raise the tension between perception and reality with respect to law and the rule of law in Thailand.

Nonetheless, to some extent, Thailand is still governed by the rule of law. One way in arriving at such conclusion is to illustrate that Thailand has embraced the core element of the rule of law which is to restrain the exercise of arbitrary power. Throughout the thesis, the different definitions of the rule of law are discussed to reflect literature from other related topics. However, when identifying if the rule of law can be found in a nation, the thesis only relies on the core element that government officials and citizens are bound by and act consistent with the law. In other words, for the thesis, the rule of law only means that “no one can be above the law”.

Before any great amounts of time and money are spent to reform the rule of law in Thailand, reformers perhaps should keep an open mind about the context of the law and the key institutions which administer and enforce it. This thesis attempts to provide a basic level of context to the rule of law in Thailand. It explores not only the effectiveness of the judiciary and other independent institutions, but many other uncharted areas of social science. The choice is selective, based on what is believed by the author to be the key influences on the rule of law in Thailand. Included in the analysis are internal influences such as, the role of religion, the military and the King. External influences, such as globalisation and Asian values, are also explored.

Throughout the thesis and especially in chapter five, the categories “Western” and “Asian” are used in opposition to one another. While “Asian”, as a category, is critically focused when analysing the influence of Asian values in chapter five, a scattering of “Western” categories are referred throughout the thesis. The basic definition of what constitutes “the West” varies, expanding and contracting over time, in relation to various historical circumstances. Particularly, in the context of politics and law, there are many kinds of democracies and many forms of the rule of law which exist in countries

broadly identified to be part of “the West”. However, it is intended that “the West” in this thesis generally refers to the nations whose legal traditions are based on Christianity, which would include the Americas, Europe, Australia and New Zealand.

The analysis is by no means complete. The thesis is not considered as the “Bible” or the “Holy Grail” for any future rule of law reform in Thailand. In fact, the thesis does not even go so far as to provide intricate recommendations on how to achieve or strengthen it. It is merely a starting point for other writers and reformers to build upon and develop. The thesis is the first attempt to provide context to rule of law analysis in Thailand. Indeed, further work needs to be done. Lawyers must work together with sociologists to understand how the secrets of the integration really work. There is no single pill that can generally cure the rule of law problem around the world. It is hoped that this thesis will help provide a better understanding of how the rule of law operates in a particular country.

CHAPTER TWO

THE RULE OF LAW – A NEW APPROACH

2.1 INTRODUCTION

There are very few writers who support the view that Thailand is governed by the rule of law. The opposing view may be persuasive if one was only to consider the standard anatomical approach. Such an approach focuses on the examination of the judiciary, other key institutions and not much more. This is inadequate, as it tells only part of the story. An anatomical approach does not appreciate a number of core sociological aspects of society when examining the rule of law. It is these core sociological aspects which are essential to the understanding of the way the rule of law operates in Thailand. Indeed, the rule of law is not only a legal and political concept, but also a social one. It is social in the sense that legal and other key institutions are interwoven with local politics, culture and tradition.

In other words, the rule of law does not operate in a legal vacuum. It operates in a society. It is for this reason why the examination of key institutions in isolation is inadequate. Context is as important as the key institutions themselves. Without a proper understanding of the traditions and culture of Thailand, it is misleading to simply transplant the classic view of the rule of law and compare its key institutions in an *ad hoc* way. History has shown that more often than not the process generally does not work. A more rigorous analysis is required. This thesis will explain and adopt *a new approach* to examining the rule of law in Thailand, one which differs considerably from past attempts and concludes contrary to popular belief that Thailand does not have the rule of law. It is hoped that this thesis will alter that belief or at least lead to some reversion.

2.2 THE FICTION IS REALLY A FACT

This chapter is divided into three main sections. The first section is focused on a brief examination of the anatomical approach. This is followed by a more in-depth analysis of some of its main misconceptions. Perhaps the greatest of these misconceptions is the belief that the rule of law is capable of export. In most modern cases, this is simply not true. The analysis of this misconception and others, such as a narrow focus on the judiciary and dubious methodology, all indicate that the anatomical approach is generally not the right approach for rule of law reform. It is argued that this is especially true for Thailand, a nation where anatomical reform is notably absent.

The second section of the chapter addresses some of the opposing views which argue that Thailand is not governed by the rule of law. This analysis includes writers from both Thailand and abroad. Almost all of these views focus on the failure of key institutions in Thailand. While these views adopt slightly different anatomical approaches, they all tend to examine at most one or two key institutions only. Some writers, for example, only examine the military coups in Thailand,¹ while others have focused on constitutional issues.² These views are almost always taken out of context and do not tell the entire story. Not all of the views will be addressed below. Some of which will be examined in more detail in later chapters. For now, only the views that can be dispelled by short analysis will be addressed.

¹ See, Asian Human Rights Commission, “No Penalties for Generals and No Rule of Law in Thailand”, 9 March 2005 <<http://www.ahrchk.net/statements/mainfile.php/2005statements/274/>> (12 May 2009);

“Thailand’s Dangerous Coup”, *The Economist*, 23 September 2006, at 11.

² For example, see Seth Mydans, “New Rule of Law in Thailand Maybe a Leaders Downfall”, *The New York Times*, 30 July 2001; Peter Leyland, “Thailand’s Constitutional Watchdogs: Dobermans, Bloodhounds or Lapdogs?” (2007) 2(2) *Journal of Comparative Law* 151; Pinai Nanakorn, “Re-Making of the Constitution in Thailand” (2002) 6 *Singapore Journal of International and Comparative Law* 90; Orapin Sopchokchai, Ryratana Suwanraks, and Panniya Binsri, *The Thai Constitution and New Mechanisms for Transparent and Anti-Corruption Society*, Thailand Development Research Institute, Bangkok, 2000; James R Klein, “The Constitution of the Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy”, *The Asia Foundation Working Paper* No. 8, March 1998.

The last section of this chapter will explain and adopt *a new approach* to examining the rule of law in Thailand. Such an approach is the first real attempt to examine the key influences of the rule of law in Thailand in light of its culture and tradition. It explores the uncharted area of social science and its connection with the rule of law. In doing so, it will not abandon the universal principles of the rule of law or work from a deviation of its mainstream definition. This approach is holistic and will set out the methodology and basis for the remaining chapters. Each chapter will then serve as a collective purpose in support of the final conclusion. It is hoped that anatomical reformers and other critics are persuaded by this conclusion and agree that the *fiction* that Thailand has the rule of law is really a *fact*.

2.3 THE ANATOMICAL APPROACH

2.3.1 What is the anatomical approach?

The core idea of the anatomical approach is that a nation will achieve the rule of law by building or reshaping its key institutions to match those of nations that are considered to have the rule of law. In simple terms, anatomical reform translates the rule of law into an institutional checklist.³ An anatomical reformer simply diagnoses the shortcomings of key institutions of the recipient nation and then builds or modifies those institutions until the checklist can be ticked off.⁴ If there is inadequate legal training, then that training should be provided.⁵ If there is insufficient access to legal materials, then those materials should be supplied.⁶ If an anatomical reformer has

³ For example see, Gary Goodpaster, “Law Reform in Developing Countries” in Timothy Lindsey (ed), *Law Reform in Developing and Transitional States*, Routledge, Hoboken, 2006, at 106-140.

⁴ Michael J Trebilcock and Ronald J Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress*, Edward Elgar Publishing, 2008, at 42.

⁵ American Bar Association, *Rule of Law Initiative Launches Local Government Legal Training Series Tajikistan* <<http://www.abanet.org/rol/news/news-tajikistan-local-gov.shtml>> (22 May 2009).

⁶ For example, see Afghanistan: Rule of Law Project (ARoLP) which is funded by USAID from March 2003-May 2009 managed by Checchi and Company Consulting, Inc. <<http://afghanistan.usaid.gov/en/Activity.85.aspx>> (25 May 2009).

enough ticks on his or her institutional checklist to fit the model, then the idea is that the rule of law will emerge.⁷

While there are slight variations of the model, the anatomical approach is supposed to be universal and mechanical in application. It is not uncommon for anatomical reformers to postulate “reform the judiciary in country X in Y years”.⁸ This postulation is generally followed by heavy funding, some tweaking of the judicial system and then an avalanche of reviews and recommendations.⁹ The object of the process is to produce institutional endpoints. Idealistically, the endpoints between the recipient nation and the model should match. If they do not, then simply tweak the institution a little more until they do. If there is resistance against the tweaking, the general advice is to simply provide incentives to those institutional actors who are resisting.¹⁰

This is what anatomical reformers call the “will to reform”.¹¹ The idea is simple. Without the “will to reform” on the part of key institutional actors, efforts to reform key institutions would be less effective or even futile. Anatomical reformers seek out these actors who are considered as vital in a

⁷Luz E Nagle, “The Rule of Law in Latin America” in Richard Millett, Jennifer S Holmes, Orlando J Perez (eds), *Latin American Democracy: Emerging Reality or Endangered Species*, Taylor and Francis, Hoboken, 2008, at 86-87.

⁸ For example, the Second Judicial Reform Project in Armenia outlines its procurement plan which started from December 2006 to December 2012 <http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2009/04/22/000334955_20090422051335/Rendered/PDF/482250PROP0P0910Box338888B01PUBLIC1.pdf> (23 July 2009); See also, Rogelio Perez-Perdomo, “Judicial Reform, Rule of Law, and Revolution in Venezuela”, a paper presented at the annual meeting of the *Law and Society Association*, Chicago, 27 May 2004.

⁹ World Bank Annual Report 2006; See also, “The Rule of Law and Judicial Reform in Post-Conflict Rwanda”, a report summary of the event at the *Woodrow Wilson International Center for Scholars*, 18 January 2006.

¹⁰ Asian Development Bank, *An Overview of ADB’s Law and Policy Reform Activities in 2000*, Asian Development Bank, Philippines, 2000.

¹¹ Victoria Harris, “Consolidating Ideology in Law?: Legal and Judicial Reform Programs at the World Bank”, *Bretton Woods Project Article* No. 2497, 25 July 2007 <<http://www.brettonwoodsproject.org/art-554671>> (25 May 2009).

recipient country and offer an appropriate incentive for that reform to occur.¹² In doing so, it is necessary to understand the underlying interests of the key actors and to try to reshape the incentives to which those actors respond.¹³ Sometimes this requires a wave of promotions or an increase in funding to a particular department.¹⁴ Whatever the incentive may be, the general presumption is that those actors would inevitably become reliable reform leaders of the institutions in question.

Today such an approach is facing increasing criticism and strong resistance from many nations.¹⁵ Anatomical reformers have been urged to re-think about their mission on how to export the rule of law. However, not much has changed. The core idea of institutional focus still represents the fundamental principle of anatomical reform. It is still implemented by financial institutions such as the World Bank and the International Monetary Fund (“IMF”) who have made rule of law reform a staple recommendation for the nations to which they provide assistance.¹⁶ The sobering truth of the matter is that it simply just does not work. One of the problems with the approach, as we shall now see, is the misconception that rule of law is capable of export.

2.3.2 Exporting the rule of law: An illusory belief

One of the greatest misconceptions of anatomical reformers is the belief that the rule of law is capable of export.¹⁷ In most modern cases, this is simply not

¹² Office of High Representative and EU Special Representative, *Judicial Reform Program*, 15 May 2000 <http://www.ohr.int/ohr-dept/hr-rol/thedep/jud-reform/default.asp?content_id=5227> (19 May 2009).

¹³ Frederick Schauer, “The Politics and Incentives of Legal Transplantation”, *Centre for International Development Working Paper* No. 44, Harvard University, April 2000.

¹⁴ Livingston Armytage, “Pakistan’s Law and Justice Sector Reform Experiences: Some Lessons” (2003) 2 *Law, Social Justice & Global Development Journal* <http://www2.warwick.ac.uk/fac/soc/law/elj/ugd/2003_2/armytage/> (26 May 2009).

¹⁵ For example, see Carlos Santiso, “The Elusive Quest for the Rule of Law: Promoting the Judicial Reform in Latin America” (2003) 23(3) *Brazilian Journal of Political Economy* 112.

¹⁶ World Bank, *Initiatives in Legal and Judicial Reform*, Legal Vice Presidency, 2004; World Bank, *Empowering People by Transforming Institutions*, Social Development in World Bank Operations, 2005.

¹⁷ Kirsti Samuels, “Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt”, *Social Development Paper* No. 37, The World Bank, October 2006, at 1.

true.¹⁸ The rule of law is not a mere commodity like fine wine or china. It simply cannot be grown in the home country, gift wrapped and delivered to a nation's doorstep for cash on delivery.¹⁹ If this was true, every nation will want and get one for Christmas. So why isn't Santa delivering to every nation? These nations do the right thing and abide by the anatomical approach and still very few of them receive a gift.²⁰ Sometimes the gift is not what they want and sometimes what they receive is not exactly what they think it to be²¹ – it must be the rule of law because Santa said so.

Yet, what if Santa was wrong? What if he ignored the advice from some of his helpers in the North Pole? What if his gift was not really a gift at all, but something different? For one thing, the gift itself is not free. There is a price, normally a lot more than just some warm milk and cookies. In one decade alone, the World Bank spent over one billion on rule of law reform.²² Perhaps all of the cost of Santa and his helpers is not just worth the money spent.²³ Training reindeer is not cheap and in some cases cannot be afforded by the nation. Exporting the anatomical approach, even if possible, is not worth spending money on unless the institutions created by such expenditure will have beneficial effects that outweigh their costs and any harm they create. This is not often achieved in reality.²⁴

¹⁸ See Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences" (1998) 61(1) *Modern Law Review* 11.

¹⁹ Pierre Legrand, "European Legal Systems Are Not Converging" (1996) 45 *International and Comparative Law Quarterly* 52.

²⁰ For example, see Jose Alvarez, "Promoting the Rule of Law in Latin America: Problems and Prospects" (1991) 25(2) *George Washington Journal of International Law & Economics* 281.

²¹ Martin Krygier, "The Rule of Law: Legality, Teleology, Sociology" in Gianluigi Palombella & Neil Walker (eds), *Re-locating the Rule of Law*, Hart Publishers, Oxford, 2008, also available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1218982> (12 March 2009), at 5-6.

²² Thomas Carothers, "The Rule of Law Revival" (1998) 77(2) *Foreign Affairs* 95, at 95 -106.

²³ Martin Krygier, "The Rule of Law: Legality, Teleology, Sociology" in Gianluigi Palombella & Neil Walker (eds), *Re-locating the Rule of Law*, Hart Publishers, Oxford, 2008, also available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1218982> (12 March 2009), at 6.

²⁴ Frank Upham, "Mythmaking in the Rule of Law Orthodoxy", *Carnegie Endowment Working Papers* No. 30, Carnegie Endowment for International Peace, September 2002, at 32.

Exporting a common template of legal institutions and rules often extracts enormous costs from recipient nations.²⁵ Santa's constructed legal systems are expensive in terms of the capital and talent necessary to operate them.²⁶ Past attempts to export the rule of law have even displaced valuable pre-existing institutions, which may have deserved elaboration.²⁷ The cost of the anatomical approach is not solely the expense of establishing new courtrooms, libraries and legal education.²⁸ It is far more. Santa may in fact, damage the chimney and other parts of the house upon delivery.²⁹ His damage may even be irreparable. The damage may extend to existing informal means to social order, without which a legal system can only struggle to succeed.³⁰

Some nations do not even ask for a gift, but Santa insists they get one. These nations have been coerced and compelled to adopt the anatomical approach for reason of repayment of foreign debt or as a condition for some other monetary or social purpose.³¹ Sometimes the reason is even less credible than this. Sometimes Santa gives a gift just because the neighbour has one.³² After

²⁵ For example, Court and Bankruptcy Administration Project for Croatia cost five million US dollars while Judicial Reform Project for Georgia cost around fourteen million US dollars.

²⁶ For example, the United States provided almost one thousand million US dollars during 1993-1998, of which three hundred and forty-nine million was for Latin America and the Caribbean. See Kirsti Samuels, "Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt", *Social Development Paper* No. 37, The World Bank, October 2006, at 1.

²⁷ Frank Upham, "Mythmaking in the Rule of Law Orthodoxy", *Carnegie Endowment Working Papers* No. 30, Carnegie Endowment for International Peace, September 2002, at 32.

²⁸ Thom Ringer, "Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the Rule of Law and Its Place in Development Theory and Practice" *Yale Human Rights and Development Law Journal*, 1 January 2007

<http://www.accessmylibrary.com/coms2/summary_0286-32522908_ITM> (1 May 2009).

²⁹ David Nelken, "Comparatists and Transferability" in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions*, Cambridge University Press, Cambridge, 2003, at 453.

³⁰ Stephanie Wolters, "The Gacaca Process: Eradicating the Culture of Impunity in Rwanda?" *Situation Report*, Institute for Security Studies, 5 August 2005; Jennifer Widner, "Courts and Democracy in Post-conflict Transitions: A Social Scientist's Perspective on the African Case" (2001) 95(1) *The American Journal of International Law* 64.

³¹ Poonam Gupta, Rachel Kleinfeld, and Gonzalo Salinas, *Legal and Judicial Reform in Europe and Central Asia*, Operations Evaluation Department World Bank, 2002; Matthew J Spence, "The Complexity of Success: The U.S. Role in Russian Rule of Law Reform" *Carnegie Endowment Working Papers* No. 60, Carnegie Endowment for International Peace, July 2005.

³² For example, see *European Neighbourhood Policy: Georgia*, Brussels, 2 March 2005 <http://europa.eu.int/comm/world/enp/index_en.htm> (1 April 2009).

all Christmas is a time for all to receive and no one should be left out. The current rule of law reform, which began in the mid-1980s in Latin America, extends to many regions, including Eastern Europe, the former Soviet Union, Sub-Saharan Africa and now more focused on Asia. The rule of law reform is currently in its fourth wave.³³ Despite its lack of success, anatomical reform is on the rise.³⁴

This fact raises an interesting challenge. The challenge is not so much filling the gap between ambition and achievement, as it is to altering the current way of thinking. How does one go about to tell Santa that his Christmas gift is *an illusory belief*? Perhaps time will tell. Santa should be aware of the possibility that the anatomical formula created to export the rule of law is a legal fiction.³⁵ It is a legal fiction which focuses on the expected result – the formalist rule of law.³⁶ This may work well on paper, but generally not in reality.³⁷ It is suspected that some of Santa’s little helpers know this already. Some of them have already called for *a new approach*.³⁸ Such calls, while refreshing and intellectual,³⁹ are not heard by the anatomical reformers and have therefore yet to deliver on their promise of a white Christmas.

³³ For a good overview of the evolution of the rule of law promotion literature see, Amichai Magen, “The Rule of Law and Its Promotion Abroad: Three Problems of Scope” (2009) 45(1) *Stanford Journal of International Law* 51, at 78.

³⁴ David Nelken, “Comparatists and Transferability” in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions*, Cambridge University Press, Cambridge, 2003, at 437.

³⁵ Roman Tomasic, “Company Law and the Limits of the Rule of Law in China” (1995) *Australian Journal of Corporate Law* 470, at 474.

³⁶ Frank Upham, “Ideology, Experience, and the Rule of Law in Developing Societies”, a presentation at the *First Meeting of the Carnegie Endowment Rule of Law Roundtable*, 5 September 2001 <<http://www.carnegieendowment.org/events/index.cfm?fa=eventDetail&id=380>> (9 May 2009) at 33.

³⁷ For example, see Jess T Ford and Albert H Huntington, *Foreign Assistance: U.S. Rule of Law Assistance to Five Latin American Countries*, U.S. General Accounting Office, National Security and International Affairs Division, 1999.

³⁸ For example, see Victoria Harris, “Consolidating Ideology in Law?: Legal and Judicial Reform Programs at the World Bank”, *Bretton Woods Project Article* No. 2497, 25 July 2007 <<http://www.brettonwoodsproject.org/art-554671>> (25 May 2009).

³⁹ David Nelken, “The Meaning of Success in Transnational Legal Transfers” in David Nelken (ed), *Beyond Law in Context*, Ashgate Publishing, Surrey, 2009, at 287.

2.3.3 Anatomical reform: A narrow focus on the judiciary

A second misconception of anatomical reformers is the belief that rule of law reform should be *focused on the judiciary*.⁴⁰ This is not a surprise. Most anatomical reformers are either lawyers or other members of the legal fraternity.⁴¹ By the very nature of the profession, most lawyers and legal staff have a tendency to focus on things that they know best, namely things that concern the law. It is no wonder why the judiciary is at the top of their institutional checklists and is often perceived as the nerve centre for rule of law reform.⁴² The emphasis on the judiciary is so common in the way of anatomical thinking, that more than one writer has observed that the terms *judicial reform* and *rule of law reform* are often used interchangeably by reformers.⁴³

To add justification to this way of thinking, anatomical reformers generally refer to the social and political “spill-over” effects argument. In simple terms, the argument states that a well-functioning judiciary will help strengthen the performance of other key institutions.⁴⁴ This will, in turn, have a spill-over effect on the development of social and political issues such as economic growth and the protection of human rights.⁴⁵ It is for this reason that anatomical reformers believe that the judiciary is of prime importance, and as such, reform of it should be undertaken at the early stages of the anatomical process. Some reformers, such as Ibrahim Shihata, have taken the argument

⁴⁰ For example, The American Bar Association Rule of Law Initiative

<http://www.abanet.org/rol/publications/judicial_reform_index.shtml> (6 June 2009).

⁴¹ Erik Jensen and Thomas Heller, “Introduction” in Erik Jensen & Thomas Heller (eds), *Beyond Common Knowledge – Empirical Approaches to the Rule of Law*, Stanford University Press, California, 2003, at 4.

⁴² James Wolfensohn, *Comprehensive Development Framework*, The World Bank, 1999, at 1-2.

⁴³ For example, see Thomas Carothers “Promoting the Rule of Law Abroad – The Problem of Knowledge”, *Carnegie Endowment Working Papers* No. 34, Carnegie Endowment for International Peace, January 2003, at 8; see also, Wendy Betts, et al, “The Post-Conflict Transitional Administration of Kosovo and the Lesson-Learned in Efforts to Establish a Judiciary and Rule of Law” (2000) 22(3) *Michigan Journal of International Law* 371.

⁴⁴ For example see, International Foundation for Electoral System, *Kosovo Judicial System Reform*, 2004.

⁴⁵ Richard E Messick, “Judicial Reform and Economic Development: A Survey of the Issues” (1999) 14(1) *World Bank Research Observer* 117.

one step further in stating that a well-functioning judiciary is not only desirable, but *necessary* for rule of law reform.⁴⁶

No one would rightly argue against the idea that a nation will benefit from a well-functioning judiciary. It is more than obvious that there are many positive aspects from an effective, efficient and non-corrupt judicial system. However, it is not as easy to believe that a well-functioning judiciary is *necessary* for rule of law reform.⁴⁷ Shihata's belief has been criticised by a number of writers for this reason.⁴⁸ Perhaps his belief is better described as placing the cart before the horse. The judiciary usually plays a late role in the legal process.⁴⁹ Most laws in Western nations are enacted by the legislative or executive arms of the government. The role of the judiciary in interpreting those laws generally comes *after* this process and any spill-over effects that are created would naturally follow from this.

Kirsti Samuels estimates that it generally takes approximately twenty years to effectively reform the judiciary in a developing nation.⁵⁰ With this in mind, one might argue that the social and political spill-over effects that are created from the reform process should not solely be attributed to the judiciary. Moreover, it should be remembered that the judiciary is only one institution of many in the *entire* reform process.⁵¹ Most citizens in Western nations do not

⁴⁶ Ibrahim Shihata, "The World Bank and Governance Issues in Its Borrowing Members" in Franziska Tschöfen and Antonio R Parra (eds), *The World Bank in a Changing World*, Martinus Nijhoff Publisher, The Hague, 1995, at 58.

⁴⁷ Chris Mburu, "Challenges Facing Legal And Judicial Reform In Post-Conflict Environments: Case Study from Rwanda and Sierra Leone", *Security and Opportunity through Law and Justice Background Paper*, World Bank Conference, Russia, 8-12 July 2001.

⁴⁸ For example, see William Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law*, Westport, Praeger, 2000, at 27; Mark Ungar, *Elusive Reform: Democracy and the Rule of Law in Latin America*, Lynne Rienner, Colorado, 2002, at 182.

⁴⁹ Brian Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, Cambridge, 2004, at 123.

⁵⁰ Kirsti Samuels, "Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt", *Social Development Paper No. 37*, The World Bank, October 2006, at 18.

⁵¹ Other key institutions often ignored by anatomical reformers are the police force, the independent "watchdogs" such as the human rights commission, the ombudsman, and the state audit commission.

come into direct contact with the judiciary. For the few that do, it becomes quickly apparent that the process itself is beyond the common knowledge and control of the citizen. Litigation is generally conducted by lawyers and barristers who more often than not use legal jargon that is foreign to the understanding of anyone who is not a member of the legal profession.⁵² In saying this, any social spill-over effects of the judiciary are suspected to be overstated or attributable to other causes.⁵³

A rigorous case study by Gerald Rosenberg of the United States Supreme Court appears to support this view. In his book, *The Hollow Hope: Can Courts Bring About Social Change?*, Rosenberg uses empirical analysis to challenge the myth of court led social reform in the United States.⁵⁴ He suggests that contrary to conventional wisdom and popular thought, the United States Supreme Court generally lags behind broader social movement and political change. He concludes by stating that:

“Problems that are unsolvable in the political context can rarely be solved by the courts...Turning the courts to produce significant social reform substitutes the myth of America for its reality. It credits courts and judicial decisions with a power that they do not have.”⁵⁵

If the United States’ experience is any guide, legal reform efforts to create social and political spill-over effects are not likely to succeed elsewhere. It may be that anatomical reformers are burdening recipient nations with expectations that far exceed those placed on Western nations in previous

⁵² Peter Butt and Richard Castle, *Modern Legal Drafting*, Cambridge University Press, Cambridge, 2001, at 113; D Shane Read, *Winning at Trial*, National Institute for Trial, Louisville, 2007, at 104.

⁵³ For example, see Luis Lopez Guerra, “Judicial Reform in Spain”, a paper presented at the Conference on *Judicial Administration Modernisation in the Arab States*, Morocco, 15-17 March 2002.

⁵⁴ Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?*, University of Chicago Press, Chicago, 2008, at 27-28.

⁵⁵ Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?*, University of Chicago Press, Chicago, 2008, at 424.

times. This burden may in fact be a monumental misdirection of valuable resources.⁵⁶ It may even be a bigger misdirection when resources have been shifted from workable, but more inexpensive informal institutions, to construct a more formalistic judiciary. Indeed, social and political spill-over effects depend on successful collaboration with many things that the judiciary cannot control.⁵⁷ To focus on the judiciary and to set it apart from its larger institutional context is to detach it from reality and to hope for something that is generally not achieved in most Western societies.⁵⁸

Prillaman also rightfully questions the effectiveness of rule of law programs which focus on judicial reform. He states that reformers “typically have focused on a narrow range of variables, seeking first to isolate and consolidate specific individual advances and then move on to other variables in an orderly, sequential fashion...One reform is thought to lead naturally to another in an orderly, un-linear fashion”.⁵⁹ Yet, as aptly observed by Santiso, recent case studies are starting to reveal the opposite conclusion.⁶⁰ Case studies are now showing that “one positive reform does not inevitably lead to another”.⁶¹ Accordingly, the original strategy of isolating a single dimension of judicial reform and improving it independently from other structural flaws is misconceived.⁶²

⁵⁶ Frank Upham, “Mythmaking in the Rule of Law Orthodoxy”, *Carnegie Endowment Working Papers* No. 30, Carnegie Endowment for International Peace, September 2002, at 32.

⁵⁷ See Helen Hershkoff, “Transforming Legal Theory in the Light of Practice: The Judicial Application of Social and Economic Rights to Private Orderings” in Varun Gauri and Daniel Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press, New York, 2008, at 268-302.

⁵⁸ See, Robert McKeever, *Raw Judicial Power? The Supreme Court and American Society*, Manchester University Press, Manchester, 1995, at 20.

⁵⁹ William Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law*, Westport, Praeger, 2000, at 4-5.

⁶⁰ Carlos Santiso, “The Elusive Quest for the Rule of Law: Promoting the Judicial Reform in Latin America” (2003) 23(3) *Brazilian Journal of Political Economy* 112, at 117.

⁶¹ Carlos Santiso, “The Elusive Quest for the Rule of Law: Promoting the Judicial Reform in Latin America” (2003) 23(3) *Brazilian Journal of Political Economy* 112, at 117.

⁶² William Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law*, Westport, Praeger, 2000, at 6.

It may very well be that the enactment of law is equally important to rule of law reform as its interpretation.⁶³ It may even be possible to argue that the making of law is the more generative part of the rule of law system than that of judicial interpretation.⁶⁴ If this is true, it is by no means clear why a well-functioning judiciary is *necessary* to rule of law reform or why it is more important than the legislative or executive arms of the government.⁶⁵ Indeed, these political institutions *and others* also contain positive spill-over effects as well.⁶⁶ Yet, for the last twenty years, anatomical reformers, such as Shihata, have ignored the point and have argued that rule of law reform should be focused on the judiciary. This has been done without much examination of whether such a focus is really the right one.⁶⁷

2.3.4 “Law *in* society” and not “law *and* society”

The choice of the right institution is only part of the problem of anatomical thinking. Strong doubts exist about whether it is useful to pursue rule of law development in primarily institutional terms. These doubts are not only encouraged by the lack of success of institutional reform.⁶⁸ They are also encouraged by the exposed imperfections of the reform itself. Institutional reform is an organic process not conducive to easy or quick solutions. It is

⁶³ See, Lord Holme of Cheltenham, *Relationship Between the Executive, the Judiciary, and Parliament: Report with Evidence*, 6th Report of Session 2006-2007, The Stationery Office, House of Lords, Great Britain, 2007, at 67, 69-72.

⁶⁴ Carlos Santiso, “The Elusive Quest for the Rule of Law: Promoting the Judicial Reform in Latin America” (2003) 23(3) *Brazilian Journal of Political Economy* 112, at 122-123.

⁶⁵ Amed Hassan, *Good Governance Needs an Effective Parliament and Judiciary*, 8 August 2004 <http://wardheernews.com/articles/March_05/12_ahmed_hassan_good_gov.htm> (23 May 2009).

⁶⁶ Gerard Brennan, “The Parliament, the Executive and the Courts: Roles and Immunities”, a speech delivered at School of Law, Bond University, 21 February 1998.

⁶⁷ Maria Diakolias, “A Strategy for Judicial Reform: The Experience in Latin America” (1995) 36(1) *Virginia Journal of International Law* 167; Pilar Domingo, “Judicial Independence and Judicial Reform in Latin America” in Andrea Schedler, Larry Diamond, and Mark F Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies*, Lynne Rienner Publishers, London, 1999, at 151-175.

⁶⁸ For example see, Michael Taylor, “Why No Rule of Law in Mexico? Explaining the Weakness of Mexico’s Judicial Branch” (1997) 27 *New Mexico Law Review* 141.

costly, time-consuming and highly complex.⁶⁹ It involves an integration of many things that are both legal and non-legal.⁷⁰ The law is not just the sum of courts and other institutions that have some direct connection to the law. It is also a normative system that resides in the minds of citizens *in* society.

If no one knows or understands the law, the law itself becomes valueless. If no one has faith in the law, the law itself is likely to fail. Indeed, the law will have no effect, if no one can receive the law, listen to it or even properly interact with it. Not everyone is really waiting to hear what key institutions have to say about the law.⁷¹ This is especially true for the judiciary. For the law is communicated by many other things in society.⁷² It is these many other things that are more often than not more effective in communicating the law, rather than the key institutions themselves. Law is only one part of social development and not a general indicator of it.⁷³ In a sense, one could say that the perception of law is equally important as the law itself and the real value of law must therefore depend upon how the law is perceived.

A well-drafted criminal code in Afghanistan, for example, would not achieve much for the development of the rule of law if the people themselves do not understand it or want to abide by it. This point has been impatiently observed by Frank Upham and further commented on by Martin Krygier.⁷⁴

⁶⁹ Celestine Nyamu-Musembi, "For or Against Gender Equality? Evaluating the Post-Cold War 'Rule of Law' Reforms in Sub-Saharan Africa", *United Nations Research Institute for Social Development Occasional Paper*, Geneva, UNRISD, 2005, at 11-12.

⁷⁰ Frederick Schauer, "The Politics and Incentives of Legal Transplantation", *Centre for International Development Working Paper* No. 44, Harvard University, April 2000.

⁷¹ Martin Krygier, "The Rule of Law and the Three Integrations" (2009) 1(1) *Hague Journal on the Rule of Law* 21, at 30.

⁷² See, Mark Van Hoecke, *Law as Communication*, Hart Publishing, Oxford, 2002.

⁷³ See, William Twining, "A Post-Westphalian Conception of Law" (2003) 37(1) *Law & Society Review* 199, at 201-206.

⁷⁴ Martin Krygier, "The Rule of Law and the Three Integrations" (2009) 1(1) *Hague Journal on the Rule of Law* 21, at 23-24.

“When the revision of the criminal code does not prevent warlords from creating havoc in Afghanistan and the training of Chinese judges by American law professors does not prevent the detention of political dissidents – or, perversely, enables judges to provide plausible legal reasons for their detention – political leaders on all sides may turn away from law completely and miss the modest role that law can play in political and economic development.”

It has become painfully clear on countless occasions that trying to promote the rule of law by simply rewriting the recipient nation’s laws and focusing on institutional reform on the basis of Western models achieves very little.⁷⁵ Yet addicted to the relative ease of rewriting laws and creating judicial and administrative training programs, anatomical reformers persist in continuing along this path without paying any real attention to how people of the nation would react to these institutional changes. As Carothers notes, the *lessons learned* by anatomical reformers are not actually being learned.⁷⁶ While most anatomical reformers do provide reports as evidence of their achievements and failures, most of the *lessons learned* from such reports are not particularly useful.⁷⁷

According to Carothers, often the official reports that are drafted by anatomical reformers are “too general or obvious or both”.⁷⁸ One possible reason for this is that the anatomical reformers have proven themselves to be ill-adept at the task of generating and accumulating the sort of knowledge that would help fill the gap in information.⁷⁹ Another reason may be that there are insufficient resources to seriously reflect the efforts of the reformers

⁷⁵ Sue Unsworth, “Getting Real about Governance” (2006) 26 *IDS Policy Briefing* <<http://www2.ids.ac.uk/gdr/cfs/pdfs/PB26.pdf>> (1 June 2009).

⁷⁶ Thomas Carothers “Promoting the Rule of Law Abroad – The Problem of Knowledge”, *Carnegie Endowment Working Papers* No. 34, Carnegie Endowment for International Peace, January 2003, at 12.

⁷⁷ Thomas Carothers “Promoting the Rule of Law Abroad – The Problem of Knowledge”, *Carnegie Endowment Working Papers* No. 34, Carnegie Endowment for International Peace, January 2003, at 11.

⁷⁸ Thomas Carothers “Promoting the Rule of Law Abroad – The Problem of Knowledge”, *Carnegie Endowment Working Papers* No. 34, Carnegie Endowment for International Peace, January 2003, at 11.

⁷⁹ Kirsti Samuels, “Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt”, *Social Development Paper* No. 37, The World Bank, October 2006, at 17.

themselves. Carothers notes that reformer organisations are not sponsoring the kind of applied policy research that would build knowledge in the rule of law domain.⁸⁰ More importantly, anatomical reformers are not well-known to be oriented towards empirical research necessary for knowledge accumulation.

What also appears to be a major part of the problem is not only what anatomical reformers know or believe to know, but what they actually do not know. Part of *this* problem relates to the trouble of knowing what to look for, what to look with and how to look.⁸¹ Anatomical reformers are not equipped for this multifunctional task.⁸² They are not sociologists, historians or political scientists, nor do they strive to be. They do not have much interest in foreign culture, traditions and local ways of doing things.⁸³ What they know often limits their foresight into acquiring what they need to know. They think they know the key institutions and they know the law, but they do not know how those institutions and the law interact with citizens in society.⁸⁴

An anatomical reformer will never really appreciate this interaction unless he or she is capable and willing to pay more attention to sociological integration.⁸⁵ This may prove to be a real challenge for nations with complex cultures and hidden traditions and a far greater challenge for nations with multiple nationalities and diverse religions. The way things are done and understood by a particular group of people in a nation may be different to

⁸⁰ Thomas Carothers "Promoting the Rule of Law Abroad – The Problem of Knowledge", *Carnegie Endowment Working Papers* No. 34, Carnegie Endowment for International Peace, January 2003, at 13.

⁸¹ See also, Martin Krygier, "The Rule of Law and the Three Integrations" (2009) 1(1) *Hague Journal on the Rule of Law* 21.

⁸² Amartya Sen, "What is the Role of Legal and Judicial Reform in the Development Process", a paper present at the *World Bank Legal Conference*, Washington, 5 June 2005, at 7.

⁸³ See, Alice Her-Soon Tay, "Asian Values and the Rule of Law" in Pietro Costa and Danilo Zolo (eds), *The Rule of Law History, Theory and Criticism*, Springer, Netherland, 2007, at 565-586.

⁸⁴ See generally, Sally Engle Merry, "Culture, Power, and the Discourse of Law" (1992) 37 *New York Law School Law Review* 206.

⁸⁵ Frank Upham, "Mythmaking in the Rule of Law Orthodoxy", *Carnegie Endowment Working Papers* No. 30, Carnegie Endowment for International Peace, September 2002, at 33.

another.⁸⁶ This is especially true for nations with high income inequality, poor education and divergent social status. In any given society, it takes an significant amount of time and intelligence to understand even the basic social norms and local beliefs, not to mention the economic and political side of things.⁸⁷ This kind of information may not always be readily available.

The study of sociological integration is further complicated by the fact that no nation is static or isolated from the rest of the world.⁸⁸ This is a universal truth that has remained true throughout time. In some way or another, a nation will interact with other nations of the world via trade, foreign policy, the Internet, etc. Evolution, decline or obliteration of that nation may occur internally or externally or by a combination of both. Triggering events such as an international economic crisis or a natural catastrophe may alter the underpinnings of that society. More potent alterations may occur by political revolution or from war. Who would rightly say that Germany is the same place now as it was before 1939 or that human rights were better protected in the United States before 1861?

Yet, the fate of the rule of law depends on the appreciation of such things and more. It depends on the integration of key institutions with people of society. Such integration will bring its own challenges. Accumulating knowledge and information gathering for empirical research is clearly one challenge that has already been identified by Carothers. Learning the lessons from the experiences of reform is another.⁸⁹ Indeed, the list goes on. What is clear is

⁸⁶ Amir N Licht, Chanan Goldschmidt, and Shalom H Schwartz, "Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance", 12 December 2006
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=314559> (2 May 2009).

⁸⁷ Thomas Carothers "Promoting the Rule of Law Abroad – The Problem of Knowledge", *Carnegie Endowment Working Papers* No. 34, Carnegie Endowment for International Peace, January 2003, at 12.

⁸⁸ Moses Kiggundu, *Managing Globalisation in Developing Countries and Transition Economies*, Praeger, Westport, 2002, at 24.

⁸⁹ See generally, Jane Stromseth, David Wippman, and Rosa Brooks, *Can Might Make Rights?: Building the Rule of Law after Military Intervention*, Cambridge University Press, Leiden, 2006.

that some of these challenges will be more difficult than institutional building. However, to shy away from these challenges for their difficulties, is to ignore the rewards that flow from the challenges themselves. Unless the challenges are met, anatomical reformers will always speak of reform in terms of a *law and society*, rather than *law in society*.⁹⁰

2.3.5 What anatomical reformers do not know, is what matters

It is clear that the primary obstacles to anatomical reform are not so much technical or financial, but more of human understanding.⁹¹ The problem with the human understanding may in fact be a part of a suspected larger problem of anatomical thinking. The larger problem may simply be explained by the following short analogy. Anatomical reformers are confident in what they know about the rule of law and how to install it.⁹² It is simple as mechanics. Just follow the instructions and assemble the institutions. There is no need to be a certified mechanic to understand the rest of the manufacturing process. If the engine does not start just go back and re-read the instructions. If the engine fails again, just send it back to the assembly line for repairs. Sooner or later, it *should* work.

What if the problem of anatomical reform was more than just the wrong mechanics or failure to read instructions? What if the model that was being installed was not the rule of law, but a foreign imitation of it?⁹³ This is not difficult to imagine. What anatomical reformers are trying to install today does

⁹⁰ Martin Krygier, “The Rule of Law and the Three Integrations” (2009) 1(1) *Hague Journal on the Rule of Law* 21, at 27.

⁹¹ See generally, Karla Hoff and Joseph Stiglitz, “After the Big Bang? Obstacles to the Emergence of the Rule of Law in Post-Communist Societies” (2004) 94(3) *American Economic Review* 753.

⁹² Thomas Carothers “Promoting the Rule of Law Abroad – The Problem of Knowledge”, *Carnegie Endowment Working Papers* No. 34, Carnegie Endowment for International Peace, January 2003, at 8.

⁹³ Martin Krygier, “The Rule of Law: Legality, Teleology, Sociology” in Gianluigi Palombella & Neil Walker (eds), *Re-locating the Rule of Law*, Hart Publishers, Oxford, 2008, also available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1218982> (12 March 2009), at 6.

not exist in Western developed nations.⁹⁴ This is especially true for the United Kingdom, Australia and the United States. Anatomical reform is not the reason why these particular nations have a strong rule of law. In fact, it is not entirely clear how these nations attained it in the first place.⁹⁵ One thing is for sure is that they did not attain it *solely* by the development of the judiciary. Nor did they attain it from the building of other key institutions or by a formalist transplantation approach.

Frank Upham provides a comprehensive and detailed comparative analysis of the formal legal mechanisms of the United States in contrast to the more informal judicial system of Japan.⁹⁶ From his analysis, he concludes that there are a number of implications for developing countries. First and perhaps the most important lesson is that both Japan and the United States legal systems are not “likely to provide a useful model for other societies” in terms of rule of law development.⁹⁷ Secondly, neither Japan, nor the United States developed the rule of law via a formalist or anatomical approach. If this analysis is true, then why should a developing nation, such as Thailand, consider it necessary to follow a formalist or anatomical approach to rule of law development?

It appears that there is no academic consensus as to how, when and why any nation can obtain a strong rule of law.⁹⁸ Some writers have suggested that rule

⁹⁴ Wolfgang Friedmann, *The State and The Rule of Law in a Mixed Economy*, Stevens and Sons, London, 1971; See also, Wolfgang Friedmann, *Law in a Changing Society*, Penguin Books, Harmondsworths, 1972.

⁹⁵ Martin Krygier, “The Rule of Law and the Three Integrations” (2009) 1(1) *Hague Journal on the Rule of Law* 21, at 27.

⁹⁶ Frank Upham, “Mythmaking in the Rule of Law Orthodoxy”, *Carnegie Endowment Working Papers* No. 30, Carnegie Endowment for International Peace, September 2002, at 14-31.

⁹⁷ Frank Upham, “Mythmaking in the Rule of Law Orthodoxy”, *Carnegie Endowment Working Papers* No. 30, Carnegie Endowment for International Peace, September 200, at 31.

⁹⁸ Thomas Carothers “Promoting the Rule of Law Abroad – The Problem of Knowledge”, *Carnegie Endowment Working Papers* No. 34, Carnegie Endowment for International Peace, January 2003, at 21.

of law develops over time simply by the *spirit and ethos* of a nation.⁹⁹ Other writers have emphasised the importance of the enactment of a constitution, a charter, or a bill of rights.¹⁰⁰ Anatomical reformers, of course, believe that rule of law development occurs because of the strength of the key institutions, with a particular focus on the judiciary.¹⁰¹ Other writers disagree and point to certain triggering events, such as political revolutions, war or otherwise.¹⁰² It just may very well be that the rule of law develops by an *integration* of some or all of the above factors *and more*, but who knows exactly how, when and why.

Legal theory does not solve the mysteries of the puzzle either. Dicey's three classic tenets or Fuller's eight desiderata does not explain how, when and why nations like the United Kingdom, Australia or the United States developed the rule of law. Similarly, such mysteries cannot be entirely solved by the writings of other legal and constitutional theorists, such as Raz, Hayek and Thompson. These theorists, as well as political theorists, like Aristotle or in more recent times, Shklar, do not provide a practical guide for rule of law reform. What can be learnt from these great thinkers and from other rule-book and rights-based theorists is more about the philosophy, characterisation and reason why we require the rule of law in society and less about how it is and should be implemented in 21st Century times.¹⁰³

⁹⁹ Robert Post, "Theories of Constitutional Interpretation" in Robert Post (ed), *Law and the Order of Culture*, University of California Press, Berkeley, 1991, at 35; Ivor Jennings, *The Law and the Constitution*, University of London Press, London, 1963, at 46.

¹⁰⁰ In England, the issuing of the Magna Carta is considered by some writers as a prime example of the rule of law. See Christopher Weeramantry, *Justice without Frontiers: Furthering Human Rights*, Kluwer Law International, The Hague, 1997, at 132, 135.

¹⁰¹ See, Erik Jensen and Thomas Heller, "Introduction" in Erik Jensen & Thomas Heller (eds), *Beyond Common Knowledge – Empirical Approaches to the Rule of Law*, Stanford University Press, California, 2003, at 3.

¹⁰² For example, in the United States, Reid has argued that "the American Revolution was the greatest triumph for the rule of law." See John Philip Reid, *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries*, University of Northern Illinois Press, Illinois, 2004, at 75.

¹⁰³ Martin Krygier, "The Rule of Law and the Three Integrations" (2009) 1(1) *Hague Journal on the Rule of Law* 21, at 31.

What is perhaps more useful is how these theories interact with those of social theorists.¹⁰⁴ This is something that has not been explored properly by academics or by rule of law developers in the past, but remains a key missing part of the puzzle.¹⁰⁵ Rule of law success is not based on a simple formula which artificially transplants the mainstream view of these theories into reality. Yet, modern writers, such as Barry Hager, continue to draw from the mainstream theorists and attempt to derive a lexicon or instruction manual for rule of law developers.¹⁰⁶ These manuals are implemented without any real understanding of social science, despite there being a deeper sociological issue in play here.

Carothers aptly remarks that while anatomical reformers do succeed in helping produce change in *some* specific areas, “they often do not really know what effects those changes will have on the overall development of the rule of law in the country.”¹⁰⁷ Consider, for example, the reform of the judiciary in Egypt in the late 1990s. The United States devoted a large amount of resources to reform the case management process of the Egyptian courts. The aim was to improve the efficiency and speed up the number of cases heard by judges. However, the result of introducing United States software case-tracking programs and other administrative procedures created the opposite effect desired. Rather than speed up the judicial process, the changes lead to a drastic increase in the number of cases filed which ultimately clogged up the Egyptian judicial system.

¹⁰⁴ David Trubek, “Toward a Social Theory of Law: An Essay on the Study of Law and Development” (1972) 82(1) *The Yale Law Journal* 1, at 17.

¹⁰⁵ Martin Krygier, “The Rule of Law: Legality, Teleology, Sociology” in Gianluigi Palombella & Neil Walker (eds), *Re-locating the Rule of Law*, Hart Publishers, Oxford, 2008, also available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1218982> (12 March 2009), at 1.

¹⁰⁶ Barry Hager, *The Rule of Law – A Lexicon for Policy Makers*, The Mansfield Centre for Pacific Affairs, 2000 <http://www.mansfieldfdn.org/programs/rol/rol_lexicon.htm> (12 March 2009).

¹⁰⁷ Thomas Carothers “Promoting the Rule of Law Abroad – The Problem of Knowledge”, *Carnegie Endowment Working Papers* No. 34, Carnegie Endowment for International Peace, January 2003, at 10.

It is to no surprise that rule of law theory and development, such as the aforementioned example in Egypt, has suffered from growing criticism including that it has become politically and socially outdated.¹⁰⁸ The essence of these criticisms is that the modern version of the rule of law is based on outdated ideology.¹⁰⁹ It does not represent the reality of modern society, nor does it provide a model for assessing its performance. It is based on a *laissez faire* economy, where the role of the government was necessary only for the tasks of protection and the provision of services that could not be provided by the market. This society has now disappeared and the idea of the rule of law has lost both its descriptive and prescriptive force.¹¹⁰

Some truth may lie in this view, but others would disagree. Where rule of law has failed in modern history to prevent some of the worst injustices of states or individuals within states, it is not surprising that criticism has attached to the concept.¹¹¹ Sociology is not the only area that has raised concerns. Some Marxian thinkers view the rule of law as a legitimating ideology which disguises the class-based hegemonising function of the law.¹¹² Critical legal studies believe that the rule of law paints over the fundamental contradictions of modern life, including the tension between the need to be free and the

¹⁰⁸ Cameron Stewart, "The Rule of Law and the Tinkerbell Effect: Theoretical Considerations, Criticisms, Justifications for the Rule of Law (2004) 7 *Macquarie Law Journal* 1, at 8.

¹⁰⁹ Carlos Santiso, "The Elusive Quest for the Rule of Law: Promoting the Judicial Reform in Latin America" (2003) 23(3) *Brazilian Journal of Political Economy* 112, at 113.

¹¹⁰ Wolfgang Friedmann, *The State and The Rule of Law in a Mixed Economy*, Stevens and Sons, London, 1971.

¹¹¹ Cameron Stewart, "The Rule of Law and the Tinkerbell Effect: Theoretical Considerations, Criticisms, Justifications for the Rule of Law (2004) 7 *Macquarie Law Journal* 1, at 1.

¹¹² Philip Corrigan and Derek Sayer, „How the Law Rules: Variations on Some Themes in Karl Marx’ in Bob Fryer, et al (eds), *Law, State and Society*, Croom Helm , London, 1981, at 29; See also, Sol Picciotto, „The Theory of the State, Class Struggle and the Rule of Law’ in Bob Fine, et al (eds), *Capitalism and the rule of law : from deviancy theory to Marxism*, Hutchinson, London, 1979, at 169. For an opposite view see, Edward Thompson, *Whigs and Hunters: The Origin of the Black Act*, Pantheon Books, New York, 1975.

desire to live in a community.¹¹³ Feminists believe that the rule of law and its focus on equality merely serves to continue the “maleness” of law.¹¹⁴

The problem with these criticisms stems from lack of integration adequate to the complexity of the subject matter. Human understanding of the complexity of rule of law reform is the core challenge of anatomical thinking. If it could be worded so crudely, it is *what anatomical reformers do not know, is what really matters*. It just may be that what anatomical reformers are trying to install in nations today is not the rule of law, but something they think it to be. If this is true, and hopefully it is not, there is an urgent need to re-think what reformers are trying to achieve and how to do it. The question remains as to how much faith should one place in anatomical reform when there is no *prototype* or *instruction manual* that has proven worth of universal application. Perhaps it is the perfect time to explore *a new approach*.

2.3.6 Anatomical reform in Thailand

It is surprising to discover that Thailand has not been the subject of focus for anatomical reform. It is not entirely clear as to why this is so. There is a disturbing lack of official publications and reports on the topic. In fact, there is none written by the World Bank or the IMF. This is somewhat odd considering the fact that Thailand is often the host or subject of international rule of law reform conferences.¹¹⁵ It is also peculiar considering the fact that the World Bank and other major reform agencies have established offices in

¹¹³ Margaret Thornton, “Feminist Jurisprudence: Illusion or Reality?” (1986) 3 *Australian Journal of Law and Society* 5, at 7.

¹¹⁴ Katherine O’Donovan, „Engendering justice – Women’s Perspectives and the Rule of Law’ (1989) 39 *University of Toronto Law Journal* 127, at 131.

¹¹⁵ For example, “The Rule of Law and Democracy: Sharing Experiences of Thailand and the European Union”, a symposium held at the Supreme Administrative Court, Bangkok, 9 March 2009; “Anti-Corruption: The Role of Lawyers, the Bar, and the Bench in Preventing and Combating Corruption within the Justice System”, a conference hosted by the Rule of Law Initiative Asian Section from American Bar Association, Bangkok, 9 February 2007. There will also be the 14th International Anti-Corruption Conference in Thailand, organised by IACC Council and Transparency International during 10-13 November 2010.

Thailand.¹¹⁶ Perhaps the lack of literature is a reflection on the lack of anatomical reform in Thailand. Astonishingly, there appears to be only a handful of *ad hoc* projects in Thailand that *indirectly* focus on rule of law reform.¹¹⁷

The largest of these official projects was on 2 June 1997 when Thailand was on the verge of bankruptcy and floated its currency (Thai baht) on the Stock Exchange.¹¹⁸ At this time, the Bank of Thailand had made enormous amounts of forward commitments to sell foreign currency in order to defend the baht against speculators.¹¹⁹ The official foreign reserves had drastically fallen. Thailand was quickly running out of foreign currencies to meet its obligations and had little choice but to seek the assistance of the IMF. As a response to the financial crisis, the IMF created a lending package of US\$16.7billion for Thailand (later raised to US\$17.2billion), which included a stabilisation and structural adjustment program.¹²⁰

¹¹⁶ For example, the United Nations and the International Commission of Jurists also have established offices in Bangkok.

¹¹⁷ The cooperation between the Thai Government and World Bank is under the framework in the Country Development Partnership. There are some projects that rule of law is one of the component including: Country Development Partnership on Governance and Public Sector Reform

<<http://go.worldbank.org/HT1EHFWUG0>>;

JSDP-Thailand: Legal Aid Services for Poor and Vulnerable People

<<http://web.worldbank.org/external/projects/main?pagePK=64283627&piPK=73230&theSitePK=40941&menuPK=228424&Projectid=P100156>>;

Land Titling Project

<<http://web.worldbank.org/external/projects/main?pagePK=64283627&piPK=73230&theSitePK=40941&menuPK=228424&Projectid=P004780>>;

Financial Sector Implementation Assistance Project

<<http://web.worldbank.org/external/projects/main?pagePK=64283627&piPK=73230&theSitePK=40941&menuPK=228424&Projectid=P053616>>;

Out of Court Mediation Capacity Building Project

<<http://web.worldbank.org/external/projects/main?pagePK=64283627&piPK=73230&theSitePK=40941&menuPK=228424&Projectid=P077902>>.

¹¹⁸ Chalongsob Sussangkarn, "Economic Crisis and Recovery in Thailand: The Role of the IMF", a paper presented at the conference on *Asia in Economic Recovery: Policy Options for Growth and Stability*, Institute of Policy Studies, Singapore, 21-22 June 1999, at 1.

¹¹⁹ Nukul Commission Report, *Analysis and Evaluation of the Facts behind Thailand's Economic Crisis*, Thailand Development Research Institute, Bangkok, 1998.

¹²⁰ Nicola Bullard, Walden Bello, and Kamal Mallhotra, "Taming the Tigers: The IMF and the Asian Crisis" (1998) 19(3) *Third World Quarterly* 505, at 507.

As part of the adjustment program, Thailand committed to economic law reform. The focus of the reform was on the banking and financial sector of Thailand. Under pressure from the IMF, Thailand enacted a number of laws to reform these areas, including the passing of the *Bankruptcy Act* (1999) and the *Foreclosure Act* (1999).¹²¹ The objective of these laws was to shift the balance of power between creditor and debtor towards the creditor. Under the previous laws, if a creditor took a debtor to court for refusing to pay his or her debt, it might take eight to ten years for the process to be concluded. Under the new laws, the timeframe was drastically reduced to two to three years. Part of this objective was to encourage more voluntary debt restructuring.

The basis of the new Thai legislation was Chapter Eleven of the American Bankruptcy Code, the Singaporean Companies Act and various sections of the British insolvency law.¹²² Thailand was also pressured by the IMF to enact the *Establishment of Bankruptcy Court and Bankruptcy Procedure Act* (1999), which established a central Bankruptcy Court in Bangkok and additional regional courts throughout Thailand to exclusively handle bankruptcy cases.¹²³ The administration and procedures of these courts were largely modelled on the United States and United Kingdom judicial systems.¹²⁴ Thai judges had to immediately become specialists in bankruptcy law.¹²⁵ Lawyers and other legal staff had to be educated and trained on the new legislative changes.

¹²¹ East Asia Analytical Unit, *Transforming Thailand: Choices for the New Millennium*, The Unit, Canberra, 2000, at 162-163.

¹²² Punjaporn Kosolkitiwong, "Regional Technical Assistance TA No. 5795-REG Insolvency Law Reform: Supplementary Report on Thailand", a report which was funded by Asian Development Bank <http://www.insolvencyasia.com/insolvency_law_regimes/thailand/index.html> (22 July 2009).

¹²³ Jonathan Leeds, "The Act Establishing Thailand's New Bankruptcy Court" <<http://www.thailawforum.com/articles/bankcourt.html>> (24 July 2009).

¹²⁴ See generally, Vicha Mahakhun, *Bankruptcy Law* (in Thai), Nitibunnakarn, Bangkok, 2004.

¹²⁵ Wisit Wisitsora, "Specialised Bankruptcy Court", a paper presented at a forum for Asian Insolvency Reform on *Insolvency Reform in Asia: An Assessment of the Recent Developments and the Role of Judiciary*, Bali, 7-8 February 2001.

Prior to these changes in law, there had been little use of Thailand's *Bankruptcy Act* (1940) (repealed).¹²⁶ Part of the reason was that the previous law was focused on liquidation proceedings only.¹²⁷ Most restructuring of loans were negotiated informally outside the judicial system and were often progressed slowly. Following the Asian economic crisis, the level of reported non-performing loans peaked at approximately fifty per cent of the total outstanding credit.¹²⁸ After the new laws were enacted along with the establishment of the Corporate Debt Restructuring Advisory Committee (CDRAC), the pace of restructuring loans was slow at first, but then significantly increased as a result of gradual adjustment, along with a decline of the official non-performing loan figures.¹²⁹

In addition, a total of one hundred and thirty-five business rehabilitation cases had been filed with the central Bankruptcy Court at the end of 2000.¹³⁰ This figure was a significant increase from the twenty-five cases filed in 1999. Although these figures appear impressive, questions still remain regarding the quality of some restructuring deals.¹³¹ A common criticism is that the so-called "restructuring" is no more than an unworkable rescheduling of debts without any realistic expectation that the debtor will be able to comply with the rescheduled timetable for repayment. Some restructuring deals have already failed. For example, the debt-restructuring plan of Thai Petrochemical Industry, the largest petrochemical conglomerate in Southeast Asia was

¹²⁶ Lampros Vassiliou, "Legal Issues: Thailand" in Mary Lehner (ed), *Guide to Restructuring in Asia*, White Page, London, 2001, at 126.

¹²⁷ IMF, "Thailand: Selected Issues", *IMF Staff Country Report* No. 00/21, Washington D.C., February 2000, at 16.

¹²⁸ Frederik Balfour, "Thai Banks Crawl Back to Health", *Business Week*, 21 March 2005.

¹²⁹ Bank of Thailand, "Progress in Debt Restructuring", *Bank of Thailand News* No. 5/2001, 8 January 2001.

¹³⁰ The statistics is provided by the Central Bankruptcy Court, Thailand through its website (in Thai) <<http://www.cbc.coj.go.th/info.php?cid=10>> (24 July 2009).

¹³¹ Cynthia Pornavalai, "Addressing Thailand's Non-Performing Loans" <http://asialaw.tripod.com/articles/non-performing_cynthia.html> (2 July 2009).

ordered by the Central Bankruptcy Court to seek and appoint the new administration team.¹³²

A further criticism is that the overall restructuring process of bankruptcy law reform in Thailand has been slow. Potential explanations include remaining weaknesses in the law and the administration of bankruptcy/debt restructuring cases.¹³³ There have been six studies conducted by the Central Bankruptcy Court identifying the remaining weaknesses in bankruptcy law.¹³⁴ In addition, it was argued that state-owned banks do not have strong incentives to liquidate companies or to take write-downs. These banks generally have a higher level of non-performing loans than other types of banks in Thailand, part of which is suspected to be a cultural issue.¹³⁵ Despite the improvements to bankruptcy law, non-performing loans remained at more than twenty per cent of total bank loans for more than eighteen months after reform.¹³⁶

While the reform has a respectable number of critics, it also has formidable supporters.¹³⁷ The supporters appear to raise three main arguments in favour of the changes. First, it is argued that the changes to the laws genuinely

¹³² See also, Masahiro Kawai, et al, "Financial Stabilisation and Initial Restructuring of East Asian Corporation: Approaches, Results, and Lessons" in Charles Adams, et al (eds), *Managing Financial and Corporation Distress: Lessons from Asia*, The Bookings Institution, Washington D.C., 2000, at 88; "TPI, now IRPC, Expects Bt 10bn Net Profit", *TMC News*, 8 November 2006 <<http://www.tmcnet.com/usubmit/2006/11/08/2062205.htm>> (23 March 2010).

¹³³ See, Kanok Jullamon, "A Private Bankruptcy Administrator: Another Solution to Improve the Efficiency of Bankruptcy Administration in Thailand" (2008) 55(1) *Journal of the Courts of Justice* 120.

¹³⁴ These include: (1) The role of bankruptcy laws and the Central Bankruptcy Court in the Thai economy system; (2) An efficiency and effectiveness evaluation of debt restructuring procedure: a comparative case study of the Central Bankruptcy Court and the Corporate Restructuring Group; (3) The impact of the debt restructuring regime in developing bankruptcy law and its administration; (4) Main factors of good reorganisation plan: effect upon the consideration of judges to achieve the successfulness of Thai business and economy; (5) Reorganisation process for solving the debt problem of small and medium enterprises in the Central Bankruptcy Court; (6) The impact of the debt restructuring process for the business which is registered in the Stock Exchange of Thailand.

¹³⁵ "Non-performing Lenders (Thailand's Banks)", *The Economist*, 4 September 1999.

¹³⁶ Sasithorn Ongdee, "Thai Banks Need at Least Bt 41 Billion", *The Nation*, 3 December 1999.

¹³⁷ For example, see Michael Vatikiotis, "Legal Hurdle: Under IMF Pressure, Thais Debate New Bankruptcy Law", *Far Eastern Economic Review*, 5 March 1998, at 54.

improve the value of the claims for both creditors and debtors.¹³⁸ This is achieved mostly from the reduction in expected costs of financial distress which is a result of the increased judiciary efficiency created from the new system. Secondly, these changes were necessary to assist in warding off a future financial crisis in Thailand.¹³⁹ Thirdly, as Susan Glazebrook rightly argues that the changes are the first real attempt to develop a formal legal process which is compatible with the customary habits of bankruptcy law in Thailand.¹⁴⁰

2.3.7 Has anatomical reform succeeded in Thailand?

There is little doubt that the reforms have made a difference to the efficiency and quality of the bankruptcy process in Thailand. This is illustrated above by the reference to the large number of cases heard each year and the vast amounts of money released. Despite progress being initially slow, non-performing loans have now dropped to a satisfactory level.¹⁴¹ Creditor and debtor disputes, which once took up to eight to ten years to be resolved, are now handled in two to three years. This has encouraged more voluntary debt restructuring in Thailand and vastly improved the value of claims for credits and debtors.¹⁴² If one was to measure the level of success in these terms, it could be argued that the changes to the bankruptcy laws in Thailand were a success for anatomical reform.

¹³⁸ Waraporn Arsaporn, "Comments Relating to the Debt Restructuring in the Draft of the Bankruptcy Act" (in Thai) (1997) 44(4) *Journal of the Courts of Justice* 72.

¹³⁹ Chris Dixon, "Post-crisis Restructuring: Foreign Ownership, Corporate Resistance and Economic Nationalism in Thailand" (2004) 26 *Contemporary Southeast Asia* 45.

¹⁴⁰ Susan Glazebrook, "The Role of the Rule of Law in the Asian Economic Crisis", a paper addressed the *Inter-Pacific Bar Association Ninth Annual Conference*, Bangkok, 1 May 1999, at 24.

¹⁴¹ Pakorn Vichyanond, "Dealing with Debt: NPLs and Debt Restructuring" in Peter Warr (ed), *Thailand Beyond the Crisis*, Routledge Curzon, New York, 2005, at 225.

¹⁴² Peter Bell, "Thailand's Economic Crisis: A New Cycle of Struggle" in Ji Giles Ungpakorn (ed), *Radicalising Thailand: New Political Perspectives*, Institute of Asian Studies, Chulalongkorn University, Bangkok, 2003, at 65.

However, rule of law reform is more than just an improvement to efficiency in one particular area of the judiciary. Indeed, it would be problematic to claim success of reform in these terms alone. As Lawrence Tshuma aptly notes:

“A problematic issue with the new institutional economic explanation of law and the Bank’s legal framework is their use of efficiency criterion to evaluate law.”¹⁴³

A successful outcome for rule of law reform should be measured by an array of selected criteria, of which efficiency is only one. Questions still remain unanswered as to the total cost of the bankruptcy reform in Thailand and to any negative spill-over effects it has created. For example, it has recently been revealed that the Central Bankruptcy Court has been flooded with a large number of cases and as a result a new bankruptcy administration has been established to cope with the growing number of unmanageable matters.¹⁴⁴ It is uncertain how much the new bankruptcy administration will cost and to what degree it will be successful in de-clogging the overloaded system.¹⁴⁵

Questions also remain unanswered as to whether the new bankruptcy reform has created any positive spill-over effects for the Thai rule of law. For example, it is unclear as to what effect, if any, the reform has made on the reduction of corruption. This is especially true for political corruption which is embedded in the Thai legal system and it is hard to believe that such corruption has not impacted the administration of the court and other key institutions.¹⁴⁶ It has now been amply demonstrated that insular judicial reforms that are implemented in a piecemeal fashion are bound to fail if they

¹⁴³ Lawrence Tshuma, “The Political Economy of the World Bank’s Legal Framework for Economic Development” (1999) 8(2) *Social and Legal Studies* 76, at 92.

¹⁴⁴ “An Interview with the President of the Central Bankruptcy Court” (in Thai), *Prajachart Turakij Newspaper*, 1 June 2009.

¹⁴⁵ “An Interview with the President of the Central Bankruptcy Court” (in Thai), *Prajachart Turakij Newspaper*, 1 June 2009.

¹⁴⁶ “Thailand Country Profile: Judicial System” <<http://www.business-anti-corruption.com/country-profiles/east-asia-the-pacific/thailand/corruption-levels/judicial-system/>> (28 July 2009).

do not address the broader institutional and social context.¹⁴⁷ In the above scenario, any benefits that are gained from increases in efficiency of a court could certainly be undermined by corrupt politics. It is also certainly one of the reasons as to why Thailand is perceived as a country with no rule of law.¹⁴⁸

2.4 SOME IMPLAUSIBLE VIEWS AGAINST THE RULE OF LAW IN THAILAND

2.4.1 Implausible views

The following section of this chapter addresses some of the opposing views which argue that Thailand is not governed by the rule of law. These views are divided into two main areas. The first area focuses on some of the theoretical concerns of the rule of law, while the second area concentrates on policy issues. More specifically, the theoretical concerns outline some of the definition problems that are associated with the rule of law and how it *serves too many purposes*. It also questions the axiom that the rule of law is necessary for *liberal democracy*. The policy concerns shift the focus towards a different axiom that the rule of law is *necessary for foreign investment* and the belief that it *serves the interests of the ruling elite*. At the end of this section, it is contended that while there is a degree of legitimacy with some of these concerns, most are misconceived.

2.4.2 Some theoretical implausible views

2.4.2.1 The rule of law serves too many purposes

Most writers have often stated that Thailand is not governed by the rule of law. Academics and legal scholars are not the only members of society who

¹⁴⁷ For example, Carlos Santiso, "The Elusive Quest for the Rule of Law: Promoting the Judicial Reform in Latin America" (2003) 23(3) *Brazilian Journal of Political Economy* 112; Kirsti Samuels, "Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt", *Social Development Paper* No. 37, The World Bank, October 2006.

¹⁴⁸ Seth Mydans, "Corruption Case against Thailand's Leader Tests Rule of Law", *The New York Times*, 10 April 2001; Asian Legal Resource Centre, "Rule of Law Versus Rule of Lords in Thailand" (2005) 4(2) *Article 2* 1, at 2-5.

voice this belief. Foreign investors complain bitterly about the lack of political stability in Thailand.¹⁴⁹ Human rights activists denounce the repeated persecutions of political dissidents.¹⁵⁰ Citizens continue to complain about judicial corruption and inequality before the law.¹⁵¹ Foreign leaders constantly condemn the repeated history of military coups.¹⁵² Greenpeace activists protest against local governments who regularly flout national laws and policies and approve projects without authority and offering tax breaks despite repeated warning not to¹⁵³ - and the list goes on and on.

Where does the list stop? A notorious misconception of the rule of law is that it *serves too many purposes*. It is often held accountable for failing to solve problems beyond its objective. This is a fallacy. The rule of law should not be responsible for every failed aspect of law.¹⁵⁴ Nor should it be held responsible for things beyond its mandate or control.¹⁵⁵ It is a short step for a Greenpeace activist to blame the Thai government for not protecting native elephants. However, it is a giant leap to extend the blame to the rule of law. Indeed, the rule of law is not a miracle concept that solves all.¹⁵⁶ It is a concept without

¹⁴⁹ See, Jocelyn Nan, "Political Instability Curbs Thailand's Economic Growth" (2007) <<http://www.oppapers.com/essays/Political-Instability-Curbs-Thailands-Economic-Growth/107762>> (15 May 2009).

¹⁵⁰ See, Vitit Muntarbhorn, "Rule of Law and Aspects of Human Rights in Thailand" in Randall Peerenboom (ed), *Asian Discourses of Rule of Law*, Routledge Curzon, London, 2004, at 363.

¹⁵¹ See, Ron Corben, "Economists Warn Corruption on the Rise in Thailand", *Voice of America*, 15 December 2005 <<http://www.voanews.com/english/archive/2005-12/2005-12-15-voa21.cfm?CFID=197896054&CFTOKEN=55208673&jsessionid=84307ca7f55dab02a403322e>> (10 March 2009).

¹⁵² See, Sirivalaya Kachathan, "Democracy and the Military Coup in Thailand", a paper presented at the annual meeting of the *Southern Political Science Association*, New Orleans, 9 January 2008.

¹⁵³ See, "More National Parks Ravaged by Construction and Tourist Tide", *Bangkok Post*, 17 May 2000, at 1; The World Travel and Tourism Council, *Poisons in Paradise*, 1 February 2000, at 2.

¹⁵⁴ See, Rachel Kleinfeld, "Competing Definitions of the Rule of Law: Implications for Practitioners", *Carnegie Endowment Working Papers* No. 55, Carnegie Endowment for International Peace, January 2005.

¹⁵⁵ See, Diane Wood, "The Rule of Law in Times of Stress" (2003) *University of Chicago Law Review* 70, at 455-456, 459. Judge Wood argued that the rule of law could account for current terrorism and the accommodation and the understanding of world political changes.

¹⁵⁶ Richard Fallon Jr, "The Rule of Law as a Concept in Constitutional Discourse" (1997) 97(1) *Columbia Law Review* 1, at 36.

precise definition.¹⁵⁷ Writers who stretch the definition beyond those limits make the concept itself meaningless.¹⁵⁸ This is one of the reasons as to why the thesis has focused the rule of law only on its core element of curbing arbitrary power.

Perhaps the “blame-game” problem lies not so much in the ideological abuse of the definition itself, but in its lack of precise definition. This is something that has been noted by many well-known scholarly writers for some time and is of no great surprise.¹⁵⁹ For instance, George Fletcher states:¹⁶⁰

“We have a pretty good idea what we mean by “free markets” and “democratic elections.” But legality and the “the Rule of Law” are ideals that present themselves as opaque even to legal philosophers...

In England, we are never quite sure what we mean by the “Rule of Law.” Do we mean rule by laws laid down – whether the legal rules are good or bad? Or do we mean “rule by Law,” by the right rules, by the rules that meet the tests of morality and justice?”

A similar and equally insightful message is echoed by Richard Fallon Jr, who states:¹⁶¹

“The Rule of Law is a much celebrated, historic ideal, the precise meaning of which may be less clear today than ever before. Significantly, however, the meaning of the

¹⁵⁷ “Rule of Law: Essential Principles”, *Democracy Web*, <<http://www.democracyweb.org/rule/principles.php>> (13 May 2009).

¹⁵⁸ For example, see the United Nations, “Legal Committee Told Observance of Strong Rule of Law Relevant to Promotion of Stable Economic Development”, a record of the 63rd General Assembly, 6th Committee, 14 October 2008 <<http://www.un.org/News/Press/docs/2008/gal3344.doc.htm>> (1 May 2009).

¹⁵⁹ Carlos Santiso, “The Elusive Quest for the Rule of Law: Promoting the Judicial Reform in Latin America” (2003) 23(3) *Brazilian Journal of Political Economy* 112, at 113.

¹⁶⁰ George Fletcher, *Basic Concepts of Legal Thought*, Oxford University Press, New York, 1996, at 12.

¹⁶¹ Richard Fallon Jr, “The Rule of Law as a Concept in Constitutional Discourse” (1997) 97(1) *Columbia Law Review* 1, at 2-5.

phrase “the Rule of Law” – which I shall refer to as “the Rule of Law ideal” – has always been contested...

In American legal discourse, debates about the historical and conceptual foundations of the Rule-of-Law ideal are seldom engaged directly. Indeed, many invocations of the Rule of Law are smug and hortatory...

[Although the Rule of Law is] a shared concept, many of the operative terms are vague. Understanding the vagueness of particular shared assumptions helps to clarify possible bases for disagreement. And disagreement is common.”

Indeed, the rule of law is not a concept without controversy, nor is it without general over-use.¹⁶² However, there appears to be a degree of legitimacy in applying different definitions of the rule of law to different nations.¹⁶³ Similarly, there appears to be a degree of legitimacy in emphasising different elements of rule of law to different nations. After all, no two nations are alike. Identifying which definition or emphasising which element(s) of the rule of law that is conducive to each nation is a difficult task, but possibly one which may help resolve the rule of law problems faced today. This, of course, may not be a serious problem, as some writers have once thought. Martin Krygier is one writer who may be of support of such a view. He believes that:¹⁶⁴

“People can define [the rule of law] as they wish and since the rule of law has such aura today, there is no tying it down.”

Having different definitions of the one concept does not make that concept meaningless. It is when that definition or its degree is applied in an

¹⁶² Judith Shklar, “Political Theory and the Rule of Law” in Allan Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology*, Carswell, Toronto, 1987, at 1.

¹⁶³ This view is also supported by Amichai Magen, “The Rule of Law and Its Promotion Abroad: Three Problems of Scope” (2009) 45(1) *Stanford Journal of International Law* 51, at 56.

¹⁶⁴ Martin Krygier, “The Rule of Law: Legality, Teleology, Sociology” in Gianluigi Palombella & Neil Walker (eds), *Re-locating the Rule of Law*, Hart Publishers, Oxford, 2008, also available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1218982> (12 March 2009), at 4.

unreasonable manner, that the concept itself becomes no longer tenable.¹⁶⁵ This is a point that is not in direct contrast with the above views of Fletcher or Fallon or even Hager's idea of a precise definition of the rule of law. Rather, it allows for a reasonable degree of flexibility to accommodate the distinctive and different rule of law requirements of each nation, particular traditional Asian nations like Thailand.¹⁶⁶ Indeed, it is acceptable to replace one element of the rule of law with another, as long as consistency in principle and application is preserved. As Hager insightfully explains:¹⁶⁷

“First, the precise elements of the Rule of Law on which there is general agreement among Western lawyers and scholars need to be spelled out with specificity. The general slogan of the Rule of Law needs to be parsed to determine precisely what is being recommended by its advocates.

“Secondly those precise elements should be considered by Asian leaders on a case-by-case basis. If objections are raised, not at the level of dismissing the general the Rule of Law banner, but to one or more specific elements of the Rule of Law, then it becomes fair to press for an equally clear statement of the alternatives Asian leaders would offer to replace those elements.”

The aim of this paper is not to spell out what precisely is the rule of law. This is something that has been explored extensively by many writers already.¹⁶⁸ Rather the following simple point is to be made. Writers and critics of Thailand, who either lack the understanding of the definition of the rule of law or the characteristics of that definition within reason, should not be

¹⁶⁵ RC Van Caenegem, *An Historical Introduction to Western Constitutional Law*, Cambridge University Press, Cambridge, 1995, at 17.

¹⁶⁶ Jonathan Rose, “The Rule of Law in the Western World: An Overview” (2004) 35(4) *Journal of Social Philosophy* 457, at 462, 464.

¹⁶⁷ Barry Hager, *The Rule of Law – A Lexicon for Policy Makers*, The Mansfield Centre for Pacific Affairs, 2000, <http://www.mansfieldfdn.org/programs/rol/rol_lexicon.htm> (12 March 2009), at 1-2.

¹⁶⁸ See, Brian Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, Cambridge, 2004; See also, David Held, *Models of Democracy*, Polity, Cambridge, 2006.

considered seriously.¹⁶⁹ Each criticism of Thailand's rule of law should be considered, not in isolation of its context, but within the reasonable limits of what is and can be considered as the rule of law. Stretched definitions should be disregarded and as such these views are not telling the real story of the rule of law in Thailand.

2.4.2.2 The rule of law is necessary for liberal democracy

A second criticism of Thailand is the axiom that the rule of law is *necessary for liberal democracy*.¹⁷⁰ While there is no universal agreed definition of liberal democracy, L Ali Khan argued that there were core attributes of liberal democracy. He raised at least four core attributes including free market; Trinitarian governmental structure; separation of religion and state; and recognition of human dignity.¹⁷¹ This definition is synonymous with the established, developed Western democracies of modern time.¹⁷² Most writers believe that if Thailand is to evolve to be a democratic state, it must first have a well-functioning rule of law.¹⁷³ These writers believe that this is ideal for any nation and Thailand is far from achieving it. They argue that the key institutions are to blame.¹⁷⁴ For it is these institutions that have failed time and time again to respect the rule of law. The solution, according to these writers, must therefore lie in the improvement of the key institutions themselves.¹⁷⁵

¹⁶⁹ Amichai Magen, "The Rule of Law and Its Promotion Abroad: Three Problems of Scope" (2009) 45(1) *Stanford Journal of International Law* 51, at 56.

¹⁷⁰ David Clark, "The Many Meanings of the Rule of Law" in Kanishka Jayasuriya (ed), *Law, Capitalism and Power in Asia*, Routledge, London, 1999, at 33; Jonathan Rose, "The Rule of Law in the Western World: An Overview" (2004) 35(4) *Journal of Social Philosophy* 457, at 457.

¹⁷¹ L Ali Khan, *A Theory of Universal Democracy: Beyond the End of History*, Kluwer Law International, Hague, 2003, at 15.

¹⁷² Bradley Watson, *Civil Rights and the Paradox of Liberal Democracy*, Lexington Books, Maryland, 1999, at 3.

¹⁷³ See, Jeffrey Race, "The Rule of Law in Thailand: Are Thailand and the United States Ready for a Free Trade Agreement?", a speech delivered before the Trade Policy Staff Committee of the Office of the United States Trade Representative, Washington D.C., 30 March 2004.

¹⁷⁴ See, Suchit Bunbongkarn, "The Military and Democracy in Thailand" in R J May and Viberto Selochan (eds), *The Military and Democracy in Asia and the Pacific*, Crawford House Publishing, Sydney, 1998, at 47-58.

¹⁷⁵ See, James R Klein, "The Battle for Rule of Law in Thailand: The Constitutional Court of Thailand" in Amara Raksasataya and James R Klein (eds), *The Constitutional Court of Thailand: The Provisions and the Working of the Court*, VJ Printing, Bangkok, 2003, at 2.

Without an effective institutional system, Thailand will never have a well-functioning rule of law and hence will never achieve the “holy grail” of liberal democracy.¹⁷⁶

Yet, is this really the right approach to solving the problem? Improving the functioning of key institutions does sound overly familiar. Why continue to adopt institutional policies that have proven to be failures in the past? Why takes that risk? The anatomical approach has already been attempted on several post-communist nations and failed.¹⁷⁷ It was even unsuccessful in numerous Asian nations including one of Thailand’s neighbours, Burma.¹⁷⁸ What is more alarming is the fact that none of these writers have provided a convincing argument or evidence to show that the improvement of key institutions by themselves will necessarily improve the rule of law. At best, one could only find some sort of correlation, *albeit* not always positive.¹⁷⁹

The axiom that the rule of law is necessary for liberal democracy may also suffer from another fundamental flaw.¹⁸⁰ The axiom itself may in fact be based on a false premise that the rule of law is an essential component to

¹⁷⁶ See, Pei-Hsiu Chen, “The End of New Politics in Thailand?: The Fall of Thaksin Regime and Its Implications for Thai Democracy”, a paper presented at the workshop on *Thai Studies*, National Chi Nan University, Taiwan, 11 May 2007; Narayanan Ganesan, “Appraising Democratic Consolidation in Thailand under Thaksin’s Thai Rak Thai Government” (2006) 7(2) *Japanese Journal of Political Sciences* 153.

¹⁷⁷ Wade Channell, “Lessons Not Learned: Problems with Western Aid for Law Reform in Postcommunist Countries”, *Carnegie Endowment Working Papers* No. 57, Carnegie Endowment for International Peace, May 2005; See also, Adam Czarnota, “Meaning of Rule of Law in Post-Communist Society” in Werner Krawietz, Enrico Pattaro, and Alice Erh-Soon Tay (eds), *Rule of Law: Political and Legal Systems in Transition*, Duncker & Humblot, Berlin, 1997, at 179-196; Guillermo O’Donnell, “On the State, Democratisation and Some Conceptual Problems: A Latin American Review with Glances at Some Post-Communist Countries” (1993) 21(8) *World Development* 1355, at 1355-1369.

¹⁷⁸ Asian Human Rights Commission, *Rule of Law and Human Rights in Asia*, Human Rights Correspondence School, Hong Kong, 2006, at 13.

¹⁷⁹ Suchit Bunbongkarn, “A Reflection on the Role of a Justice of the Thai Constitutional Court” in Niyom Rathamarit (ed), *Eyes on Thai Democracy: National and Local Issues*, King Prajadhipok’s Institute, Bangkok, 2006, at 41-48.

¹⁸⁰ Brian Tamanaha, “A Concise Guide to the Rule of Law”, *St John’s Legal Studies Research Paper Series*, Paper No. 07-0082, September 2007
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1012051> (23 July 2009), at 16-17.

democracy.¹⁸¹ This is dangerously simplistic and partially incorrect. It is more accurate to state that the rule of law and democracy share some intimate relationship, but can exist independently.¹⁸² Liberal democracy is not an absolute guarantee of the rule of law and vice versa.¹⁸³ In fact, the rule of law predates democratic regimes and liberal democracy usually co-exists with substantial shortcomings of the rule of law.¹⁸⁴ In this respect, it may very well be misconceived to argue that the rule of law in Thailand is a necessary “stepping stone” for liberal democracy.

Indeed, the anatomical approach appears to be dangerously simplistic and possibly misleading. Yet, it also appears to be presumptuous. It is presumptuous in the sense that it presumes that Thailand can become and should become a liberal democracy. This may or may not be the case.¹⁸⁵ It should be emphasised that what type of system that may work for some nations may not necessarily work for others.¹⁸⁶ Each nation is unique with its own traditions and culture.¹⁸⁷ No one would rightly say that Thailand is similar to the United Kingdom in this respect. The “holy grail” of liberal democracy does not apply to all, nor should it be expected to. It should not therefore be presumed that one system of governance is superior to another or be universally applicable to all nations.

¹⁸¹ Doug Hammerstrom, “The Rule of Law Versus Democracy” (2002) 5(1) *By What Authority* <<http://www.ratical.org/corporations/RoLvDem.pdf>> (21 May 2009).

¹⁸² See, Guillermo O'Donnell, “The Quality of Democracy: Why the Rule of Law Matters” (2004) 15(4) *Journal of Democracy* 32.

¹⁸³ Yasuo Hasebe, “The Rule of Law and Its Predicament” (2004) 17(4) *Ratio Juris* 489, at 490.

¹⁸⁴ Robert Barros, “Dictatorship and the Rule of Law: Rules and Military Power in Pinochet's Chile” in José María Maravall and Adam Przeworski (eds), *Democracy and the Rule of Law*, Cambridge University Press, Cambridge, 2003, at 188.

¹⁸⁵ See, Likhit Dhiravegin, *Demi-Democracy: The Evolution of the Thai Political System*, Times Academic Press, Singapore, 1992.

¹⁸⁶ Martin Krygier, “The Rule of Law: Legality, Teleology, Sociology” in Gianluigi Palombella & Neil Walker (eds), *Re-locating the Rule of Law*, Hart Publishers, Oxford, 2008, also available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1218982> (12 March 2009), at 3.

¹⁸⁷ See, Fred Dallmayr, “Hermeneutics and the Rule of Law” in Gregory Leyh (ed), *Legal Hermeneutics: History, Theory, and Practice*, University of California Press, Berkeley, 1992.

2.4.3 Some policy implausible views

2.4.3.1 The rule of law is necessary for foreign investment

A third criticism of Thailand is based on the axiom that the rule of law is *necessary for foreign investment*. Some writers believe that if Thailand is to succeed economically, it must first have a well-developed rule of law.¹⁸⁸ Without the latter, the former cannot be achieved. Thailand will not be able to attract foreign investors if the judicial system is ineffective and corrupt and the Parliament is unstable.¹⁸⁹ Foreign investors will take their investment elsewhere. They want faith in the Thai legal system to deliver a secure working environment for their investments. They want predictability in political and legal decision-making. They want access to legal sources and impartial laws that they know will be enforced. They want to be sure that any form of arbitrary power and corruption could be detected.¹⁹⁰ In other words, they want the “rule of law”.

While there may be some level of truth in the axiom, there is a lack of convincing evidence that a nation, such as Thailand, must have a well-developed rule of law in order to attract foreign investment.¹⁹¹ China, for example, is the largest recipient of foreign investment and very much a subject of rule of law criticism.¹⁹² In 2006, China attracted sixty-three billion US dollars in foreign direct investment alone.¹⁹³ It has achieved this despite the

¹⁸⁸ For example see, Jeffrey Race, “The Rule of Law in Thailand: Are Thailand and the United States Ready for a Free Trade Agreement?”, a speech delivered before the Trade Policy Staff Committee of the Office of the United States Trade Representative, Washington D.C., 30 March 2004.

¹⁸⁹ Prawes Wasi, *Political Reform: The Way out for Thailand* (in Thai), Mo Chao Ban, Bangkok, 1995.

¹⁹⁰ James Greene, *Obstacles and Incentives to Private Foreign Investment: 1962-1964*, National Industrial Conference Board, New York, 1965, at 118; Kevin O’Rourke, *Reformasi*, Allen & Unwin, Sydney 2002, at 29.

¹⁹¹ See, for example, Carlos Santiso, “The Elusive Quest for the Rule of Law: Promoting the Judicial Reform in Latin America” (2003) 23(3) *Brazilian Journal of Political Economy* 112, at 116.

¹⁹² Joseph P. H. Fan, Randall Morck, Lixin Colin Xu, and Bernard Yin Yeung, “Institutions and Foreign Investment: China Versus the World”, *NBER Working Paper* No. W13435, September 2007; Björn Ahl, “A Human Rights Law for China? In Search for Legal Constraints of the Authoritarian State”, a paper presented at the 6th *Asian Law Institute Conference*, University of Hong Kong, Hong Kong, 31 May 2009.

¹⁹³ “China Foreign Investment Incentives” <http://www.worldwide-tax.com/china/chi_invest.asp> (11 March 2009).

fact that Chinese judges frequently suffer from outside interference in their decision-making.¹⁹⁴ Also, there were more than thousand cases of political prisoners detained or imprisoned as of 31 October 2008.¹⁹⁵ Yet, foreign investors are generally motivated to make money on their investment.¹⁹⁶ A weak rule of law is possibly only one of many reasons why an investor should not invest.¹⁹⁷ For foreign investors in China, it appears that this reason is not taken seriously or is obviously outweighed by other concerns.¹⁹⁸

A similar view has been formed with respect to most post-communist nations, as one recent study concludes.¹⁹⁹ This conclusion is in line with other more general studies on the relationship between the rule of law and foreign investment.²⁰⁰ For example, John Hewko concludes that the most important factor in attracting foreign investment is the existence of real business opportunities - it is not the rule of law.²⁰¹ Even if a nation possessed a well-developed rule of law, it may not attract foreign investment in the absence of genuine economic prospects. The opposite may also be true. If economic opportunities exist and are made available, the fact that a nation's legal system is imperfect may not dissuade foreign investment.

¹⁹⁴ Congressional-Executive Commission on China, *Chinese Court and Judicial Reform* <<http://www.cecc.gov/pages/virtualAcad/rol/judreform.php?PHPSESSID=56eb398c4a803a071799738a12beb889>> (24 July 2009).

¹⁹⁵ Congressional-Executive Commission on China, *Political Prisoner Database* <http://www.cecc.gov/pages/victims/20081031_PPD.pdf> (24 July 2009).

¹⁹⁶ Klaus E Meyer, "Foreign Direct Investment in the Early Years of Economic Transition: A Survey" (1995) 3(3) *Economics of Transition* 301.

¹⁹⁷ For example, see the *Law on Foreign Investment* of Kosovo (Law No. 02/L-33) 21 November 2005, <<http://www.invest-ks.org/repository/docs/Law%20on%20foreign%20investment.pdf>> (21 May 2009).

¹⁹⁸ Grace Ying Lin, "Foreign Investment and Cultural Context: Law, Administration, and Social Relations in China", 2007 *ALPN Paper Series* <<http://www.alpn.edu.au/publications/2007-alpn-paper-series>> (21 May 2009).

¹⁹⁹ Thomas Carothers "Promoting the Rule of Law Abroad – The Problem of Knowledge", *Carnegie Endowment Working Papers* No. 34, Carnegie Endowment for International Peace, January 2003, at 6.

²⁰⁰ For example see, Carlos Santiso, "The Elusive Quest for the Rule of Law: Promoting the Judicial Reform in Latin America" (2003) 23(3) *Brazilian Journal of Political Economy* 112, at 116.

²⁰¹ John Hewko, "Foreign Direct Investment: Does the Rule of Law Matter?", *Carnegie Endowment Working Papers* No. 26, Carnegie Endowment for International Peace, April 2002.

Robert Barro is one scholar who opposes this view. Barro argues that the index of overall maintenance of the rule of law provides the greatest explanatory power for investment and economic growth.²⁰² The opposing, yet influential conclusion reached by Barro is that a higher level of rule of law generates a higher rate of economic growth. This finding however, has been widely criticised for adopting questionable quantitative indicators of the rule of law.²⁰³ The data on the rule of law relies on survey data, reflecting the subjective judgments of individuals and is thus marked by a host of accuracy and measurement problems. While once persuasive, more recent research suggests that his conclusion is not as straightforward as initially assumed.²⁰⁴

In respect of Thailand, there is no evidence to suggest that it should be in a different category to that of China and these post-communist nations. In fact, Thailand already received almost one and a half billion US dollars in foreign investment in 2008.²⁰⁵ Most of this flows from the European countries. In terms of ranking with other nations, Thailand is number forty-eight for the stock of direct foreign investment.²⁰⁶ This position clearly stands at odds with the axiom. If Thailand does not have a well-developed rule of law, how could it achieve this ranking position? Either the axiom is incorrect or Thailand must have a well-developed rule of law. As Frank Upham once wrote for a case-study, the axiom is by no means as clear-cut as many might hope.²⁰⁷

²⁰² Robert Barro, *Determinants of Economic Growth: A Cross-country Empirical Study*, MIT Press, Cambridge, 1998, at 72.

²⁰³ Carlos Santiso, "The Elusive Quest for the Rule of Law: Promoting the Judicial Reform in Latin America" (2003) 23(3) *Brazilian Journal of Political Economy* 112, at 116.

²⁰⁴ Anja Linder and Carlos Santiso, *The Predictive Powers of Country Risk Ratings*, Washington D.C., SAIS Working Paper 02/02, 2002.

²⁰⁵ Board of Investment, *Foreign Investment from Major Countries* <http://www.boi.go.th/english/download/statistics_foreign_investment/164/FINV093.pdf> (22 May 2009).

²⁰⁶ Central Intelligence Agency, *Country Comparison – Stock of Direct Foreign Investment* <<https://www.cia.gov/library/publications/the-world-factbook/rankorder/2199rank.html>> (24 May 2009).

²⁰⁷ Frank Upham, "Mythmaking in the Rule of Law Orthodoxy", *Carnegie Endowment Working Papers* No. 30, Carnegie Endowment for International Peace, September 2002.

2.4.3.2 The rule of law serves the interests of the ruling elite

A fourth criticism of the rule of law in Thailand is that it is a mask that serves the *interests of the ruling elite*.²⁰⁸ Many writers believe that there is often a wide gap between the laws on the books and actual practice.²⁰⁹ This is because the ruling elite have the power to manipulate and exploit the commoners through the law. Such a view is akin to Marxist theory. For Marx, the capitalist state is an instrument of oppression of the proletariat at the hands of the bourgeoisie. It is the bourgeoisie who set the laws to suit themselves. These laws, while appearing to be objective to the mass, are really a disguise of “class power”. Similarly, the rule of law in Thailand is seen by some writers as a concept which unfairly legitimises already existing imbalanced power structures.²¹⁰

It is these imbalanced power structures in the Thai society and not the law itself which really determine the outcome of legal disputes. Although the rule of law appears to be objective in the sense that it is applied equally to all, it is in reality subjectively unfair and easy to manipulate.²¹¹ For instance, the favourable licences and tax concessions on the mobile phone and television industry owned by ex-Prime Minister Thaksin Shinawatra is only one of many such examples of unfair laws.²¹² When Thaksin was summoned to the Supreme Court of Thailand on charges of conflicts of interest, he simply did not show up.²¹³ Some writers believe that the laws, which for example are in

²⁰⁸ Brian Tamanaha, “A Concise Guide to the Rule of Law”, *St John’s Legal Studies Research Paper Series*, Paper No. 07-0082, September 2007

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1012051> (23 July 2009), at 19-20.

²⁰⁹ Vitit Muntarbhorn, “Deconstructing Thailand’s (New) Eighteenth Constitution” (2009) 12(1) *Thailand Law Journal* <<http://www.thailawforum.com/articles/Thailand-Eighteenth-Constitution.html>> (25 March 2009).

²¹⁰ For example see, Surapol Taweesak, “The Royal Institution and Thai Democracy” (in Thai), *Matichon Daily*, 23 March 2009, at 7.

²¹¹ See also, Deunden Nikomborirak and Saowaluk Cheevasittiyanon, “Corporate Governance among State-Owned Enterprises in Thailand” in Sakulrat Montreevat (ed), *Corporate Governance in Thailand*, Institute of Southeast Asian Studies, Singapore, 2006, at 74.

²¹² “Thaksin Troubles Worsening”, *Bangkok Post*, 12 July 2008.

²¹³ Thomas Bell, “Thai Court to Give Verdict on Thaksin Shinawatra Corruption Trial”, *Telegraph*, 21 October 2008.

Thaksin's favour, have given the rule of law an undeserved image in Thailand.²¹⁴

If this is true, and not saying that it is for all, the relevant question is whether the limited accountability of senior officials in practice is sufficient by itself to deny Thailand the label of the rule of law?²¹⁵ Indeed, it is one thing to say, that such inequality tarnishes the image of the rule of law in Thailand. However, it is another thing to say that Thailand does not have the rule of law. In saying this, it is not denied that the Thai judiciary at present may lack sufficient authority to hold *every* senior government official accountable, at least without the support of particular sects of the wider community, the military, or the royal family.²¹⁶ Yet, as we shall see, this reason by itself is not sufficient to deny the existence of rule of law in Thailand.

After all, even in the United States of America, senior government officials are frequently not held accountable for their actions.²¹⁷ Despite the rhetoric of equality of all before the law, in reality senior government officials often receive special treatment in many countries. One needs only to consider the previous Bush administration and their recent falsified claims of weapons of mass destruction in Iraq.²¹⁸ Or what about Gerald Ford's pardoning of Richard Nixon for the "Watergate" affair or Bill Clinton lying under oath about his relationship with Monica Lewinsky or his pardoning of former Housing Secretary Henry Cisneros and Congressman Daniel

²¹⁴ Surat Horachaikul, "Political Developments of Thailand in the Last 7 Years", a speech delivered at the *National Thai Studies Centre*, Australian National University, Canberra, 22 August 2007, at 2.

²¹⁵ See, Pichet Soontornpipit, "Is a Culture of Accountability Developing in Thailand?" <http://www.cdi.anu.edu.au/CDIwebsite_1998-2004/thailand/thailand_downloads/Culture%20of%20Accoutability.pdf> (12 May 2009).

²¹⁶ IntiraChewrum, "Independence, Autonomy and Discretionary Justice among Thai Judges: A Study of Criminal Cases Regarding Political Office Holders" (in Thai) (2008) 55(2) *Journal of Office of Court of Justice* 134.

²¹⁷ *The World according to Bush*, a French documentary directed by William Karel, 2004.

²¹⁸ Charles Lewis and Mark Reading-Smith, "False Pretenses", *The War Card*, 23 January 2008, <<http://projects.publicintegrity.org/WarCard/>> (22 May 2009).

Rosternkowski?²¹⁹ Indeed, the light slap on the wrist Mr Clinton received for lying under oath reeks of special privilege.²²⁰

The United States is not the only nation where political and judicial corruption is easily identified. In 2004, former Prime Minister of France Alain Juppe was convicted in the Nanterre Law Court in Paris for “the use of public office for personal ends”.²²¹ Similarly, in Israel, criminal investigations were launched against former Prime Minister Ehud Olmert during 2006-2007. The ex-Israeli leader was charged with fraud, breach of trust, falsifying corporate records and tax evasion. He resigned as Prime Minister in September 2008 after police investigations recommended that he be indicted.²²² In India, its former Prime Minister Narasimha Rao was sentenced to three years in prison for bribing lawmakers to back him on a crucial confidence vote that saved his government in 1993.²²³

More recently, in Italy, Prime Minister Silvio Berlusconi was hounded by the media for conflicts of interest for privately owning three major network television stations, which unequally published his advertising election campaigns against the laws.²²⁴ In Taiwan, the Ex-President Chen Shui-Bian was sentenced to life imprisonment.²²⁵ The prosecutors has charged him with embezzling from a special presidential office fund, accepting bribes in connection with a land deal and laundering money through Swiss bank

²¹⁹ See, Nelson Klose and Curt Lader, *United States History: Since 1865*, Barron's Educational Series, 2001, at 335.

²²⁰ Robert Levy, “The War on Tobacco” in Roger Pilon (ed), *The Rule of Law in the Wake of Clinton*, Cato Institute, Washington D.C., 2000, at 122.

²²¹ Antoine Lerougetel, “France: Former Prime Minister Juppé Convicted on Corruption Charges”, *World Socialist Website*, 3 February 2004 <<http://www.wsws.org/articles/2004/feb2004/jupp-f03.shtml>> (1 June 2009).

²²² “Olmert Corruption Trial Begins”, *Jewish and Israel News*, 25 February 2010.

²²³ “Three Years for Former Indian Prime Minister Rao”, *The Independent*, 12 October 2000.

²²⁴ Soria Blatmann, “A Media Conflict of Interest: Anomaly in Italy”, April 2003 <<http://www.rsf.org/IMG/pdf/doc-2080.pdf>> (23 March 2010).

²²⁵ Tania Branigan, “Taiwan Court Jails Former President for Corruption”, *Guardian*, 11 September 2009 <<http://www.guardian.co.uk/world/2009/sep/11/taiwan-jails-former-president-corruption>> (21 March 2010).

accounts.²²⁶ Lastly, but by no means least, in 2005, 2006, 2007 and 2008, impeachment complaints were filed against Philippine President Gloria Macapagal-Arroyo for corruption, extra-judicial killings and torture, although none of the cases reached the required endorsement of one third of the Senate.²²⁷

One can continue to indulge in a more comprehensive comparative analysis of special privilege examples between Thailand and other nations. Yet, such a task for the present purposes appears superfluous. It appears superfluous in the sense that in reality most, if not, all nations endure some level of corruption or possess laws which may serve the *interests of the ruling elite*.²²⁸ No nation is entirely free from this. The question is really as much a matter of degree as it is a matter of judgment. Some writers may be confident enough to believe that they can make such a comparison. Here, it appears to be a difficult task to make the comparison entirely accurate, considering the uniqueness and complexity of the Thai history and culture.

For example, how does one go about selecting which nation or nations that Thailand should be compared with? Even if a nation or nations are found to be comparable, how does one then determine which examples are compatible with another? Why should Mr Clinton's special privilege be treated differently from that of Mr Thaksin Shinawatra? Both are leaders who lied on oath. The results of such an analysis, even if comprehensive, could lead to obscure outcomes that can manipulate what appear to be a justified conclusion. Indeed, this is not the correct approach to examining the issue. In order to overcome the short fall of a misguided conclusion, one needs to move beyond

²²⁶ Natalie Tso, "Taiwan: Ex-President's Corruption Trial Begins", *Time*, 26 March 2009.

²²⁷ Raju Gopalakrishnan, "Impeachment case filed against Philippine's Arroyo", *Reuters*, 13 October 2008 <<http://in.reuters.com/article/worldNews/idINIndia-35930720081013>> (2 June 2009).

²²⁸ All nations fall short in their practice of the rule of law ideal. See, Kirsti Samuels, "Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt", *Social Development Paper* No. 37, The World Bank, October 2006, at 3.

a meagre comparative analysis and into the sociological context of the rule of law in Thailand.

2.4.4 How plausible are the theoretical and policy views?

The above analysis indicates that most of the opposing views that Thailand is not governed by the rule of law are misconceived. All of these writers, while adopting slight different anatomical approaches, have focused on *ad hoc* examples of the failure of one or two key institutions in Thailand. These views are almost always taken out of context and do not tell the entire story. A story can only be told correctly if sufficient attention to context is provided. Once the sociological context is given, an examination of rule of law criterion, including the key institutions, will provide a better representation of Thailand. This analysis, which has been ignored or not included by most anatomical writers, should serve well to replace a great deal of previous isolated studies in Thailand which are either misconceived or outdated.

2.5 A NEW APPROACH

2.5.1 Why do we seek it? What is it? How do we achieve it?

Much has already been said about anatomical thinking and why it is not the right approach to rule of law reform. However, not much has been said about the new approach. *Why* do we seek it? *What* is it? *How* do we achieve it? These are the core questions which will be answered in this section of the chapter. The answers are considered as fundamental to any rule of law analysis for Thailand. The answers will, of course, be different for other nations. The questions unfortunately do not trigger universal responses. Each nation is inherently different and rule of law reform is not an exact science. It is therefore only fair to expect that each nation will have dissimilar reasons for seeking the rule of law and a different “*new approach*” method for achieving it.

However, in saying this, it is not entirely clear that the “*new approach*” will be successful for every nation. It is certainly not the reason why nations like the United Kingdom, Australia or the United States achieved a strong rule of law. Yet, it is still considered to have a better chance of success than the anatomical approach or other similar methods of reform.²²⁹ Why the rule of law works in some nations but not others is not a legal mystery. It is a sociological one.²³⁰ This is beyond the understanding of anatomical thinking. However, it does not mean that rule of law reformers should stop everything and abandon entirely their way of doing things. Indeed, some aspects of anatomical reform have benefited some nations.²³¹

It is not intended that the “*new approach*” abandons current reforms on the judiciary or other key institutions. It is intended that this aspect of reform be considered in light of the wider sociological picture. For Thailand, that picture includes many other integrated influences. For instance, chapter four will explore the relationship between the rule of law and the King, the culture and the religion, etc. Chapter five will continue this analysis, but with a focus on external influences such as Asian values and globalisation. This approach is far more holistic than anatomical reform. The remainder of this chapter will set out the methodology for other chapters. Each chapter will then serve as a collective purpose in support of the final conclusion.

2.5.2 Why do we seek the new approach?

²²⁹ For example see, Richard E Messick, “Judicial Reform and Economic Development: A Survey of the Issues” (1999) 14(1) *World Bank Research Observer* 117.

²³⁰ Martin Krygier, “Misconceiving the Rule of Law”, an inaugural lecture at Faculty of Law, University of New South Wales, 6 May 2009 <<http://www.themonthly.com.au/misconceiving-rule-law-martin-krygier-1646>> (3 February 2010).

²³¹ For example see, David Trubek, et al, “Global Restructuring and the Law: Studies of the Internationalisation of Legal Fields and the Creation of Transnational Arenas” (1994) 44 *Case Western Reserve Law Review* 407.

Before explaining what the new approach is, it is first desirable to understand why we seek it.²³² In other words, we are asking the question - what do we really want to achieve from the new approach? Is it the rule of law that delivers equality before the law or is it that no one can be punished except by the law or both?²³³ Or do we seek the rule of law that includes a basic protection of human rights?²³⁴ Or should we seek a concept that extends to other freedoms such as freedom of speech or the right to vote?²³⁵ Is it better to have a “thick” or “thin” theory of rule of law?²³⁶ Or should there be a list of principles that are observed by people to avoid injustices?²³⁷ What do we seek²³⁸ or more importantly what is the *minimum requirement* of the rule of law for Thailand?²³⁹

It is submitted that the starting point of any rule of law definition should be the restraint of arbitrary power.²⁴⁰ At its core, the rule of law requires that government officials and citizens are bound by and act consistent with the law. In other words, “no one can be above the law”. A number of scholars further elaborate or extend the core element of the rule of law to entail other

²³² Martin Krygier advocates that this question should be the first question asked before any study of the rule of law on any nation commences: Martin Krygier, “Misconceiving the Rule of Law”, an inaugural lecture at Faculty of Law, University of New South Wales, 6 May 2009

<<http://www.themonthly.com.au/misconceiving-rule-law-martin-krygier-1646>> (3 February 2010).

²³³ For example see, S A Palekar, *Comparative Politics and Government*, PHI, New Delhi, 2009, at 64-65.

²³⁴ For example see, Randall Peerenboom, “Varieties of Rule of Law” in Randall Peerenboom (ed), *Asian Discourses of Rule of Law*, Routledge Curzon, London, 2004, at 39.

²³⁵ For example see, Ronald Dworkin, *A Matter of Principle*, Harvard University Press, Cambridge, 1985, at 11; Paul Craig, “Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework” (1997) *Public Law* 467.

²³⁶ For example see, JiangYu Wang, “The Rule of Law in China: A Realistic View of the Jurisprudence, the Impact of the WTO, and the Prospects for Future Development” (2004) *Singapore Journal of Legal Studies* 347.

²³⁷ For example see, Luc B Temblay, *The Rule of Law, Justice and Interpretation*, McGill-Queen’s University Press, Canada, 1997, at 166-174.

²³⁸ For Example see, Rachel Kleinfeld, “Competing Definitions of the Rule of Law: Implications for Practitioners”, *Carnegie Endowment Working Papers* No. 55, Carnegie Endowment for International Peace, January 2005.

²³⁹ Renata Uitz, “The Rule of Law in Post-Communist Central Europe: Imported or Imposed?”, a paper presented at the international workshop on *Relocating the Rule of Law*, the European University Institute, Florence, 8-9 June 2007, at 2.

²⁴⁰ Martin Krygier, “The Rule of Law: An Abuser’s Guide”, *UNSW Law Research Paper* No. 2007-4, 5 January 2007 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=952576> (23 February 2010), at 5.

characteristics.²⁴¹ However, it is noted that the thesis only examines the function and the existence of the rule of law by using the level of restraining of arbitrary power as a consistent standard. The minimum requirement of the rule of law accordingly measures from how much arbitrary acts and corruption or conflicts of interest from the public sectors can be detected.

Many academics have already emphasised the importance of why there is a need to restrain arbitrary power.²⁴² Martin Krygier suggests that there are two unoriginal reasons why this is so.²⁴³ The first reason is that arbitrary power leads to fear of abuse.²⁴⁴ There is always a need to protect the weak from the strong.²⁴⁵ This is both an ancient and contemporary concern for all societies.²⁴⁶ It encompasses not only authoritarian governments, but also democracies as well.²⁴⁷ Yet, the government is not the only problem. There are also dangers posed by the private sector. Individuals should not live in fear or suspicion of one another. Each citizen should be able to rely on the state, the law and each other and not be concerned that society could turn against them.²⁴⁸

²⁴¹ For example see, Brian Tamanaha, "A Concise Guide to the Rule of Law", *St John's Legal Studies Research Paper Series*, Paper No. 07-0082, September 2007

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1012051> (23 July 2009), at 3; Barry Hager, *The Rule of Law – A Lexicon for Policy Makers*, The Mansfield Centre for Pacific Affairs, 2000, <http://www.mansfieldfdn.org/programs/rol/rol_lexicon.htm> (12 March 2009), at 48.

²⁴² David Kipnis, "Using Power: Newton's Second Law" in Annett Y Lee-Chai and John A Bargh (eds), *The Use and Abuse of Power: Multiple Perspectives on the Causes of Corruption*, Sheridan Books, Ann Arbor, 2001, at 15.

²⁴³ Martin Krygier, "The Rule of Law: Legality, Teleology, Sociology" in Gianluigi Palombella & Neil Walker (eds), *Re-locating the Rule of Law*, Hart Publishers, Oxford, 2008, also available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1218982> (12 March 2009), at 11-12.

²⁴⁴ T Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 *Cambridge Law Journal* 111, at 112-113.

²⁴⁵ David Beatty, *The Ultimate Rule of Law*, Oxford University Press, Oxford, 2004, at 1.

²⁴⁶ John Locke, *The Second Treatise of Government*, Barnes & Noble Books, New Jersey, 2004, at 52.

²⁴⁷ Larry Diamond, et al, "Introduction" in Larry Diamond, et al (eds), *The Self-Restraining State: Power and Accountability in New Democracies*, Lynne Rienner, London, 1999, at 1.

²⁴⁸ Jim Corkery, "The Rule of Law" (2000) *Faculty of Law Papers, Bond University* <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1130&context=law_pubs> (3 March 2010), at 4.

The second reason why there is a need to restrain arbitrary power is that it leads to uncertainty. Uncertainty of choice restricts human behaviour. Confident interaction and co-ordination among strangers are reasonable expectations in life. Citizens should know the full range of conduct they can engage in without the worry of repercussion. This is an important aspect of liberty.²⁴⁹ Anything not prohibited by the law can be done by citizens without fear.²⁵⁰ Without this assurance, citizens would have to act or refrain from acting at their own peril. People need to have a basis for legitimate expectations in order to co-ordinate their lives between each other. This is considered as vital for the well-being of any modern society.

The rule of law responds to these two concerns of fear and uncertainty by imposing restraints on government officials and citizens.²⁵¹ It achieves this in different ways. One way is by requiring compliance with existing law and another is by imposing legal limits on law-making power. If government officials wish to pursue a course of action that violates existing law, the law itself must be changed in accordance with ordinary legal procedure *before* the course of action is pursued.²⁵² Citizens also have to abide by the existing law and must be deterred or punished if they violate it.²⁵³ Any transgressions of legal rules or social disruption, whether criminal or civil, should provoke a response from legal institutions charged with enforcing the laws.

²⁴⁹ Richard Komaiko and Beibei Que, *Lawyers in Modern China*, Cambria Press, New York, 2009, at 55.

²⁵⁰ Thomas Paine, *Political Writings*, Cambridge University Press, Cambridge, 2000, at 124.

²⁵¹ Brian Tamanaha, "A Concise Guide to the Rule of Law", *St John's Legal Studies Research Paper Series*, Paper No. 07-0082, September 2007

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1012051> (23 July 2009), at 3-5.

²⁵² Henry Schofield, *Essays on Constitutional Law and Equity and Other Subjects*, The Lawbook Exchange, New Jersey, 2004, at 82.

²⁵³ Tony Honoré, "The Necessary Connection between Law and Morality" in David Dyzenhaus and Arthur Ripstein (eds), *Law and Morality: Readings in Legal Philosophy*, University of Toronto Press, Toronto, 2007, at 147-148.

The ideal of the rule of law is today universally advocated.²⁵⁴ Yet, the concept itself has been afflicted by an extraordinary divergence of meanings.²⁵⁵ It often seems that there are almost as many meanings of the rule of law as there are people defending it.²⁵⁶ One must find a meaning which is meaningful for what is sought.²⁵⁷ In saying this, not all meanings are meaningful. The relevant question here is: what is meaningful for Thailand? Or in other words, why does Thailand seek the new approach? The answer is that Thailand seeks it to restrain the exercise of arbitrary power, particularly in the form of corruption. This is something that anatomical reform will struggle to achieve. The new approach is considered to have a better chance of success.

2.5.3 *What is the new approach?*

The new approach examines the key influences of the rule of law in light of its sociological context. It looks beyond the judiciary and other independent institutions and into some specific area of social science. This requires the integrated study of many things that are both legal and non-legal.²⁵⁸ The law itself is only one part of the study. How people respond to the law is another. Indeed, there are many areas of legal studies and sociology that need to be explored.²⁵⁹ Understanding how these areas interact with each other is fundamental to any rule of law reform.²⁶⁰ Lawyers must work together with

²⁵⁴ Adam Bouloukos and Brett Dakin, "Toward a Universal Declaration of the Rule of Law: Implications for Criminal Justice and Sustainable Development" in Gregory Howard and Graeme Newman (eds), *Varieties of Comparative Criminology*, Brill, Leiden, 2001, at 145.

²⁵⁵ See, Rachel Kleinfeld, "Competing Definitions of the Rule of Law: Implications for Practitioners", *Carnegie Endowment Working Papers* No. 55, Carnegie Endowment for International Peace, January 2005.

²⁵⁶ Marise Cremona, "Regional Integration and the Rule of Law: Some Issues and Options" in Robert Devlin and Antoni Estevadeordeal (eds) in *Bridges for Development: Policies and Institutions for Trade and Integration*, Inter-American Development Bank, Washington D.C., 2003, at 137.

²⁵⁷ The benefits of the rule of law depend on how the rule of law defined. See, Michael J Trebilcock and Ronald J Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress*, Edward Elgar Publishing, 2008, at 24.

²⁵⁸ Martin Krygier, "The Rule of Law and the Three Integrations" (2009) 1(1) *Hague Journal on the Rule of Law* 21, at 21.

²⁵⁹ For example, see Leszek Balcerowicz, "Institutional Change After Socialism and the Rule of Law" (2009) 1(2) *Hague Journal on the Rule of Law* 215, at 215-216.

²⁶⁰ Frank Upham, "Mythmaking in the Rule of Law Orthodoxy", *Carnegie Endowment Working Papers* No. 30, Carnegie Endowment for International Peace, September 2002, at 33.

sociologists to achieve this.²⁶¹ The task is not only to select the key influences of the rule of law, but also to understand how they integrate with each other.

There is no hard and fast rule to achieve such a task. For some nations, it may take a few years to achieve. For others, it may be even longer.²⁶² The process is generally expected to be long and complex, but comprehensive.²⁶³ No rule of law reform can be achieved overnight. More importantly, no rule of law reform can be expected to be same as another.²⁶⁴ There is no such thing as a quick and easy solution. Preparation of resources, research and funding are all essential elements of the new approach. Understanding the particular law, how it is delivered and how it is received all takes time. Indeed, there are enormous conceptual and practical challenges associated with any rule of law reform, especially in societies that are not open to the rest of the world.²⁶⁵

The new approach tackles these challenges by intellectual integration. That is, the integration of state and non-state influences on the rule of law.²⁶⁶ Each challenge is not simply resolved by a linear response although some may. Rather, the challenges are undertaken by a mixture of layered responses from different fields. For example, the new approach would not suggest that corruption in the independent institutions could be reduced by increasing the wages of the Thai officers or by additional training in ethics. Instead, the new approach would suggest that before any form of action is undertaken to solve

²⁶¹ David Nelken, "Comparatists and Transferability" in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions*, Cambridge University Press, Cambridge, 2003, at 438.

²⁶² For example see, Thomas Carothers, "The Rule of Law Revival" (1998) 77(2) *Foreign Affairs* 95, at 95-106.

²⁶³ For example see, Adam Czarnota, "Lustration, Decommunisation and the Rule of Law" (2009) 1(2) *Hague Journal on the Rule of Law* 307, at 307.

²⁶⁴ For example see, James R Maxeiner, "Different Roads to the Rule of Law: Their Importance for Law Reform in Taiwan" (2003) 1 *Tunghai University Law Review* 159.

²⁶⁵ Thomas Carothers "Promoting the Rule of Law Abroad – The Problem of Knowledge", *Carnegie Endowment Working Papers* No. 34, Carnegie Endowment for International Peace, January 2003, at 12-13.

²⁶⁶ Martin Krygier, "The Rule of Law and the Three Integrations" (2009) 1(1) *Hague Journal on the Rule of Law* 21, at 21.

the problem, it is first necessary to understand not only the extent of the problem, but also *why* the problem has arisen in the first place.

This would involve the *combined* research of many legal and sociological subjects that influence corruption in the Thai independent institutions. Some of these things would include the history, culture and policies of the government and/or the practices and attitudes of the officers themselves. The research may even extend further into other areas such as their wages, behaviours and beliefs. Research may also be undertaken into the “checks and balances” mechanism that resides inside the institutions as well as outside. It is more likely that the problem arises because of a combination of reasons, including the lack of performance of other closely-related institutions which have the task to promote good governance in the workforce.

The new approach therefore goes beyond the rule of law itself. It ensures that any attempts to reform the law are supported by solid non-legal foundations. Mysteries about the rule of law lie outside the law as much as it does within it.²⁶⁷ The rule of law is not just made up of a particular set of institutions, nor is it merely the law itself. It is better understood as a state of affairs.²⁶⁸ More specifically, it is a state of affairs that is particular to the context itself. This is where sociology comes into play.²⁶⁹ It provides the missing piece of the puzzle by drawing upon other areas of non-legal studies that matter.²⁷⁰ The new

²⁶⁷ Michael J Trebilcock and Ronald J Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress*, Edward Elgar Publishing, 2008, at 10.

²⁶⁸ Martin Krygier and Whit Mason, “Violence, Development and the Rule of Law”, *UNSW Law Research Paper* No. 2008-8, 13 March 2008
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392055> (23 February 2009), at 6.

²⁶⁹ Roger Cotterrell, *Law, Culture and Society*, Ashgate, Hampshire, 2006, at 30.

²⁷⁰ Klaus Ziegert, “Law in Asia: The Key Role of Law as a Productive Force for Development” (2009) 2(1) *The Law and Development Review* 96, at 96.

approach integrates these non-legal studies along with other legal studies in order to provide a proper basis for effective rule of law reform.²⁷¹

2.5.4 *How do we achieve it?*

Understanding how to achieve the new approach to the rule of law is far more difficult than describing what it is. Perhaps the simplest way is to explain in general terms the basic steps that should be adopted. The first step is to ask *why* the country seeks the rule of law.²⁷² As stated above, the minimum reason why any nation should seek it is to restrain the exercise of arbitrary power.²⁷³ This, of course, may not be the only reason, but should be the core reason.²⁷⁴ Nations that have already achieved this objective should strive for more moralistic reasons for strengthening the rule of law. Whatever the reason or reasons are, it is fundamentally important to understand why the nation seeks the rule of law so as to provide better focus on how to achieve it.

The second step of the new approach is to ask how to restrain the exercise of arbitrary power. This step involves the identification of who is capable of wielding power without restraint. This may not be an easy task. Public figures may only be puppets to the hidden master(s) pulling the strings. They may be concealed by other members and other institutions. For example, a corrupt police force may be protected by a powerful political party. Or similarly, a powerful dictator may be supported by the military. Even a wealthy businessperson may be capable of wielding arbitrary power with the assistance

²⁷¹ For example see, Shulamit Almog and Amnon Reichman, “Ethics, Aesthetics, and Law: The Third Man’s Three Prongs” in Austin Sarat (ed), *Studies in Law, Politics, and Society*, JAI Press, Bingley, 2009, at 170.

²⁷² Martin Krygier, “The Rule of Law: Legality, Teleology, Sociology” in Gianluigi Palombella & Neil Walker (eds), *Re-locating the Rule of Law*, Hart Publishers, Oxford, 2008, also available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1218982> (12 March 2009), at 2.

²⁷³ Joseph Raz, “The Rule of Law and Its Virtue” in David Dyzenhaus and Arthur Ripstein (eds), *Law and Morality: Readings in Legal Philosophy*, University of Toronto Press, Toronto, 2007, at 298.

²⁷⁴ For example see, Adam Czarnota, “Barbarians ante portas of the Post-Communist Rule of Law in Post-Democratic European Union” in Wojciech Sadurski, Adam Czarnota, and Martin Krygier (eds), *Spreading Democracy and the Rule of Law?*, Springer, Dordrecht, 2006, at 283-297.

of some politicians. The key is to identify who is capable of using power without restraint and who is responsible for protecting those most capable.

Once these public figures are identified, it is necessary for the *scope* of the key institutions to reach these figures. The long arm of the law needs to reach all areas of unrestrained power, and not just some. There should be no carve out or exception for any member of society. This includes all members of Parliament and even the royal family, if there is one.²⁷⁵ The duties and powers of the key institutions need to reach the public and the public needs to have access to those institutions.²⁷⁶ For this to be truly effective, the character of the law and other social norms that channel the restraint of the exercise of arbitrary power have to be known, understood and accepted by the public.²⁷⁷

This raises a range of deep sociological issues. For instance, how does the law count in the minds of people? Does it count because people obey the law? Why do people obey the law?²⁷⁸ When do they obey and not obey the law?²⁷⁹ Understanding the answers to these questions and more are crucial for effectiveness of the new approach. To think seriously about the rule of law, we must think seriously beyond the law itself.²⁸⁰ People need to know that they can rely on the law. Key institutions must work in sync with the public to ensure that this is so. The law must count in the minds of the people and

²⁷⁵ Brian Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, Cambridge, 2004, at 7.

²⁷⁶ Larry Diamond, "The Rule of Law as Transition to Democracy in China" in Suisheng Zhao (ed), *Debating Political Reform in China: Rule of Law vs. Democratisation*, An East Gate Book, New York, 2006, at 83.

²⁷⁷ Sally Engle Merry, "Culture, Power, and the Discourse of Law" (1992) 37 *New York Law School Law Review* 206; Frank Munger, "Culture, Power, and Law: Thinking about the Anthropology of Rights in Thailand in an Era of Globalisation" (2008) 2(11) *Thailand Law Journal* <<http://www.thailawforum.com/articles/Culture.html>> (16 April 2009).

²⁷⁸ Tom R Tyler, *Why People Obey the Law*, Princeton University Press, New Jersey, 2006, at 71-84.

²⁷⁹ For example see, David Callahan, *The Cheating Culture: Why More Americans are Doing Wrong to Get Ahead*, Harcourt, Orlando, 2004.

²⁸⁰ Roger Cotterrell, *The Sociology of Law: An Introduction*, 2nd ed, Butterworths, London, 1992, at 2.

people must trust and respect the law. It must make sense, be effective and most importantly yield fair and just results.²⁸¹

The next step of the new approach is to *select* the key institutions that are capable of restraining the exercise of arbitrary power. The key institutions could range anything from the police force to the human rights commission. Independent institutions, such as the ombudsman and the judiciary are often the focus for most nations.²⁸² Whatever key institutions are selected, it is important that they have the right level of independence. “Checks and balances” mechanism must be built into these institutions in order to ward off corruption and malpractice. It may even be that the institutions themselves act as the checks and balances mechanism for each other. Transparency and accountability of these institutions is therefore desirable, if not necessary.²⁸³

In addition to the selection of the key institutions, there is the need that they are given the right amount of resources. Lack of funding is a common reason (and excuse) of the institution for not being effective.²⁸⁴ Adequate funds, especially in the form of wages, will also provide a less incentive for public servants to engage in bribery and other similar forms of illegal behaviour.²⁸⁵ Funding should also be portioned according to the importance, the level of

²⁸¹ David Beatty, *The Ultimate Rule of Law*, Oxford University Press, Oxford, 2004, at 148.

²⁸² For example see, Malcolm Rowat, “Judicial Reform in Latin America and the Caribbean: Operational Implications for the Bank” in Malcolm Rowat, et al (eds), *Judicial Reform in Latin America and the Caribbean*, The World Bank, Washington D.C., 1995, at 17; Peter H Solomon, et al, *Courts and Transition in Russia: the Challenge of Judicial Reform*, Westview Press, Boulder, 2000; Arnab Kumar Hazra and Bibek Debroy (eds), *Judicial Reforms in India: Issues and Aspects*, Academic Foundation, New Delhi, 2007; Asia Pacific Judicial Reform Forum, *Searching for Success in Judicial Reform: Voices from the Asia Pacific Experience*, Oxford University Press, Oxford, 2009.

²⁸³ Colleen Lewis and Jenny Fleming, “The Everyday Politics of Value Conflict: External Independent Oversight Bodies in Australia” in Ian Holland and Jenny Fleming (eds), *Government Reformed: Values and New Political Institutions*, Ashgate, Hants, 2003, at 170.

²⁸⁴ For example see, Matthew Stephenson, “A Trojan Horse behind Chinese Walls?: Problems and Prospects of U.S.-Sponsored ‘Rule of Law’ Reform Projects in the People’s Republic of China” (2000) 18 *UCLA Pacific Basin Law Journal* 64; Kate Warner, “Institutional Architecture” in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform*, The Federation Press, Sydney, 2005, at 62.

²⁸⁵ Paolo Mauro, “The Effects of Corruption on Growth and Public Expenditure” in Arnold Heidenheimer and Michael Johnston (eds), *Political Corruption: Concepts & Contexts*, Transaction Publishers, New Jersey, 2009, at 341.

duties and powers of these institutions. If the institution has enormous responsibility in say preventing corruption or given a wide range of powers such as, powers of entry and seizure, it only makes sense that the institution is resourced properly to handle the workload in an efficient and timely manner.

The last step of the new approach is evaluation of progress.²⁸⁶ This requires an on-going evaluation of how the key institutions perform and how they are perceived.²⁸⁷ It is preferred that the evaluation takes place by two independent institutions, one local and one international.²⁸⁸ The aim of the evaluation is not to provide general or too obvious recommendations, such as “x institution requires more funding”. Rather, it is expected to be more rigorous and comprehensive. It requires the continual, in-depth study of the effectiveness of the law and how the affected people would want to improve it.²⁸⁹ In other words, it requires a continual evaluation of the integration of key institutions and the sociological aspects of society that influence them.²⁹⁰

The remaining chapters of the thesis analyses a *selection* of key influences on the rule of law in Thailand. The chapters do not go further and explain how to achieve rule of law reform. This is something that is beyond the scope of this thesis. The thesis is not intended to consider or provide advice on how reform is to be achieved. The remaining chapters will, where appropriate, adopt the *new approach* to analysing the rule of law in Thailand. It should be noted that

²⁸⁶ Different countries may choose different approaches in carrying out the evaluation process. See, Hellmut Wollmann (ed), *Evaluation in Public-Sector Reform*, Edward Elgar Publishing, Cheltenham, 2003.

²⁸⁷ As suggested by Thomas Carothers “Promoting the Rule of Law Abroad – The Problem of Knowledge”, *Carnegie Endowment Working Papers* No. 34, Carnegie Endowment for International Peace, January 2003, at 13.

²⁸⁸ Keyuan Zou, *China’s Legal Reform: Towards the Rule of Law*, Brill, Leiden, 2006, at 103.

²⁸⁹ For example, a report from Human Rights Watch or Asian Human Rights Commission. See also, Thomas Marshall, *Public Opinion and the Supreme Court*, Unwin Hyman, London, 1989; Benjamin Page and Robert Shapiro, “Effects of Public Opinion on Policy” (1983) 77(1) *The American Political Science* 175.

²⁹⁰ See also, Reza Banakar, *Merging Law and Sociology: Beyond the Dichotomies in Socio-Legal Research*, Galda, Berlin, 2003; Theodore Benditt, *Law as Rule and Principle: Problems of Legal Philosophy*, Stanford University Press, California, 1978, at 44-45.

while the analysis is comprehensive, it is far from complete. The analysis is considered as only a first step in adopting the *new approach*. It is hoped that this step is not the last and that other writers will provide further contribution to the analysis.

2.6 CONCLUSION

Most writers argue that Thailand does not have the rule of law. Often the blame is focused on the failure of key institutions. It is unfortunate that there is a tendency to examine these institutions in isolation. This is a fallacy of composition. It is also a fallacy of anatomical reform. For it only accepts that the adoption of key institutions is sufficient to anchor the rule of law. The reality is far more intricate. Many well-designed laws are simply not enforced. Many well-constructed institutions are simply not effective or free from corruption. The rule of law is not a concept that is capable of export. Neither is it a concept that solves all problems in society, nor does it necessarily attract foreign investment or essential for liberal democracy. Above all, it should not be served for the interests of the ruling elite either.

Writers who advocate the anatomical approach almost always take the rule of law out of context. Thailand has always been an easy target. It is simple to focus on a controversial event or a key institution and conclude that an abuse of power in that particular instance means that there is no rule of law. The analysis is often done in isolation and without any real examination of the sociological aspects of Thailand. Those writers have a tendency to ignore how the key institutions interact with society or how society will react to institutional changes. Are the lessons learned by anatomical reform being learned? Indeed, there are obstacles to knowledge with anatomical reform and a lack of integration of ideas. Perhaps a *new approach* which appreciates these ideas and more will have a greater chance of success in rule of law reform.

CHAPTER THREE

THE JUDICIARY AND OTHER INDEPENDENT INSTITUTIONS

3.1 INTRODUCTION

The judiciary and independent institutions in Thailand play a pivotal role in the rule of law development. There are obvious advantages to having grievances against public bodies investigated and judged by independent bodies. For one reason, it can restrain the exercise of arbitrary power. A stable government, reduced corruption and a basic protection of human rights are other reasons. The judiciary and other independent institutions strive to achieve these advantages and more by remaining impartial, transparent and accountable. Their duties, powers and independence are drawn from the Constitution and further carved out by legislation. This ensures that each citizen enjoys a basic level of constitutionally protected rights.

In the past, the judiciary and some of the independent institutions of Thailand have been criticised. At the forefront of the criticism is lack of performance and corruption. Despite such critiques which tarnish their reputation, it is contended that the judiciary and independent institutions generally perform well in achieving their constitutional goals. This is evident not only from the increased number of cases investigated and judged, but also from the positive feedback from the Thai people. Indeed, the judiciary and independent institutions have the potential to bring important benefits to the rule of law in Thailand as much the same way as similar agencies have done in other nations that have achieved a high level of strong governance.

3.2 THE FICTION IS REALLY A FACT

This chapter is divided into two main sections. The first section is focused on the independence and performance of the judiciary of Thailand. Specifically, it

examines how key decisions of the judiciary have impacted on the rule of law. Particular attention is given to the more high profile decisions which concern the abuse of power of the most recent administrations of government. The analysis will include the examination of the three main courts in Thailand, namely, the Courts of Justice, the Constitutional Court and the Administrative Courts.²⁹¹ It is argued that while the performance of these courts has been criticised at the odd occasion, they have nonetheless participated actively in reducing the exercise of arbitrary power in the form of political corruption.

The second part of the chapter examines a selection of other independent institutions in Thailand. The focus of the analysis is on the level of independence and performance of these institutions. In particular, it examines the extent of the constitutional duties imposed on these institutions and the powers granted to each of them. The analysis also explores an evaluation on the case load of these institutions, including an examination of key investigations conducted. As similar to the judiciary, the perception of some of the institutions has been tarnished on a number of occasions. Yet, that perception has not been overshadowed by the overall contribution that these institutions have made to the rule of law in Thailand.

3.3 THE JUDICIARY

The function of the rule of law is to work as a restraint upon the exercise of power, whether the power in question is that of an individual in a capacity of a state authority or whether it is the power of government. In order to work as a safeguard against those who abuse their power, there needs to be an independent judiciary. Simply, this is because once the court is called upon to investigate the abuse of power, the court will often be resented by those

²⁹¹ There is also the Military Court in Thailand. However, it will be excluded from the analysis since the Military Court has a specific jurisdiction over the military criminal matters. See section 228 of the 2007 Constitution.

whose power is restrained.²⁹² The court being disliked is one thing. Yet, the court's impartiality being compromised is another. Those who will be exposed by the court would go to their full length to ensure that the judiciary has less capacity to become the instrument of a constraint upon power.

Common practices in reducing judicial impartiality include bribing presiding judges, interfering with the judicial selection, or limiting the budget and the administrative staff of the court. The Thai judiciary also shares the same fate. However, several attempts have been implemented in ensuring that the judiciary, as a whole, is independent of other branches. In general, the Thai judiciary has received a high level of public confidence. This is even so considering the fact that the country is seriously divided over the former Prime Minister Thaksin Shinawatra. The judgments at times are criticised of being bias either *for* or *against* the government. Yet, the overall performance of the courts proves that the rule of law in Thailand is not a fiction.

3.3.1 Courts of Justice

The Courts of Justice has the broadest jurisdiction in the Thai judicial system.²⁹³ The Courts of Justice can try and adjudicate all cases except those specified by the Constitution and other laws within the jurisdiction of other courts.²⁹⁴ The Courts of Justice consist of the Courts of First Instance, the Appeal Courts, and the Supreme Court, as well as a series of specialised courts.²⁹⁵ The Judicial Commission is the governing body responsible for the appointment, transfer, removal and disciplinary actions over the judges.²⁹⁶ Originally, the Ministry of Justice was responsible for other administrative

²⁹² Murry Gleeson, *The Rule of Law and the Constitution*, BC Books, Sydney, 2000, at 2-3.

²⁹³ Udomsak Nitimontri, "The Role of the Courts of First Instance in relation to the Jurisdiction among Courts" (in Thai) (2000) 56(4) *Journal of the Courts of Justice* 105.

²⁹⁴ Section 218 of the 2007 Constitution.

²⁹⁵ For example, a Juvenile and Family Court, a Labour Court, a Bankruptcy Court, a Tax Court, and an Intellectual Property and International Trade Court.

²⁹⁶ Section 47 of the *Act on Judicial Service of the Courts of Justice* (2000).

works of the Courts of Justice. Judges were allowed to transfer their judicial positions to the executive positions in the Ministry.²⁹⁷ This has now been abolished.

When the 1997 Constitution came into force, it mandated the total separation of powers.²⁹⁸ In removing the Courts from the control of the executive branch's Ministry of Justice, the Courts' administrative works were transferred to the Office of the Judiciary which was founded by the 1997 Constitution as an independent secretariat of the Courts.²⁹⁹ The separation of the Courts of Justice from the Ministry of Justice certainly follows the rule of law principle in providing the public with an independent judiciary that is not influenced by the executive branch of government.³⁰⁰ With its recent judgments in relation to political corruption, respect for the Courts has been elevated to the unprecedented level and some are calling this a "judicial revolution".³⁰¹

Judicial independence in Thailand does not only come from disconnecting the Courts from the Ministry.³⁰² One of the other important factors which contribute to judicial independence is that career judges in Thailand are recruited by way of judicial examination as opposed to the appointment by the executive power.³⁰³ Throughout the history of the Thai judicial system, the Courts of Justice has thrived on the fact that there is no gap for politics to

²⁹⁷ "The Independence of Judicial Power" (in Thai), a paper dissimilated for the national judicial conference at Pattaya, Thailand, 16-19 January 1993.

²⁹⁸ Chapter VIII of the 1997 Constitution.

²⁹⁹ Section 275 of the 1997 Constitution; Section 222 of the 2007 Constitution.

³⁰⁰ Prasobsook Boondech, "Judicial Independence", a speech delivered at the *Asian Development Bank's International Symposium on Judicial Independence*, Manila, 7 August 2003.

³⁰¹ Marwaan Macan-Markar, "Judicial Revolution Changing Political Landscape", *Inter Press Service News Agency*, 19 August 2008.

³⁰² Apisak Promsawas, "The Independence of the Judiciary" (in Thai), a thesis submitted as part of the Master of Law Program, Faculty of Law, Thammasat University, Bangkok, 23 March 1992, at 160-162.

³⁰³ Section 26 of the Regulation of the *Act on Judicial Service of the Courts of Justice* (2000).

intervene the judicial system in terms of selection procedures and criteria.³⁰⁴ Perhaps the Courts being aloof from politics is the reason as to why the 1997 Constitution widened the jurisdiction of the Courts of Justice to try and adjudicate a case against a politician who is accused of performing duties dishonestly or being corrupted according to related laws.³⁰⁵

As a consequence of such expansion of the Courts' jurisdiction, the Criminal Division for Holders of Political Positions was set up in the Supreme Court, which is the highest court in the Courts of Justice hierarchy.³⁰⁶ There are special proceedings which apply particularly to the Division. For example, the Division must rely on records from the National Anti-Corruption Commission ("NACC").³⁰⁷ It may also investigate to receive additional facts and evidence as it deems fit.³⁰⁸ During a trial, a member of the House of Representatives or a senator is unable to claim the immunity provided in the Constitution.³⁰⁹ The establishment of the Division is considered as a good example of how the Thai judiciary is adapted to respond to a number of politicians' corruption and misconduct which Thailand has increasingly encountered.

In 2003, there was a seminar jointly organised by the Office of Attorney General, the Courts of Justice and the NACC which expressed their satisfaction towards the performance of the Criminal Division for Holders of

³⁰⁴ Trachuying, "The Role Model of the Judiciary: The Independence of Judicial Power" (in Thai) (1995) 42 (3) *Journal of the Office of the Judiciary* 160, at 165-176; Nikorn Tassar, "The Supreme Court: The Highest Place for Justice" (in Thai) (2009) 56(1) *Journal of the Office of the Judiciary* 50, at 61.

³⁰⁵ Section 272 of the 1997 Constitution; Section 219 of the 2007 Constitution.

³⁰⁶ Information and Public Relations Division, *General Information of the Supreme Court of Justice's Criminal Division for Person Holding Political Positions*, Office of the Judiciary, Bangkok, 2007.

³⁰⁷ The National Anti-Corruption Commission (NACC) used to name the National Counter Corruption Commission (NCCC) before 15 July 2008.

³⁰⁸ Section 5 of the *Organic Act on Criminal Procedure for Persons Holding Political Position* (1999).

³⁰⁹ Section 310 of the 1997 Constitution; Section 277 of the 2007 Constitution.

Political Positions.³¹⁰ In the years after its establishment, the Division has played a significant role in curbing the abuse of political power. Ironically, the members of the NACC were the ones who were tried by the Division. In 2005, a suspended jail sentence was given to the Commissioners for committing malfeasance by giving themselves a salary rise.³¹¹ In 2007, Thaksin was given a two-year jail sentence as he was found guilty of conflicts of interest by helping his wife receive a discounted price for her purchase of a land in Bangkok.³¹²

In February 2010, the Division confiscated forty six billion baht of Thaksin's assets. The Court ruled that the assets were gained illegally through conflicts of interest when Thaksin was Prime Minister.³¹³ The amount seized is only half of what was frozen since the coup. The Court articulated that "to seize all the money would be unfair since some of it was made before Thaksin became Prime Minister". Immediately after the decision was read, Thaksin, living in exile, told his "red shirts" supporters (who wear their shirts only in the red colour) through the video link that the verdict is an "international joke".³¹⁴ Yet, it is hardly legitimate to criticise the reasoning of the Court. In the judgment, the Court made it clear which assets were from Thaksin's abuse of power and which were not.

The jurisdiction of the Courts of Justice was further expanded by the 2007 Constitution. The Supreme Court now has an extended power to try and adjudicate cases connected with elections and revocation of the right to stand

³¹⁰ "The Criminal Trial of Holders of Political Positions" (in Thai), a proceeding of a seminar by Attorney General with the coordination of Narcotics and Law Enforcement Affairs, Nakorn Nayok, 19-20 September 2003.

³¹¹ The Criminal Division of Holders of Political Positions Decision No. 1/2548 (2005).

³¹² The Criminal Division of Holders of Political Positions Decision No. 1/2550 (2007).

³¹³ The Criminal Division of Holders of Political Positions Decision No. 1/2553 (2010).

³¹⁴ "Court Confiscates B46bn of Thaksin's Asset", *Bangkok Post*, 26 February 2010.

in the election of Members of the House of Representatives.³¹⁵ As a result, the Election Cases Division was established in the Supreme Court. The establishment was a response to a sad but undeniable fact that the more Thai democracy develops, the more corruption, abuse of power and electoral frauds are widespread.³¹⁶ In order to restrain those deficiencies of the rule of law, the judiciary was again made better equipped in handling all malpractices in elections and politics.

In the first three years of its operation, the Supreme Court's Election Cases Division delivered its verdicts imposing punishment on a large number of politicians who had been accused of perpetrating electoral frauds.³¹⁷ This resulted in a number of members of Parliament being disqualified including: an MP organising an entertainment event to sway voters to his support;³¹⁸ an MP giving valuables to inspire people to vote for him in the election campaign;³¹⁹ an MP concealing the fact of being an undischarged bankrupt;³²⁰ and the most infamous one – a former House Speaker, found guilty of electoral fraud by giving money to villagers in his province.³²¹ It is noted that most of the convictions were members of the parties which were under the ex-Prime Minister's patronage.³²²

The Courts of Justice does not only gain its impartial reputation from its verdicts in imposing punishment on corrupt politicians. The Courts also

³¹⁵ Section 219 of the 2007 Constitution.

³¹⁶ Vinay Bhargava and Emil Bolongaita, *Challenging Corruption in Asia: Case Studies and a Framework for Action*, The World Bank, Washington, 2004, at 171-204.

³¹⁷ The decisions of the Election Cases Division can be accessed via <http://www.supremecourt.or.th/webportal/maincode/index.php?&base=21> (24 December 2009).

³¹⁸ The Supreme Court Order No. 8428/2552 (2009).

³¹⁹ The Supreme Court Order No. 1978/2552 (2009).

³²⁰ The Supreme Court Order No. 8856/2550 (2007).

³²¹ The Supreme Court Order No. 5019/2551 (2008).

³²² Khien Theeravit, *Judicialisation of Political Crisis in Thailand*, Thai World Affairs Centre, Institute of Asian Studies, Chulalongkorn University, Bangkok
http://www.thaiworld.org/en/include/print.php?text=878&category_id=3&print=true (28 December 2009).

acquire its unprejudiced standing from punishing the officers who were involved and assisted such politicians in committing electoral corruption.³²³ Prior to the 2006 Coup, the Criminal Court of the Courts of Justice found the Chairman of the Election Commission and two Election Commissioners guilty of malfeasance for mishandling the election.³²⁴ The Criminal Court held that the Election Commissioners had unlawfully allowed candidates to switch constituencies, change application dates and use old identity numbers for the benefit of the Thai Rak Thai Party, which was the party headed by the former Prime Minister Thaksin Shinawatra.³²⁵

In the recent years, with so many politicians convicted, it may seem that the Courts of Justice have diverted their focus to the cases where political dimension is attached.³²⁶ Yet, the Courts of Justice have not ignored to guarantee basic human rights, especially personal rights and liberties in the context of procedural law. For example, the police was originally able to arrest, detain and search an accused without any warrant from the Courts.³²⁷ Not surprisingly, this led to a number of cases brought to the Courts alleging the police had ignored due process of law.³²⁸ To satisfy the public demand of having the judiciary review the conduct of the police, the Constitution and the Criminal Procedural Code now requires that an arrest, detention or search must be authorised by the Courts' warrants.³²⁹

³²³ Nophakhun Limsamarnphun, "Determined Citizen Stands up to Political Dragon", *The Nation*, 28 July 2006.

³²⁴ The Criminal Court Decision No. Aor 2343/2549 (2006).

³²⁵ Asian Human Rights Commission, "Thailand: Thai Criminal Court Sets an Example for Eliminating Electoral Corruption by Sending Election Commissioners to Jail", 26 July 2006 <<http://www.ahrchk.net/statements/mainfile.php/2006statements/657/>> (29 December 2009).

³²⁶ "The Criminal Division for Holders of Political Positions of the Supreme Court of Justice Jails Wattana 10 Years for Corruption at Klong Dan" (in Thai), *Matichon Daily*, 19 August 2008.

³²⁷ See the *Act of Amendment and Addition to the Criminal Procedural Code* (No. 22) (2004).

³²⁸ "Thailand: Convictions of Police in Drug Campaign Abuse a First Step", Human Rights Watch, 14 December 2009 <<http://www.hrw.org/en/news/2009/12/14/thailand-convictions-police-drug-campaign-abuse-first-step>> (9 January 2010); Asian Human Rights Commission, *Rule of Law and Human Rights in Asia*, Human Rights Correspondence School, Hong Kong, 2006, at 38.

³²⁹ Section 32 of the 2007 Constitution; Sections 57-119 Twi of the Criminal Procedural Code.

Due to the fact that the Courts of Justices are one of the main judicial institutions in upholding the rule of law, it is indispensable to maintain a high level of the judicial qualification.³³⁰ Even though judicial examination can avoid political influence on the judiciary, the exam endures its weakness including candidates concentrating on taking the exam without having a job; rich candidates studying law abroad rather than in Thailand to be eligible to take an easier exam; and candidates attempting to acquire the exam questions from the Judicial Exam Committee.³³¹ Admittedly, these are concerning factors and one could not help imagine what kind of judge they will be if these candidates pass the judicial examination.

During 1999-2003, there were three hundred and ninety-nine complaints filed against the judges in the Courts of Justice.³³² Mostly, the complaints involved the performance and the personal behaviour of the judges.³³³ Yet, this did not ward off the level of trust Thai people have given to their Courts of Justice. In 2004, judges still enjoyed a higher trust level than those of politicians or public prosecutors.³³⁴ While only just over half of the respondents to a survey had any knowledge or opinion regarding the Courts' ability to resist outside pressure, those aware of this issue tended to have a positive view.³³⁵ It is common to hear judges joke that they are the *lesser of the many evils*. They claimed that while corrupt judges can be found, the level of corruption was not as high as that of other government agencies.

³³⁰ Michelle Austein, "Judicial Independence and the Rule of Law Essential, Judges Say", 16 August 2006 <<http://www.america.gov/st/democracyhr-english/2006/August/20060816144026hmnietua0.700329.html>> (8 January 2010).

³³¹ The Supreme Court of Justice, *The Report of the Research on the Examination and the Orientation of the Judges of the Courts of Justice*, Thammasat University Press, Bangkok, 2003, at 40-55.

³³² The Supreme Court of Justice, *The Report of the Research on the Examination and the Orientation of the Judges of the Courts of Justice*, Thammasat University Press, Bangkok, 2003, at 59.

³³³ The Supreme Court of Justice, *The Report of the Research on the Examination and the Orientation of the Judges of the Courts of Justice*, Thammasat University Press, Bangkok, 2003, at 59.

³³⁴ The Asia Foundation, *Public Opinion Surveys on Judicial Independence and Accountability*, Asian Development Bank, Manila, 2004, at 15.

³³⁵ The Asia Foundation, *Public Opinion Surveys on Judicial Independence and Accountability*, Asian Development Bank, Manila, 2004, at 16.

In general, it is agreed that the Courts of Justice have actively played a crucial part in elevating the rule of law for Thailand.³³⁶ Its reputation while creating a good image of the Courts' efficiency and impartiality appears to pave the way to the Courts being more politicised.³³⁷ To some extent, this includes the establishment of the Criminal Division for Holders of Political Positions and the Election Cases Division in the Supreme Court of Justice. To much greater extent, the 2006 Interim Constitution as a result of the 2006 Coup mandated judges from the Courts of Justice to sit as members of several committees which were set up by the military-led government.³³⁸ For example, judges were assigned to be members in the Asset Investigation Committee and members in the Selection Committee for the National Legislative Council Members.³³⁹

Although the extraordinary task of the judges in the Courts of Justice was required in a short period (before the 2007 Constitution was promulgated), the task attracted a large amount of critics about judicial independence including the judiciary themselves.³⁴⁰ Clearly, the membership in those committees clouded judicial impartiality and the assigned judges might be seen as a tool of the coup leaders. While the critiques about such membership subsided after the 2007 Constitution came into force, fear that judges from the Courts of Justice are overstepping their bounds continues. Justifiably, this is because the 2007 Constitution still requires the President of the Supreme

³³⁶ Nantawat Borammanand, *The Entitlement of the People in Filing an Application in the Constitutional Court* (in Thai), P Press, Bangkok, 2005, at 117-120.

³³⁷ Suchit Bunbongkarn, "Democracy and Rule of Law in Thailand: Judicialisation of Politics or Politicisation of the Judiciary", a speech delivered at Georgetown University Law Centre, 5 November 2009.

³³⁸ Section 18 of the 2006 Interim Constitution.

³³⁹ Saroj Kasemtawornsilp, "When the Judge Performs the Duty Outside the Court" (in Thai) (2007) 54(1) *Journal of the Office of the Judiciary* 32, at 33-37.

³⁴⁰ "Why Must the Court Be Away from Politics?" (in Thai), *Matichon Daily*, 18 May 2007.

Court of Justice to help appointing members to the Election Commission,³⁴¹ the Ombudsman,³⁴² and the National Anti-Corruption Commission.³⁴³

The 2007 Constitution further calls for a judge (to be assigned by the general meeting of the Supreme Court of Justice) to become part of a Selection Committee for Senators.³⁴⁴ Among many concerns over the inappropriateness of such duty is the question of conflicts of interest which is central to the principle of judicial independence.³⁴⁵ The reason for such concern is directed to the provision in the 2007 Constitution which at the same time, allows the Senate to remove from office the judiciary for having become unusually wealthy, or malfeasance in judicial office, or non-compliance with the ethical standard.³⁴⁶ Consequently, the 2007 Constitution becomes at the forefront of constitutional debate, especially the controversy of the rise of judicial power.³⁴⁷

The constitutional provisions giving the judiciary a membership of different selection committees are not the only evidence in affirming the rise of judicial power.³⁴⁸ As previously illustrated, former Prime Minister Thaksin and the political parties and politicians affiliated with him have been given verdicts in numerous cases.³⁴⁹ There is no doubt that the constitutional provisions together with such verdicts allow the judiciary to play a more assertive role in

³⁴¹ Section 231 of the 2007 Constitution.

³⁴² Section 243 of the 2007 Constitution.

³⁴³ Section 246 of the 2007 Constitution.

³⁴⁴ Section 113 of the 2007 Constitution.

³⁴⁵ Daniel Ten Kate, "The Rise of Thailand's Third Branch", *Asia Sentinel*, 11 May 2007 <http://www.asiasentinel.com/index.php?option=com_content&task=view&id=490&Itemid=185> (30 December 2009).

³⁴⁶ Section 270 of the 2007 Constitution.

³⁴⁷ Prasit Pivavatanpanich, *The Thai Politics after the Coup: Judicial Coup* (in Thai), Siam Alternatives, Bangkok, 2009, at 79.

³⁴⁸ Matichon Editorial Board, *Secret, Get, Deep* (in Thai), Matichon, Bangkok, 2008, at 182.

³⁴⁹ Khien Theeravit, *Judicialisation of Political Crisis in Thailand*, Thai World Affairs Centre, Institute of Asian Studies, Chulalongkorn University, Bangkok <http://www.thaiworld.org/en/include/print.php?text=878&category_id=3&print=true> (28 December 2009).

ensuring clean politics.³⁵⁰ Yet, it raised the question if the new role could lead to the judiciary being politicised. The question is not limited to the Courts of Justice. With the power to determine disputes which has more political implication, the concern over the scope of judicial responsibility is also extended to that of the Constitutional Court.

3.3.2 Constitutional Court

The Constitutional Court is an independent body created for the first time under the 1997 Constitution.³⁵¹ The jurisdiction of the Constitutional Court is divided into four main categories: (i) determining the constitutionality of statutes and the organic law bills;³⁵² (ii) determining the qualifications of certain officials who shall submit an account showing particulars of their assets and liabilities;³⁵³ (iii) adjudicating the governance of constitutional bodies;³⁵⁴ and (iv) adjudicating cases submitted to the Court under authorities of other laws, as in accordance with the provisions of the *Organic Act on the Political Party* and the *Organic Act on the Election Commission* such as removing an executive committee of a political party from office,³⁵⁵ or dissolving a political party.³⁵⁶

According to the 1997 Constitution, the Constitutional Court consisted of a President and fourteen other judges who were appointed by the King upon the advice of the Senate.³⁵⁷ The President and the judges can hold office for no longer than nine years from the date of their appointment and they can

³⁵⁰ Suchit Bunbongkarn, “Democracy and Rule of Law in Thailand: Judicialisation of Politics or Politicisation of the Judiciary”, a speech delivered at Georgetown University Law Centre, 5 November 2009.

³⁵¹ Chapter VIII, Part II of the 1997 Constitution.

³⁵² Sections 177, 198, 219, 262, and 264 of the 1997 Constitution

³⁵³ Sections 96, 142, 216, 291, and 295 of the 1997 Constitution.

³⁵⁴ Section 266 of the 1997 Constitution.

³⁵⁵ Section 27 of the *Organic Act on the Political Party* (1998).

³⁵⁶ Sections 66, 67, 72, and 73 of the *Organic Act on the Political Party* (1998).

³⁵⁷ Section 255 of the 1997 Constitution.

hold office for only one term.³⁵⁸ The quorum of judges of the Constitutional Court for hearing and giving a decision consists of not less than nine judges and the decision must be made by a majority of votes.³⁵⁹ Like the Courts of Justice, the Constitutional Court has its own independent administrative unit functioning as its secretariat, with the Secretary-General of the Office of the Constitutional Court as the head of the administration.³⁶⁰

The establishment of the Constitutional Court is part of an on-going debate whether the Courts of Justice or a new court should have a power to override the law which are enacted by the legislature.³⁶¹ In 1946, the Supreme Court of Justice decided that the *War Criminal Act* (1945) was void due to the fact that the *Act* had retroactive effect in criminalising an action which was committed prior to the passing of the *Act*.³⁶² To ward off the authority of the Courts of Justice, the Constitutional Tribunal was formed by the 1946 Constitution to rule on the constitutionality of the law.³⁶³ The Tribunal was hardly seen as an independent body with real power of judicial review since the members of the Tribunal at times were wholly selected and appointed by the legislature itself.³⁶⁴

When the Constitutional Court was established in the form of judicial body and took over the power of judicial review, it was one of the main highlights

³⁵⁸ Section 259 of the 1997 Constitution; Section 208 of the 2007 Constitution.

³⁵⁹ Section 267 of the 1997 Constitution. This is reduced to five judges according to section 216 of the 2007 Constitution.

³⁶⁰ Section 270 of the 1997 Constitution; Section 217 of the 2007 Constitution.

³⁶¹ Suwan Suwanwecho, "The Role of the Constitutional Court in the New Era" (in Thai), in Office of the Constitutional Court (ed), *The Constitutional Court and the Assurance of Rights and Liberties Protection According to the People Constitution*, P Press, Bangkok, 2006, at 387-389.

³⁶² The Supreme Court Decision No. 1/2489 (1946).

³⁶³ Somkid Lertpaitoon, *The Judges of the Constitutional Court* (in Thai), Nititham, Bangkok, 1993, at 10-12.

³⁶⁴ Office of the Constitutional Court, *Introduction to the Constitutional Tribunal* (in Thai), P Press, Bangkok, 2007, at 6-9.

of the judicial system under the 1997 Constitution.³⁶⁵ The new selection process for the Constitutional Court judges was expected to effectively replace that of the Constitutional Tribunal judges who were ex officio officials.³⁶⁶ According to Amara Raksasataya, the qualification of the Constitutional Tribunal judges was the reason as to why the Tribunal did not enjoy popularity.³⁶⁷ Very few cases were tried by the Tribunal over fifty years while there were eight hundred and five cases presented to the Constitutional Court during the first eleven years of its operation (1998-2009).³⁶⁸

There was a genuine belief that the arrival of the Constitutional Court would facilitate the development of the rule of law in Thailand.³⁶⁹ Such belief was based on the performance of the Constitutional Court especially in adjudicating cases where politicians were removed because of corruption. With the cooperation from other independent agencies such as the NACC and the Election Commission (which were also reformed or established by the 1997 Constitution), the Court appeared to produce some significant results.³⁷⁰ From 1998-2002, the Constitutional Court ruled on eighteen cases in which the NACC had indicted politicians who had either failed to submit an asset

³⁶⁵ Tom Ginsburg, "Constitutional Afterlife: The Continuing Impact of Thailand's Postpolitical Constitution" (2009) 7(1) *International Journal of Constitutional Law* 83, at 93.

³⁶⁶ Nantawat Borammanand, *Research Report on Constitutional Courts in Comparison* (in Thai), P Press, Bangkok, 2005, at 146-150.

³⁶⁷ Amara Raksasataya, "The Jurisdiction of the Constitutional Court" in and James R Klein (eds), *The Constitutional Court of Thailand: The Provisions and the Working of the Court*, VJ Printing, Bangkok, 2003, at 25.

³⁶⁸ Office of the Constitutional Court, "The 11th Anniversary of the Establishment of the Constitutional Court" (in Thai), 30 April 2009 <<http://www.constitutionalcourt.or.th/download/11ycourt.pdf>> (14 January 2010). It is noted that the Constitutional Court was brought to an end after the coup in 2006. However, All matters prescribed by laws as the powers of the Constitutional Court were transferred to the Constitutional Tribunal.

³⁶⁹ Chaowana Trimas, "The Constitutional Court and the Development of Democracy in the Legal States" (in Thai) in Office of the Constitutional Court (ed), *The Constitutional Court and the Development of Democracy in Legal States*, P Press, Bangkok, 2005, at 89.

³⁷⁰ Vinay Bhargava and Emil Bolongaita, *Challenging Corruption in Asia: Case Studies and a Framework for Action*, The World Bank, Washington, 2004, at 194-195.

declaration or provided a false one.³⁷¹ Seventeen out of eighteen were found guilty and were banned from politics.³⁷²

The Court's rulings in banning seventeen high profile politicians from future politics have been considered as a milestone in the rule of law development. Not only was the Court praised for its performance, but the public also admired the NACC for conducting the investigation and in reviewing the account of corrupt politicians.³⁷³ Both institutions seemed to make their mark in their role to combat corruption among politicians.³⁷⁴ Yet, the only case that the Constitutional Court did not agree with the NACC did illustrate the limits of the NACC's effectiveness.³⁷⁵ At the same time, this particular case raised a serious question if the judges of the Constitutional Court were absolutely independent and free from any political interference.³⁷⁶

The question of judicial independence was formed on the ground that the Court had concurred with the NACC in seventeen other cases.³⁷⁷ The only exception was the case of Thaksin Shinawatra who was acquitted on a split decision in 2001.³⁷⁸ The 1997 Constitution required a person holding political position to file statements declaring his assets.³⁷⁹ However, the Court ruled

³⁷¹ The National Anti-Corruption Commission (NACC) used to name the National Counter Corruption Commission (NCCC) before 15 July 2008.

³⁷² James R Klein, "The Battle for Rule of Law in Thailand: The Constitutional Court of Thailand" in Amara Raksataya and James R Klein (eds), *The Constitutional Court of Thailand: The Provisions and the Working of the Court*, VJ Printing, Bangkok, 2003, at 70.

³⁷³ Surin Maisrikrod, "Civil Society, Accountability and Governance in Thailand: A Dim Case of Participatory Democracy" in Terence Chong (ed), *Globalisation and Its Counter-forces in Southeast Asia*, Institute of Southeast Asian Studies, Singapore, 2008, at 108.

³⁷⁴ Pasuk Phongpaichit, "Good Governance: Thailand's Experience", a paper presented at the *Asia Pacific Finance Association Annual Conference*, Bangkok, July 2001, at 4.

³⁷⁵ Peter Leyland, "The Quest for Good Governance in Thailand and the Thai Constitutional Watchdogs", a paper presented at the *7th World Congress of the International Association of Constitutional Law*, Athens, 11-15 June 2007, at 12.

³⁷⁶ Borwansak Uwanno, "Analytical Report of the Constitutional Court Ruling on Concealing Asset" (in Thai) (2001) (57(3) *Journal of the Thai Bar* 1, at 1-25.

³⁷⁷ James R Klein, "The Battle for Rule of Law in Thailand: The Constitutional Court of Thailand" in Amara Raksataya and James R Klein (eds), *The Constitutional Court of Thailand: The Provisions and the Working of the Court*, VJ Printing, Bangkok, 2003, at 69.

³⁷⁸ The Constitutional Court Ruling No. 20/2544 (2001).

³⁷⁹ Section 295 of the 1997 Constitution.

eight to seven that he was not guilty of concealing assets by registering some of his assets under the names of his maid, chauffeur, security guard and business associates.³⁸⁰ Incredibly, the Court believed that Thaksin did not know at the time of submission of accounts that there were shares in the names of others holding on his spouse's behalf.³⁸¹ Thaksin, the Court concluded, did not "intentionally" commit a prohibited act.³⁸²

If the Court were to decide that Thaksin was guilty, he would have been removed from his Prime Ministerial position.³⁸³ Thaksin pleaded that if he was to be removed, the Court and the NACC would have had extra power to remove a Prime Minister whom was elected by millions of Thai people.³⁸⁴ The public was divided on this issue.³⁸⁵ Sadly, it exhibited that many Thai people did not understand the mechanism of the rule of law. Once the Court handed down the ruling, while many Thais were happy for Thaksin, the integrity of the judges was gravely criticised. Even one of the minority judges found it necessary to publish his own comment of the case with the hope to lessen public resentment against himself and the Constitutional Court.³⁸⁶

His Honour emphasised that for the rule of law to be respected, having public officials declare their assets and liabilities was an essential step since it showed

³⁸⁰ Alan Klima, "Thai Love Thai: Financing Emotion in Post Crash Thailand" in Jonathan Xavier Inda and Renato Rosaldo (eds), *The Anthropology of Globalisation: A Reader*, 2nd ed, Blackwell, Oxford, 2008, at 128-129.

³⁸¹ Summary of the Constitutional Court Ruling No. 20/2544 (2001) <http://www.constitutionalcourt.or.th/download/Summary_desic/44/Summary_desic_eng/e20_44.pdf> (13 January 2010); Brian Brewer, "Thailand: Building the Foundations for Structural and Systematic Transformation" in Anthony Cheung and Ian Scott (eds), *Governance and Public Sector Reform in Asia*, Routledge Curzon, London, 2003, at 206.

³⁸² Pasuk Phongpaichit and Chris Baker, *Thaksin: The Business of Politics in Thailand*, Silkworm Books, Chiang Mai, 2004, at 98.

³⁸³ Sections 97 and 295 of the 1997 Constitution.

³⁸⁴ *Bangkok Post*, 12 August 2001.

³⁸⁵ Shinya Imaizumi, *Political Reform and the Constitutional Court of Thailand*, Institute of Developing Economies, Japanese External Trade Organisation, Japan, 2003, at 31-32.

³⁸⁶ Suchit Bunbongkarn, "A Reflection on the Role of a Justice of the Thai Constitutional Court" in Niyom Rathamarit (ed), *Eyes on Thai Democracy: National and Local Issues*, King Prajadhipok's Institute, Nonthaburi, 2006, at 41-48.

the effort to tackle corruption and abuse of power.³⁸⁷ Yet, his Honour portrayed that a real burden for the justices of the Constitutional Court was to arrive at a ruling that was proper but somewhat against public opinion.³⁸⁸ The Constitutional Court appeared to show a clear sign of hesitation in deciding a widely controversial case once again in March 2006. The Election Commission filed its petition with the Court since the Commission was unsure about some respects of its power in organising the general election for the House of Representatives which was scheduled for 2 April 2006.³⁸⁹

The Court has jurisdiction in cases where there is a dispute arrived as to the powers and the duties of organs under the Constitution, such organs can submit a matter together with the opinion to the Court for decision.³⁹⁰ In this case, it was the Election Commission which was publicly accused of abusing its power to assist Thaksin and his Thai Rak Thai Party to win the coming election. To avoid such accusation as the election was approaching, the Commission laid out its plans and strategies for organising the upcoming election, hoping that the Court would approve such plan and thus would clear any accusation against the Election Commission.³⁹¹ Unfortunately for the Commission, its plan was not certified by the Court.

Rather the Court refused to accept the petition of the Election Commission for consideration. The main reason was that the election had not occurred at

³⁸⁷ Suchit Bunbongkarn, "A Reflection on the Role of a Justice of the Thai Constitutional Court" in Niyom Rathamarit (ed), *Eyes on Thai Democracy: National and Local Issues*, King Prajadhipok's Institute, Nonthaburi, 2006, at 46.

³⁸⁸ Suchit Bunbongkarn, "A Reflection on the Role of a Justice of the Thai Constitutional Court" in Niyom Rathamarit (ed), *Eyes on Thai Democracy: National and Local Issues*, King Prajadhipok's Institute, Nonthaburi, 2006, at 45.

³⁸⁹ The Constitutional Court Ruling No. 6/2549 (2006).

³⁹⁰ Section 266 of the 1997 Constitution.

³⁹¹ The Election Commission submitted its petition to the Constitutional Court on 20 March 2006.

the time the Commission launched its petition to the Court.³⁹² In this way, what the Commission foresaw to be a dispute once the election finished had not occurred yet. However, the Court's refusal was interpreted as its hesitation to be involved in politics. The evidence of this hesitation was much clearer when the election was finally completed and the Ombudsman requested the Court to consider the constitutionality of the election. The Court did not promptly respond to the Ombudsman's petition. Rather it was the King who urged the Court to resolve the election problem.³⁹³

The result of the election on 2 April 2006 was highly contentious.³⁹⁴ The election was called after former Prime Minister Thaksin dissolved the House of Representatives. The election was dubbed "a one-horse race" since his Thai Rak Thai Party was the major party running in this election.³⁹⁵ The opposition parties were boycotting the election so not all the seats were filled, leaving Thailand in political limbo after the election.³⁹⁶ Despite the Ombudsman filing the petition with the Court, the public had not heard from the Court until the King took an unprecedented step to express his concern about the legality of the election.³⁹⁷ The King's influence on the judiciary was incontestable since the Court annulled the election within two weeks after his royal appearance.

³⁹² Summary of the Constitutional Court Ruling No. 6/2549(2006) (in Thai) <http://www.constitutionalcourt.or.th/download/Summary_desic/49/Summary_desic_thai/t6_49.pdf> (13 January 2010).

³⁹³ Michael Kelly Connors, *Democracy and National Identity in Thailand*, Nordic Institute of Asian Studies, Copenhagen, 2007, at 270-271.

³⁹⁴ "Thai Court Rule Election Invalid", *BBC News*, 8 May 2006 <<http://news.bbc.co.uk/2/hi/asia-pacific/4983600.stm>> (14 January 2010).

³⁹⁵ "April 2 General Election", The Government Public Relations Department, 30 March 2006 <http://thailand.prd.go.th/view_inside.php?id=1316#> (15 January 2010).

³⁹⁶ David Hollingsworth, *The Rise, the Fall, and the Recovery of Southeast Asia's Minidragons*, Lexington Books, Lanham, 2007, at 148-149.

³⁹⁷ The Constitutional Court Ruling No. 9/2549 (2006).

After the coup in 2006, the 1997 Constitution and the Constitutional Court were brought to an end.³⁹⁸ All matters prescribed by laws as the powers of the Constitutional Court were transferred to the Constitutional Tribunal.³⁹⁹ The Tribunal had the President of the Supreme Court of Justice as chairperson and the President of the Supreme Administrative Court as vice chairperson. To maintain judicial independence of the Tribunal, the other seven justices were elected at a general meeting of the Supreme Court of Justice and of the Supreme Administrative Court by secret ballot. Yet, rather than being accused of taking Thaksin's side, the Tribunal was accused of being prejudiced against Thaksin as well as a judicial tool for the military.⁴⁰⁰

The accusation was largely based on the Constitutional Tribunal's ruling to dissolve the Thai Rak Thai Party and revoke the election rights of the Party's executives in accordance with *Announcement No.27 of the Council for Democratic Reform* (the coup). The Tribunal found that the Thai Rak Thai Party had hired some small parties to seek candidates to assist the Thai Rak Thai Party in running for the election. Two of those parties, with the help of the Election Commission's officers, issued false party membership certificates for use as evidence in the applications for election candidacy.⁴⁰¹ Despite the Party contravening the *Organic Law on the Political Party* (1998), certain academics believed that the Tribunal, by using the delegated power from the coup, did not conform to the basic legal principle of law being prospective.⁴⁰²

³⁹⁸ Office of the Constitutional Court, *Introduction to the Constitutional Tribunal* (in Thai), P Press, Bangkok, 2007, at 4.

³⁹⁹ Section 35 of the 2006 Interim Constitution.

⁴⁰⁰ Editorial Board, "Thailand's Struggle for Constitutional Survival" (2007) 6(3) *Article 2* 1, at 4-6.

⁴⁰¹ Nopadol Hengjareon, "Reports on Important Decisions in Recent Years", an oral presentation at the 5th *Seminar of Asian Constitutional Court Judges*, Constitutional Court of Korea, 11 October 2007.

⁴⁰² Vorajet Pakirat, et al, *Decision of the Constitutional Tribunal to Dissolve Thai Rak Thai – A Legal Analysis* <<http://www.truehaksin.com/documents/English/JuntaCharges/DecisionBanofThaiRakThai.pdf>> (15 January 2010).

They argued that the *Announcement No.27 of the Council for Democratic Reform* resulted in the law being used retroactively to ban the executives of the Thai Rak Thai Party from politics. The Tribunal rebutted this argument by elaborating the reason why the revocation of election rights was not in breach of the principle that law must be prospective.⁴⁰³ While the ruling was debated on a technicality, it cannot be denied that the Tribunal made a major contribution to Thai politics and the rule of law. The fact that the Party was dissolved because it sought to acquire national administration powers by unconstitutional means demonstrated that the Tribunal exercised its judicial review to guarantee that those with authority may not abuse their power.⁴⁰⁴

When the 2007 Constitution came into force in August 2007, the Constitutional Court was re-established with wider and clearer jurisdiction.⁴⁰⁵ Yet, the two early rulings of the Constitutional Court after its re-establishment hardly dispelled the popular impression that the Court was prejudiced against Thaksin. The first ruling was a removal of Prime Minister Samak Sundaravej from office on the ground of conflicts of interest.⁴⁰⁶ The 2007 Constitution prohibits the Prime Minister and ministers from being employees of any person.⁴⁰⁷ Samak regularly hosting TV cooking shows and accepting payment from doing so, was considered as an employee of a private company while in office. His premiership was terminated by a unanimous vote of the Court.⁴⁰⁸

⁴⁰³ The Constitutional Tribunal Ruling No. 3-5/2550 (2007). The summary of the ruling with the English translation can be accessed through the website of Ministry of Foreign Affairs <www.mfa.go.th/internet/document/3408.doc> (16 January 2010).

⁴⁰⁴ Boonserm Naksarn, "The Democratic Principle of the Thai Political Party" (in Thai), Office of the Constitutional Court, *Constitutional Court and the Implementation to Its Mission According to the Rule of Law*, P Press, Bangkok, 2008, at 333-361.

⁴⁰⁵ Sections 204-217 of the 2007 Constitution.

⁴⁰⁶ The Constitutional Court Ruling No. 12-13/2551 (2008).

⁴⁰⁷ Section 267 of the 2007 Constitution.

⁴⁰⁸ Chalermpon Ake-uru and Nantapol Khaimuk, "Influential Constitutional Justice: Its Influence on Society and on Developing Human Rights Jurisprudence - A Thai Perspective", a paper presented at the *World Conference on Constitutional Justice*, Cape Town, 23-24 January 2009.

Samak was alleged to be a proxy for former Prime Minister Thaksin.⁴⁰⁹ He was also a leader of People Power Party which was formed by many MPs of the previous Thai Rak Thai Party.⁴¹⁰ The People Power Party was therefore publicly known to be driven by Thaksin as a real leader.⁴¹¹ The Court's ruling to disqualify Samak was unsurprisingly criticised by proponents of Thaksin that the Court was trying to uproot any connection that Thaksin had with Thai politics. They attacked the Court on a simple, but inane ground that the Court was discouraging "anyone" having a talent in cooking Thai food.⁴¹² It was not the case for "anyone" of course. The Constitution only prohibited "those in power" not to abuse their position. In this particular case, the abuse of power was in the form of having conflicts of interest.

After Samak was forced to step down, Somchai Wongsawat became the leader of the People Power Party and the new Prime Minister. However, his premiership too was ended shortly after the Constitutional Court dissolved the Party.⁴¹³ Since Somchai is Thaksin's brother-in-law, the Court was once again criticised of holding a grudge against Thaksin.⁴¹⁴ The dissolution of the Party was based on the decision of the Election Cases Division of the Supreme Court of Justice finding that a member of the executive committee was involved in the election fraud.⁴¹⁵ He was a House Speaker who paid the

⁴⁰⁹ "Court Orders Thai PM to Step Down", *Sky News*, 9 September 2008

<<http://news.sky.com/skynews/Home/World-News/Thailand-Constitutional-Court-Tells-PM-Samak-Sundaravej-To-Step-Down-In-TV-Cooking-Show-Row/Article/200809215095879?f=rss>> (20 January 2010).

⁴¹⁰ Daljit Singh and Tin Maung Maung Than, "Introduction" in Daljit Singh and Tin Maung Maung Than (eds), *Southeast Asian Affairs 2008*, Institute of Southeast Asian Studies, Singapore, 2008, at xx.

⁴¹¹ Suchit Bunbongkarn, "Thailand's 2007 Constitution and Re-emerging Democracy; Will Political Polarisation Continue?" in John Funston (ed), *Divided over Thaksin: Thailand's Coup and Problematic Transition*, Institute of Southeast Asian Studies, Singapore, 2009, at 91.

⁴¹² "Wasan Soipisut Argued Against Double Standard" (in Thai), *Khao Sod Daily News*, 2 February 2009, at 6.

⁴¹³ The Constitutional Court Ruling No. 20/2551 (2008).

⁴¹⁴ UNHCR, *Freedom in the World 2009- Thailand*, Freedom House, 16 July 2009

<<http://www.unhcr.org/refworld/publisher.FREEHOU.,THA,4a64527bc,0.html>> (21 January 2010).

⁴¹⁵ The Supreme Court Order No. 5019/2551 (2008).

local leaders to influence them to campaign for the People Power Party.⁴¹⁶ Somchai, as a Party leader, was also barred from politics.⁴¹⁷

The second ruling dissolving the People Power Party and banning its executive committee from politics had gravely aggravated Thaksin's followers. The dissolution of the Party meant that its members who had escaped the political ban imposed on their leaders would have to gather and re-form a new party.⁴¹⁸ Prior to the delivery of its ruling, the building of the Constitutional Court was blocked by Thaksin's proponents. A bomb was thrown into the house of one of the presiding judges.⁴¹⁹ These attempts were to prevent the Court from reaching its judgment so that Somchai could remain in power.⁴²⁰ At the final hearing, the Court was forced to move and read its ruling at the building of the Supreme Administrative Court, another venue in Bangkok.⁴²¹

It was unfortunate that people were divided into two sides over Thaksin.⁴²² His followers were wearing red shirts under the name of the United Front of Democracy against Dictatorship while his opponents were wearing yellow shirts with the banner of People's Alliance for Democracy.⁴²³ The opponents were continually protesting against the government under the Samak and Somchai administrations since they both were labelled as Thaksin's nominees.⁴²⁴ The campaign became violent and protesters from both sides

⁴¹⁶ Monruthai Norakong, "Yongyuth Disqualified after Video Prove Electoral Fraud", *Bangkok Post*, 9 July 2008.

⁴¹⁷ Sections 68 and 237 of the 2007 Constitution.

⁴¹⁸ "Top Thai Court Ousts PM Somchai", *BBC News*, 2 December 2008.

⁴¹⁹ "PAD Declares It's under Attack", *Bangkok Post*, 31 October 2008.

⁴²⁰ Rattaphol Onsanit and Daniel Ten Kate, "Thai Court May Disband Somchai's Party, Force Him out" *Bloomberg*, 1 December 2008.

⁴²¹ Shawn Crispin, "Court Brings down Thai Government", *Asia Times*, 3 December 2008.

⁴²² Kitti Prasirtsuk, "Thailand in 2008: Crises Continued" (2009) 49 (1) *Asian Survey* 174, at 176.

⁴²³ "Join Red-Shirt Protest, Thaksin Tells People", *The Nation*, 29 March 2009.

⁴²⁴ James Ockey, "Thailand in 2008: Democracy and Street Politics" in Daljit Singh and Tin Maung Maung Than (eds), *Southeast Asian Affairs 2009*, Institute of Southeast Asian Studies, Singapore, 2009, at 335-337.

were killed.⁴²⁵ Several government offices and the international airport were invaded and destroyed.⁴²⁶ When the Court handed down the ruling ousting Somchai, it put an end to an elongated protest against the government.⁴²⁷

For the Court to prevent Thailand from further violence and possibly a civil war, the justices of the Constitutional Court were named the Political Persons of the Year 2008.⁴²⁸ The rulings of the Court on the one hand, were praised for the end of Thaksin and his affiliation. On the other hand, it was argued that the Court was interfered by the military and those who disagreed with Thaksin's policy.⁴²⁹ This will always be the case since the country is so divided over Thaksin.⁴³⁰ Yet, the most important issue is that the Court has played a significant role in strengthening the rule of law in Thailand. It helped cultivate the new political culture that any abuse of power will not be tolerated and those who are involved will be solemnly condemned and punished.

The rulings of the Constitutional Court have not only exerted its influence to strengthen the concept of limit government in the context of politics. During eleven years (1998-2009) of its operation, the Constitutional Court has made a contribution to assuring the public that their basic rights will be respected.⁴³¹ In other words, human rights which in theory have long been guaranteed by

⁴²⁵ "Thaksin: Force Used against Protesters", *Bangkok Post*, 13 April 2009.

⁴²⁶ Ian MacKinnon, "Thailand Protest Strands Thousands of Tourists at Bangkok Airport", *The Guardian*, 26 November 2008.

⁴²⁷ "End of Protests in Thailand is Time for Accountability", *Amnesty International*, 5 December 2008 <<http://www.amnesty.org/en/news-and-updates/news/end-protests-thailand-time-accountability-20081205>> (21 January 2010).

⁴²⁸ "Political Persons of the Year 2008" (in Thai), *Thairat Daily News*, 30 December 2008.

⁴²⁹ Suchit Bunbongkarn, "Democracy and Rule of Law in Thailand: Judicialisation of Politics or Politicisation of the Judiciary", a speech delivered at Georgetown University Law Centre, 5 November 2009.

⁴³⁰ Duncan McCargo, "Thailand: State of Anxiety" in Daljit Singh and Tin Maung Maung Than (eds), *Southeast Asian Affairs 2008*, Institute of Southeast Asian Studies, Singapore, 2008, at 334.

⁴³¹ Nopadol Hengjareon, "The New Legal Precedent from the Rulings of the Constitutional Court" (in Thai) in Office of the Constitutional Court (ed), *10 Years of the Thai Constitutional Court: Towards a New Decade of Thai Legal State*, P Press, Bangkok, 2008, at 183-190.

the Constitution would now become alive in the Constitutional Court.⁴³² While it was argued that the Court has made virtually no contribution to human rights enforcement in some areas, several rulings have illustrated the progress the Court has made on issues of the constitutionality of laws and the protection of constitutional rights.⁴³³

The progress is reflected in the jurisdiction where the Court must ensure that any parliamentary act must be constitutional.⁴³⁴ This also includes the constitutionality of emergency royal decrees, bills and organic law bills.⁴³⁵ There are at least two significant implications of this jurisdiction which are positive to the rule of law development. The former is that the Court can guarantee that the legislature and the executive cannot abuse their power by enacting laws or royal decrees which are contrary to the Constitution. The latter is that fundamental rights are protected when the Court invalidates such laws or decrees. A number of judgments illustrated that the Court while asserting human rights, also ward off the power of the legislature and the executive.⁴³⁶

The classic example was the ruling on the *Names of Person Act* (1962) which was stated that married women shall use their husbands' surnames.⁴³⁷ The *Act* was alleged of containing the discriminatory clause against a person on the ground of the difference in sex and personal status.⁴³⁸ In supporting the

⁴³² Section 27 of the 2007 Constitution.

⁴³³ James R Klein, "The Battle for Rule of Law in Thailand: The Constitutional Court of Thailand" in Amara Raksasataya and James R Klein (eds), *The Constitutional Court of Thailand: The Provisions and the Working of the Court*, VJ Printing, Bangkok, 2003, at 45.

⁴³⁴ Asian Development Bank, *Law and Policy Reform at the Asian Development Bank*, Asian Development Bank, Manila, 2004, at 87.

⁴³⁵ Sections 141, 149, 154, 155, 211, 212, 245, and 257 of the 2007 Constitution.

⁴³⁶ Office of the Constitutional Court, *Annual Report 2008* (in Thai) <<http://www.constitutionalcourt.or.th/download/rp51.pdf>> (22 January 2010).

⁴³⁷ The Court held that the word 'shall use' in section 12 of the *Names of Person Act* (1962) bore the characteristics of a mandatory provision.

⁴³⁸ Section 30 of the 1997 Constitution stated "[a]ll persons are equal before the law and shall enjoy equal protection under the law. Men and women shall enjoy equal rights..."

provision of the *Act*, the Minister of Interior, being in charge of the *Act*, asserted that the *Act* provided a legal method which enhanced the strength of the family unit.⁴³⁹ This was dismissed by the Court on the grounds that such law was gender-discriminatory.⁴⁴⁰ The *Act* was announced unconstitutional and later amended by the *Names of Person Act (No. 3)* (2005) allowing married women to choose either their maiden names or their husbands' surnames.⁴⁴¹

The rights of the parties in court proceedings were also guaranteed by the Constitutional Court. The Court held that the any judge not sitting at the hearing of a case should not give judgment of such case except for unavoidable necessity as provided by law. The *Organisation of the Military Courts Act* (1955) stated that the Provincial Military Court may conduct criminal proceedings but if a heavier sentence than that provided by law to be imposed, the Provincial Military Court had to refer the case to the Municipal Military Court.⁴⁴² The *Act* was ruled to be unconstitutional since the Municipal Military Court had not in any manner tried the case from the beginning and there were no provisions of law which provided for the exception of the case of unavoidable necessity.⁴⁴³

However, there are other precedents illustrating that the Constitutional Court remained conservative with reference to certain areas of human rights.⁴⁴⁴ These areas include the right of the disabled persons and freedom of religion. With regard to the right of the disabled, it was argued that the Constitutional

⁴³⁹ The Constitutional Court Ruling No. 21/2546 (2003).

⁴⁴⁰ The Office of Women's Affairs and Family Development, *Questionnaire to Governments on Implementation of the Beijing Platform for Action (1995) and the Outcome of the Twenty-Third Special Session of the General assembly* (2000) <<http://www.un.org/womenwatch/daw/Review/responses/THAILAND-English.pdf>> (4 October 2007).

⁴⁴¹ Section 6 of the *Names of Person Act (No. 3)* (2005).

⁴⁴² Section 19 of the *Organisation of the Military Courts Act* (1955).

⁴⁴³ The Constitutional Court Ruling No. 24/2546 (2003).

⁴⁴⁴ Andrew Harding, "A Turbulent Innovation: the Constitutional Court of Thailand, 1998-2006", a paper presented at the workshop on *New Courts in the Asia-Pacific Region*, University of Victoria, 13 July 2007.

Court has chosen a narrow interpretation and demonstrated a lack of interest in enforcing the rights of citizens mandated by the Constitution when those rights are infringed by law, rules or regulation.⁴⁴⁵ A spotlight was put on the Court when the Ombudsman petitioned to the Court on behalf of two lawyers who were rejected by the Courts of Justice to become judges because of their disabilities.

The Constitutional Court ruled in an eight to three decision that the *Act on Judicial Service of the Courts of Justice* (2000) prohibiting persons with disabilities from serving as judges did not violate the Constitution since the law must ensure that judges were individuals with optimum potential.⁴⁴⁶ The ruling articulated that being a judge required a good appearance to gain respect from the public.⁴⁴⁷ One of the presiding judges also referred to the prevalent cultural value of preference for non-disabled people.⁴⁴⁸ The majority did not believe that the *Act* contravened the principle of equality before the law.⁴⁴⁹ The ruling was widely criticised for the Court's failure to recognise that the *Act* was considered to constitute discrimination against persons with disabilities.⁴⁵⁰

The Court was further evaluated as traditionalist in the area of freedom of religion. The Court was asked to decide if a Buddhist monk could remain in his position as a member of a local authority. According to the *Municipal Council Act* (1952), a Buddhist priest, novice, monk or clergy should vacate

⁴⁴⁵ James R Klein, "The Battle for Rule of Law in Thailand: The Constitutional Court of Thailand" in Amara Raksasataya and James R Klein (eds), *The Constitutional Court of Thailand: The Provisions and the Working of the Court*, VJ Printing, Bangkok, 2003, at 45.

⁴⁴⁶ The Constitutional Court Ruling No. 16/2545 (2002).

⁴⁴⁷ The Constitutional Court Ruling No. 16/2545 (2002).

⁴⁴⁸ Kay Schriner, "Thailand Court Upholds Ban on Disabled Judges" (200) 13 *Disability World* <http://www.disabilityworld.org/04-05_02/gov/thailand.shtml> (20 January 2010).

⁴⁴⁹ Section 30 of the 1997 Constitution; Section 30 of the 2007 Constitution.

⁴⁵⁰ Wiriya Namsiripongpun, "The Implementation of the Provisions of the Convention on the Rights of Persons with Disabilities: The Case of Thailand", a paper distributed in *The Expert Group Meeting on the Harmonisation of National Legislations with the Convention on the Rights of Persons with Disabilities in Asia and the Pacific*, Bangkok, 8-10 June 2009.

office as a member of the Municipal Council Committee.⁴⁵¹ It was contended that the *Act* contravened the Constitution which recognised the liberty of a person to profess a religion, and observe religious precepts.⁴⁵² The Court ruled that the *Act* did not cause such a person to lose his liberty to profess in a religion but once such a person held the position of member of the Municipal Council Committee, he should be subject to the laws relation to capacity.⁴⁵³

In this regard, a person who was a Buddhist priest did not have the ability to perform the duties of a member of the Committee. Similar prohibitions which constituted causes for termination of the offices such as becoming a priest, novice, monk or clergy were also applied to the members of the House of Representatives and the Senate.⁴⁵⁴ Even though a scholar might see the Court being old-fashioned in interpreting freedom of religion, it will be difficult to see Thai people who are most Buddhist prefer having the monk sit in the meeting of the Municipal Committee to the temple.⁴⁵⁵ It could argue that the Court has made a reasonable attempt in interpreting constitutional rights.⁴⁵⁶

It cannot be denied that the rulings of the Constitutional Court have significant impact on the society and the political scene of the country.⁴⁵⁷ It is very much affirmed in the recent cases of the termination of the premiership of the Prime Ministers and the dissolution of political parties which were in

⁴⁵¹ Section 10(4) of the *Municipal Council Act* (1952).

⁴⁵² Section 38 of the 1997 Constitution.

⁴⁵³ The Constitutional Court Ruling No. 44/2542 (1999).

⁴⁵⁴ Sections 106(2), 109(3), 126(4), and 133(5) of the 1997 Constitution.

⁴⁵⁵ Andrew Harding, "A Turbulent Innovation: the Constitutional Court of Thailand, 1998-2006", a paper presented at the workshop *on New Courts in the Asia-Pacific Region*, University of Victoria, 13 July 2007.

⁴⁵⁶ Somkid Lertpaitoon and Kla Samuthawanich, "Protection of Rights and Freedom of the Public" (in Thai), a research report to the Constitutional Court, Democracy Development Learning Centre, Thammasat University, Bangkok, 2003, at 53.

⁴⁵⁷ Tom Ginsburg, "Constitutional Afterlife: The Continuing Impact of Thailand's Postpolitical Constitution" (2009) 7(1) *International Journal of Constitutional Law* 83, at 101.

the coalition government.⁴⁵⁸ However, if one looks closely to those judgments, one would realise that these judgments were delivered by the Constitutional Court under the new structure which came into force by the 2007 Constitution.⁴⁵⁹ The Constitutional Court at present consists of a President and other eight judges, rather than fourteen judges as required by the 1997 Constitution.

The substantive change is not, however, the number of the judges. The more constructive amendment the 2007 Constitution made with regard to the judges of the Constitutional Court is the alteration of their qualifications. Originally, the Court was composed of five judges from the Supreme Court of Justice, two judges from the Supreme Administrative Court, five qualified persons in the field of law, and three qualified persons in the field of political science.⁴⁶⁰ In effect, there were eight judges who did not have a judicial background and they might not be familiar with the writing style of the Court's judgment.⁴⁶¹ This was suspected because the Court's ruling were often criticised for being poorly drafted, lacking consistency and detailed reasoning.⁴⁶²

It was claimed that these non-career judges may not have written their own opinions as they may have relied on some other person to prepare their opinions.⁴⁶³ This allegation was based on several rulings including the case

⁴⁵⁸ Kong Hyun Lee, "Rapporteur Report for the Asian Constitutional Courts", a paper presented at the *World Conference on Constitutional Justice*, Cape Town, 23-24 January 2009.

⁴⁵⁹ Office of the Constitutional Court, "The Constitutional Court According to the 2007 Constitution" (in Thai), Office of the Constitutional Court (ed), *Constitutional Court and the Implementation to Its Mission According to the Rule of Law*, P Press, Bangkok, 2008, at 181.

⁴⁶⁰ Section 255 of the 1997 Constitution.

⁴⁶¹ Section 267 of the 1997 Constitution.

⁴⁶² Same Varayudej, "The Constitutional Court of Thailand: Its Role in Protecting the Rule of Law and Democracy", a paper presented at the 6th Asian Law Institute Conference on *Dynamics of Change in Asia*, University of Hong Kong, 29 May 2009, at 21.

⁴⁶³ Arpamong Kritawetin, "The Problem of the Qualification and the Selecting Process of the Judges of the Constitutional Court" (in Thai), a Master of Law thesis submitted to the Graduate Research School, Chulalongkorn University, Bangkok, 2002, at 106-158.

where Thaksin was accused of concealing the asset account.⁴⁶⁴ As a result, the Constitutional Court according to the 2007 Constitution consists of three judges from the Supreme Court of Justice, two judges from the Supreme Administrative Court, two qualified persons in law and two qualified persons in political science, public administration or social sciences.⁴⁶⁵ This change does not only reflect the problem of the judges' qualification.⁴⁶⁶ It also attempts to reduce the concern on the selection of the non-career judges.

In fact, there are a number of studies which identified the disadvantage of having non-career judges as a majority of the Constitutional Court.⁴⁶⁷ The disadvantage was not limited to the question of their proficiency. The concern over the selection process was also raised as a major weakness of the Court.⁴⁶⁸ Originally, there was a Selection Committee assigned to select those qualified persons and submit a list of nominated persons to the Senate.⁴⁶⁹ Many criticised that the Committee might not be independent enough since it was partly composed of representatives of all political parties.⁴⁷⁰ This composition is totally removed by the 2007 Constitution.⁴⁷¹ Correspondingly, this is expected to also assure the judicial independence of the Constitutional Court.

If the Court is to be judged on its independence, James Klein believed that the general public have perceived the Court to have made its decisions without undue political interference except in the small number of cases involving

⁴⁶⁴ "Ghost-written Verdicts Claim", *Bangkok Post*, 21 August 2001.

⁴⁶⁵ Section 204 of the 2007 Constitution.

⁴⁶⁶ Office of the Secretariat of the Senate, *Development of Independent Organisation in Thailand: The Case of Constitutional Court* (in Thai), Office of the Secretariat of the Senate, Bangkok, 2007, at 56.

⁴⁶⁷ For example, Jukkrit Sathapanasiri, "Review of Constitutionality of Court Judgment" (in Thai), a Master of Law thesis submitted to the Graduate Research School, Chulalongkorn University, Bangkok, 2005, at 196-199.

⁴⁶⁸ Wiruch Wiruchnipawan, *Management Administration and Development Administration of Organs under the Constitution* (in Thai), Nititham, Bangkok, 2005, at 109.

⁴⁶⁹ Section 257 of the 1997 Constitution.

⁴⁷⁰ Ruthai Hongasiri, "The Constitutional Court and Political Reform in Thailand" (in Thai), a paper presented at King Prajadhipok Congress I on *Politics, Administration and Change in Thai Society at the Outset of Next Century*, Chonburi, 10-12 December 2000.

⁴⁷¹ Section 206 of the 2007 Constitution.

prominent politicians.⁴⁷² While some ruling in certain areas of human rights might also be criticised, the Court has made a satisfactory progress in invalidating the laws that were contrary to the rights protected by the Constitution. As a result, during the political turmoil in 2006, the Court still gained the most public confidence in exercising their judicial review.⁴⁷³ With the new composition, it is hoped that the Court can maintain the high level of trust and continue to play a significant role in strengthening the rule of law.⁴⁷⁴

3.3.3 Administrative Courts

The Administrative Courts were established by the 1997 Constitution.⁴⁷⁵ The Administrative Courts consist of two tiers: the Supreme Administrative Court in Bangkok and several Administrative Courts of First Instance which include a Central Administrative Court in Bangkok and seven regional Administrative Courts in major provinces.⁴⁷⁶ The Courts have jurisdiction over: (i) disputes *between* a private sector or individual *and* state agencies, local government organisations, or state officials who are under government supervision (ii) disputes *between* state agencies, local government organisations, or state officials who are under government supervision.⁴⁷⁷ In sum, the jurisdiction concerns the issue of the abuse of power by these state agencies.⁴⁷⁸

⁴⁷² James R Klein, "The Battle for Rule of Law in Thailand: The Constitutional Court of Thailand" in Amara Raksataya and James R Klein (eds), *The Constitutional Court of Thailand: The Provisions and the Working of the Court*, VJ Printing, Bangkok, 2003, at 77.

⁴⁷³ "The Public Confidence in the Constitutional Court" (in Thai)

<<http://www.constitutionalcourt.or.th/download/infordocument/article6.pdf>> (21 January 2010).

⁴⁷⁴ Office of the Constitutional Court, *Annual Report 2008* (in Thai)

<<http://www.constitutionalcourt.or.th/download/rp51.pdf>> (22 January 2010).

⁴⁷⁵ Chapter VIII, Part IV of the 1997 Constitution.

⁴⁷⁶ Section 7 of the *Act on Establishment of Administrative Court and Administrative Court Procedure* (1999).

⁴⁷⁷ Section 276 of the 1997 Constitution.

⁴⁷⁸ Institute of Developing Economies, "The Judicial System in Thailand: An Outlook for a New Century", *IDE Asian Law Series* No. 6, Japan, 2001, at 13.

Prior to the establishment of the Administrative Courts, Thai citizens had no appropriate recourse to seek legal redress against their government.⁴⁷⁹ Those aggrieved by any injury in consequence of actions of administrative agencies or state officials could have their grievance remedied through a dichotomy of channels. This could be done either through litigation before the Courts of Justice or lodging a petition to the Petition Committee, a department in the Council of State.⁴⁸⁰ The obstacle with the second path was that the Petition Committee could not enforce its decision. It was the Prime Minister who could endorse or reject the Petition Committee's opinion.⁴⁸¹ In a political case, the injured party may be immensely discouraged to rely upon the Committee.

When the 1997 Constitution came into force, disputes which arise from the exercise of power of an administrative agency were transferred to the Administrative Courts.⁴⁸² This was a positive step to ensure that the administrative disputes were going to be tried and adjudicated by an independent and competent judiciary rather than the Prime Minister who holds an executive position. It is in line with the checks and balances system.⁴⁸³ Since the nature of administrative disputes involves the exercise of the executive and administrative power, the Administrative Courts are regarded as a proper institution in investigating the use of executive power

⁴⁷⁹ Asian Development Bank, *Law and Policy Reform at the Asian Development Bank*, Asian Development Bank, Manila, 2004, at 87.

⁴⁸⁰ Bhokin Bhalakula, *Execution in Administrative Cases*, the Administrative Courts <http://www.admincourt.go.th/amc_eng/06-ARTICLE/law_execution_eng.pdf> (21 January 2010), at 1.

⁴⁸¹ Bhokin Bhalakula, *Pridi and the Administrative Court*, the Administrative Courts <http://www.admincourt.go.th/amc_eng/06-ARTICLE/pridi_eng.pdf> (29 January 2010), at 27-28.

⁴⁸² Ackaratorn Chularat, *The View of the President of the Supreme Administrative Court on the Existing Important Issues in the Understanding of the Role and Mission of the Administrative Court during the Past Three Years since the Establishment of the Administrative Court*, the Administrative Courts <http://www.admincourt.go.th/amc_eng/06-ARTICLE/3year_edited.pdf> (30 January 2010), at 8.

⁴⁸³ Ackaratorn Chularat, *The View of the President of the Supreme Administrative Court on the Existing Important Issues in the Understanding of the Role and Mission of the Administrative Court during the Past Three Years since the Establishment of the Administrative Court*, the Administrative Courts <http://www.admincourt.go.th/amc_eng/06-ARTICLE/3year_edited.pdf> (30 January 2010), at 3.

and thus upholding the rule of law.⁴⁸⁴ The evidence of this can be seen in a number of key decisions since its founding in 2001.⁴⁸⁵

The decisions of the Administrative Courts are not under the spotlight like those of the Constitutional Court. Perhaps this is because the Administrative Courts' decisions do not straightforwardly strike corrupt politicians out of their executive positions. Yet, the Administrative Courts have managed to strengthen the concept of limited government in many ways. The Courts' rulings where they are applicable also have compensated those injured parties who suffered from the wrongful acts of a state official or a state organ.⁴⁸⁶ The claim for compensation for a wrongful act of a state official covers the performance of duties both by the physical action and by the exercise of power.⁴⁸⁷

In the past, the filing of a case relating to a wrongful act was lodged with the Courts of Justice and governed by the principles in the Civil and Commercial Code.⁴⁸⁸ This created another obstacle if the injured party would like to go down this path. Clearly, the Civil and Commercial Code was not appropriate law for the administrative disputes. When the Administrative Courts are empowered to try a case on a wrongful act, they apply public law principles and administrative procedural law to create a proper venue for the aggrieved person to claim for the compensation from the state agency. This was agreed by the victims of cobalt radiation leak.⁴⁸⁹ They were compensated by the

⁴⁸⁴ Peter Leyland, "Administrative Justice in Thailand" in Tom Ginsburg and Albert H Y Chen (eds), *Administrative Law and Governance in Asia*, Routledge, New York, 2009, at 238.

⁴⁸⁵ Ackaratorn Chularat, *Until It Became the Administrative Courts* (in Thai), the Administrative Courts, Bangkok, 2006, at (5).

⁴⁸⁶ Ampone Charoencheewin, *The Claim on Compensation for a Wrongful Act of a State Official against a Private Individual*, the Administrative Courts <http://www.admncourt.go.th/amc_eng/06-ARTICLE/the_claim.pdf> (22 January 2010).

⁴⁸⁷ *The Act on Liability for Wrongful Act of Officials* (1996).

⁴⁸⁸ Ruthai Hongsir, *Filing of a Case on a Wrongful Act with the Administrative Court*, the Administrative Courts <http://www.admncourt.go.th/amc_eng/06-ARTICLE/Filing_of_a_case.pdf> (29 January 2010).

⁴⁸⁹ Central Administrative Court Ruling No. 1820/2545 (2002).

Office of Atomic Energy for Peace when the Office was found negligent in supervising the safe storage of cobalt. The victims also initiated the claim in the Civil Court but failed to receive the same result as provided by the Administrative Courts.⁴⁹⁰

More importantly, in the case where the state administration could imminently and vastly damage the public health, the Administrative Courts tend to be more critical of the decisions of the state organs. In 2009, the Supreme Administrative Court suspended the industrial projects in Map Ta Phut industrial estate in the eastern province of Thailand.⁴⁹¹ The local residents were concerned that the Industrial Estate Authority and several involved ministers failed to properly issue operating licence to the developers.⁴⁹² While such a licence would benefit investors doing business in the pollution control zone, it was issued without the study of environmental and health impact which was a procedure prescribed in the 2007 Constitution.⁴⁹³

Where the licence or the concession is issued without fulfilling the legal requirement, the Administrative Courts may straightforwardly revoke such licence or concession.⁴⁹⁴ As it is generally agreed among scholars, a revocation of an order of an administrative agency in whole or part is one of the most important aspects of grievance machinery which provides effective redress in judicial review proceedings.⁴⁹⁵ In 2004, the Chiang Mai Provincial Administrative Court was called upon to investigate if the Local Administration Department legally removed the citizenship of twelve hundred and forty-three villagers in Mae Ai, a district in Chiang Mai, the northern

⁴⁹⁰ "Radiation Victims Lose Compensation", *Bangkok Post*, 21 October 2009.

⁴⁹¹ "Court Suspends 76 Projects in Map Ta Phut Industrial Estate", *MCOT*, 29 September 2009.

⁴⁹² "Amata Upbeat on Map Ta Phut Ruling", *Bangkok Post*, 3 December 2009.

⁴⁹³ The Supreme Administrative Court Ruling No. 586/2552 (2009).

⁴⁹⁴ The Khon Kaen Administrative Court Ruling No. 218/2545 (2002)

⁴⁹⁵ Carol Harlow and Richard Rawlings, *Law and Administration*, 2nd ed, Butterworths, London, 1997, at 560.

province of Thailand. Their Thai nationality was removed when a new district officer found that they lack proof of their birth or origin.⁴⁹⁶

The proof of the villagers' identity was destroyed by the fire in the district office during 1976.⁴⁹⁷ Yet the new officer revoked the villagers' identity cards and registration documents. The villagers were cut all the benefits that a Thai citizen should receive such as government health care scheme, social security, or public education.⁴⁹⁸ Without being given any opportunity to contest the order of the officer, the Court found that the officer's order amounted to unlawful use of discretionary powers.⁴⁹⁹ The Court instructed the order to be revoked.⁵⁰⁰ The villagers' citizenship was restored for the villagers. From the time of this incident in 2004, public confidence in the Administrative Courts has been on the rise. It was 75.3 % in 2005, 84.6% in 2006 and 87.9% in 2007.⁵⁰¹

The effectiveness of the Court's remedy sometimes results in the change of other courts' rulings. As previously discussed, the two disabled lawyers were rejected to become judges in the Courts of Justice. The Constitutional Court ruled earlier in 2002 that the *Act on Judicial Service of the Courts of Justice* (2000) prohibiting persons with disabilities from serving as judges did not violate the Constitution. The same applicant later applied to be a public prosecutor and

⁴⁹⁶ Supara Janchitfah, "Thai Smiles Returning in Mai Ai", The Human Rights Sub-Committee on Ethnic Minorities, Stateless, Migrant Workers and Displaced Persons, The Lawyers Council of Thailand <<http://www.statelessperson.com/www/?q=node/650>> (29 January 2010).

⁴⁹⁷ Lawyers Council of Thailand and Asian legal Resource Centre, "Human Rights Judgments under the 1997 Constitution of Thailand" (2007) 6(3) *Article 2* 1, at 26.

⁴⁹⁸ Andrew Harding, "Buddhism, Human Rights and Constitutional Reform in Thailand" (2007) 2(1) *Asian Journal of Comparative Law* 1, at 10.

⁴⁹⁹ The Supreme Administrative Court Ruling No. 117/2548 (2005).

⁵⁰⁰ Nattha Keenapan, "The Stateless Classroom", UNICEF Thailand <http://www.unicef.org/thailand/reallives_10445.html> (2 February 2010).

⁵⁰¹ Policy and Planning Bureau, *Strategic Plan of the Administrative Courts (Volume 2) 2008-2011* (in Thai), Chulalongkorn University Press, Bangkok, 2007, at 140.

he was rejected by the Public Prosecution Commission on the same ground.⁵⁰² Rather than petition the Constitutional Court the second time, the applicant complained to the Administrative Court that the Commission's decision discriminated against the disabled.

The Supreme Administrative Court in 2005 ruled in the applicant's favour. The Court noted that he had been able to work as a lawyer for five years without obstacle, and that the work of a public prosecutor was no different.⁵⁰³ The Court found it to be an illegal discretionary act that the Public Prosecution Commission had not explained what physical handicaps that would be deemed to hinder the capacity of an applicant to do the job of a prosecutor.⁵⁰⁴ In effect, the Administrative Court's decision overturned the earlier decision of the Constitutional Court. At the same time, the Administrative Court created a precedent for any state organ to be more precise when exercising their discretion concerning equality before the law.⁵⁰⁵

Some of the Administrative Courts' decisions, while endorsing basic rights of the citizen, also uphold the concept of limit government.⁵⁰⁶ In 2005, the Court had to decide if the Anti-Money Laundering Office abused its power in investigating the financial transactions of the journalists who were critical of Thaksin administration. The Office has an oversight function to conduct an investigation and take action to prevent offenders from enjoying the proceeds of their corrupt activities.⁵⁰⁷ The Prime Minister is in charge of the

⁵⁰² Somchai Jarujinda, "The Rulings of the Supreme Administrative Courts which Create the Precedent in Improving the State Administration" (in Thai) (2009) *Journal of Administrative Court* (Special Volume), at 382-383.

⁵⁰³ The Supreme Administrative Court Ruling No. 142/2547 (2005).

⁵⁰⁴ Lawyers Council of Thailand and Asian legal Resource Centre, "Human Rights Judgments under the 1997 Constitution of Thailand" (2007) 6(3) *Article 2* 1, at 24-25.

⁵⁰⁵ The Central Administrative Court Ruling No. 54/2541 (1998).

⁵⁰⁶ Pisit Polrakkhet, *Administrative Cases Which Closely Concern You* (in Thai), Winyuchon, Bangkok, 2003, at 11, 45, and 123.

⁵⁰⁷ Section 5 of the *Anti-Money Laundering Act* (1999).

enforcement of the Office and has power to appoint its officials.⁵⁰⁸ It seemed too coincidental that the journalists who were critical of the Prime Minister at that time were investigated by the Office.⁵⁰⁹

In the decision of the Central Administrative Court, it was held that the Office had acted unlawfully by inquiring into the bank transactions of the journalists.⁵¹⁰ The Court reiterated that it was illegitimate to collect information on the private bank accounts of ordinary citizens.⁵¹¹ It was a clear breach of privacy right. Further investigations into other journalists' private transactions by the Anti-Money Laundering Office were also suspended by the Court's injunction.⁵¹² It is apparent that the decisions of the Administrative Courts have produced a positive correlation to the concept of limit government. Inevitably, these decisions have occasionally put the Administrative Courts under scrutiny of the state agencies.⁵¹³

It appears that a number of the rulings of the Administrative Courts have helped limit the discretionary power of the government and other state agencies. These rulings also occasionally have political implications. As discussed earlier in the case between the journalists and the Anti-Money Laundering Office, the investigation by the Office was instigated because the journalists were probing Thaksin's government. Similar political implications were arguably found in at least two controversial rulings: (i) the privatisation of the Electricity Generation Authority of Thailand ("EGAT") and, (ii) the

⁵⁰⁸ Section 4 of the *Anti-Money Laundering Act* (1999).

⁵⁰⁹ Duncan McCargo, "Democracy under Stress in Thaksin's Thailand" (2002) 13(4) *Journal of Democracy* 112, at 121-122.

⁵¹⁰ The Central Administrative Court Ruling No. 216/2548 (2005).

⁵¹¹ Lawyers Council of Thailand and Asian legal Resource Centre, "Human Rights Judgments under the 1997 Constitution of Thailand" (2007) 6(3) *Article 2* 1, at 27-28.

⁵¹² "Attacks on the Press 2002: Thailand", *Committee to Protect Journalists* <<http://cpj.org/2003/03/attacks-on-the-press-2002-thailand.php>> (2 February 2010).

⁵¹³ Khien Theeravit, *Judicialisation of Political Crisis in Thailand*, Thai World Affairs Centre, Institute of Asian Studies, Chulalongkorn University, Bangkok <http://www.thaiworld.org/en/include/print.php?text=878&category_id=3&print=true> (28 December 2009).

expansion of Asian Satellite Television station (“ASTV”). Both cases were connected with the administration of the ex Prime Minister Thaksin.

In 2005, Thaksin government was proposing to privatise EGAT while the consumer organisations and the union groups raised the concern of the transparency of the process.⁵¹⁴ The privatisation of EGAT was part of the exchange for the International Monetary Fund bailout package to help the Thai economy overcome the financial crisis. The early privatisation of public enterprises including petroleum, airport, or telecommunications was successful with less criticism.⁵¹⁵ Yet, the privatisation of EGAT was strongly resisted as the end users would pay considerably more while giving disproportionate financial rewards to a group of investors, including a group of politicians who stood to gain directly from the privatisation.⁵¹⁶

Opponents of EGAT’s privatisation had joined the “yellow shirts” forming the larger protest against Thaksin. When the Supreme Administrative Court nullified two royal decrees calling for privatisation of EGAT, the Court’s decision was praised as a national turning point against the corrupt practices of the Thaksin government.⁵¹⁷ The Court’s President was named “Person of the Year” in 2005 as a symbol of the Constitution’s checks and balances system.⁵¹⁸ The Court’s ruling has brought the public genuine belief that there remains at least one independent organisation in the country.⁵¹⁹ The ruling

⁵¹⁴ Patcharin Areewong, “EGAT Tense as Administrative Court Reaches Verdict”, *National News Bureau of Thailand*, 23 March 2006.

⁵¹⁵ Violeta Perez-Corral, “Energy Privatisation in Thailand- The Final Curtain?” *Public Services International* <<http://www.world-psi.org/Template.cfm?Section=Home&CONTENTID=23357&TEMPLATE=/ContentManagement/ContentDisplay.cfm>> (2 February 2010).

⁵¹⁶ Peter Leyland, “Droit Administratif Thai Style: A Comparative Analysis of the Administrative Courts in Thailand” (2006) 8 *Asian Law* 121, at 142.

⁵¹⁷ “High Court in Thailand Nullifies EGAT Privatisation”, 3 April 2006 <<http://www.icem.org/en/78-ICEM-InBrief/1742-High-Court-in-Thailand-Nullifies-EGAT-Privatisation>> (2 February 2010).

⁵¹⁸ Michael H Nelson, “Thailand and Thaksin Shinawatra: From Election Triumph to Political Decline” (2005) 4(2) *Eastasia*. At 1, at 7.

⁵¹⁹ Nantiya Tangwisutijit, “Royal Decrees Revoked”, *The Nation*, 24 March 2006.

also served as evidence that a minimum requirement of the rule of law, an independent judiciary, does exist in Thailand.

When Samak Sundaravej took the premiership in 2007, the “yellow shirts” continued their demonstration against his government. As Samak formed the People Power Party from the ruins of Thaksin’s Thai Rak Thai Party and made no secret of his support towards Thaksin, those who were against Thaksin became those who were against Samak.⁵²⁰ Samak’s cabinet were made up largely of members of the old Thai Rak Thai Party. The anti-Thaksin lobby wanted Samak out of office. They were using ASTV, a cable television station as an alternative media to build the network across the grassroots, middle class and elite segments of society.⁵²¹ But for Samak, ASTV propagandised people to join the protest and that contributed to chaos in the country.⁵²²

To little surprise, ASTV was ordered to stop its broadcast by the Public Relations Department. In the order, the Department informed ASTV that its program had used the language that could be perceived as offensive to the monarch and to state officers as well as the government. The Department also accused ASTV of operating without a broadcasting licence. The order was revoked by the Central Administrative Court. The Department had made a false accusation.⁵²³ It was the Court which prevented arbitrary power of the state organ and at the same time, provided the protection for the right of expression. The ruling also encouraged people to speak out and move away from the mainstream media which is controlled by the government.⁵²⁴

⁵²⁰ “Obituary: Samak Sundaravej”, *BBC News*, 12 September 2008.

⁵²¹ Palphol Rodloytut, “Evolution of People’s TV in Thailand: The PAD Experiment”, *Alternative Media Portal* <<http://www.amicaltmedia.net/research.php?pid=30>> (4 February 2010).

⁵²² “PM Says Administrative Court Has No Power to Stop ASTV from Broadcasting”, *National News Bureau of Thailand*, 31 August 2008.

⁵²³ Mongkol Bangprapa, “Thailand: Court Revokes PRD Order to Cut ASTV Transmissions”, *Bangkok Post*, 1 February 2008.

⁵²⁴ Glen Lewis, “Thai Media and the Thaksin Ork Pai (Get out!) Movement” in Krishna Sen and Terence Lee (eds), *Political Regimes and the Media in Asia*, Routledge, New York, 2008, at 136.

For the Thai people, the establishment of the Administrative Courts was a step forward in securing the place of the rule of law. The survey found that most people were highly satisfied with the Courts' operations and their work performance of the Courts.⁵²⁵ Yet, the Courts admit that there are certain weaknesses that they must overcome to be fully competent in dealing with administrative disputes. One of the disadvantages is the qualification of the judges in the Administrative Courts. Unlike the judges in the Courts of Justice, the judges in the Administrative Courts may not have a law degree. They could be qualified in the fields of political science, public administration, economics and social science.⁵²⁶

This raises the same problem as it was found in the Constitutional Court context. A justice without a law degree may be unfamiliar with the legal pattern, analytical thinking and the writing style of judgments. Despite recruiting judges from various fields of qualification, the number of judges is not sufficient to handle the rising administrative disputes. In 2001, there were almost six thousand cases filed at the Administrative Courts. By the end of 2006, there were fourteen thousand two hundred and ninety-six cases which were in the Courts' jurisdiction. Five thousand five hundred and seventy-two cases were decided in 2006. This means that only thirty-nine per cent of the cases were completed.⁵²⁷ It was clear that the small number of the judges were inadequate to deal with the increase of the cases.

⁵²⁵ Thawanrat Woratheppudhipong, "The Rule of Law" in King Prajadhipok's Institute (ed), *Monitoring the Pulse of the Nation: Indicators of Democratisation of Good Governance in Thailand 2005-2007*, Bangkok, 2007, at 61.

⁵²⁶ Section 13 of the *Act on Establishment of Administrative Court and Administrative Court Procedure* (1999).

⁵²⁷ Policy and Planning Bureau, *Strategic Plan of the Administrative Courts (Volume 2) 2008-2011* (in Thai), Chulalongkorn University Press, Bangkok, 2007, at 142.

Lack of qualified judges is not only problem the Courts encounter. The Courts also faces the same problem in recruiting qualified administrative staff.⁵²⁸ In the *Strategic Plan of the Administrative Courts (2008-2011)*, it was pointed out that the Courts found that their staff tended to transfer their position to other organisations.⁵²⁹ A number of the reasons were identified including the low income and the insufficiency of the welfare. Originally, there will be sixteen Regional Administrative Courts around Thailand.⁵³⁰ It appears that the lack of courts' staff could be a reason as to why there are only seven Regional Administrative Courts at present.⁵³¹ Needless to say, it could also be a reason for the overloaded number of cases each year.

Unlike the staffing and the budgetary structure of the Courts of Justice, the budgets and the staff of the Administrative Courts are restricted by the executive branch. According to the *Act on Establishment of Administrative Court and Administrative Court Procedure* (1999), the number of the judges of the Administrative Courts must be approved by the House of Representatives as well as the Senate.⁵³² To overcome the staffing and the budgetary problems, the Administrative Courts have focused their policy on increasing the efficiency and the effectiveness of their current staff. The extensive plan was laid out in their *Strategic Plan of the Administrative Courts (2008-2011)*.⁵³³ If the *Plan* is successful, the Courts will be more competent in handling those cases where state officials abuse their power.

⁵²⁸ King Prajadhipok's Institute, *Monitoring and Assessing the Operations of Independent Public Agencies* (in Thai), Siriroj Karn Pim, Bangkok, 2005, at 29.

⁵²⁹ Policy and Planning Bureau, *Strategic Plan of the Administrative Courts (Volume 2) 2008-2011* (in Thai), Chulalongkorn University Press, Bangkok, 2007, at 143.

⁵³⁰ Asian Development Bank, *Law and Policy Reform at the Asian Development Bank*, Asian Development Bank, Manila, 2004, at 88.

⁵³¹ "The Administrative Courts of First Instances" <http://www.admncourt.go.th/amc_eng/01-COURT/structure/first.htm> (13 February 2010).

⁵³² Sections 12 and 17 of the *Act on Establishment of Administrative Court and Administrative Court Procedure* (1999).

⁵³³ Policy and Planning Bureau, *Strategic Plan of the Administrative Courts (Volume 2) 2008-2011* (in Thai), Chulalongkorn University Press, Bangkok, 2007.

3.3.4 Performance of the Thai judiciary

To a limited extent, public opinion towards the performance of an institution could be an indicator demonstrating how well such institution carries out its duty. In recent years, the three main courts: the Courts of Justice, the Constitutional Court and the Administrative Courts have achieved a high level of trust and satisfaction for their performance. This is even so, considering that the Constitutional Court and the Administrative Courts are relatively new institutions. They were officially established by the 1997 Constitution. Yet, they soon gain respectability in Thai society. The high level of public trust is also reflected in the expansion of the courts' duties and their jurisdictions. Unfortunately, judicial independence and impartiality have been put into question at times.

Political corruption is one of the most serious diseases in Thai society. As highly regarded as the most trustworthy institution, the courts are called upon to tackle political corruption. However, people in Thailand are so divided over their political ideas. The courts' judgments are inevitably criticised. Where the decisions involved high profile politicians, the judges were not only verbally but also physically abused. At times, political interference has been raised to question the judges' integrity. Judges of the Constitutional Court seem to face more of such criticism than judges of the Administrative Courts and the Courts of Justice. Simply, this is because the Constitutional Court has a specific power to directly get rid of corrupt politicians from the Parliament.

As a result, the selection of judges for the Constitutional Court was the subject of criticism and the change to such selection was made by the 2007 Constitution. The Courts of Justice and the Administrative Courts also face the problems of judicial recruitment. With the increase of cases, lack of qualified judges is becoming more of a serious problem. Against all the odds,

many surveys show that the judiciary remains at the top of the independent institutions. The more recent rulings from the three courts have proved that the judiciary is one of the main mechanisms in upholding the rule of law in Thailand. It is hoped that these key decisions will set a precedent for the behaviour of government and corrupt politicians for so many years to come.

3.4 OTHER INDEPENDENT INSTITUTIONS

The 1997 Constitution established and re-shaped a number of independent institutions in Thailand. After the 2006 military coup, the jurisdiction of these institutions was re-affirmed under Chapter XI of the 2007 Constitution. Apart from their constitutional requirements, the institutions are governed by separate statute law and regulation. Each institution remains as an executive branch agency that exists and functions outside the Cabinet Ministries of Thailand. The institutions perform a pivotal role as constitutional oversight bodies. Their main objectives are to provide a basis for a stable government, reduce corruption and protect human rights. In many ways, the institutions also preserve and promote democracy and the rule of law in Thailand.

In the past, each institution has been active in exercising its authority. However, some institutions have exercised authority better than others. Lack of funding, malpractice and corruption are the core reasons for this. While there are many other factors which undermine the institutions themselves, it is submitted that they do generally perform well in carrying out their duties. This is shown below from the evaluation of the Election Commission, the National Anti-Corruption Commission, the Office of the Auditor General, the National Human Rights Commission and the Ombudsman.⁵³⁴ These institutions have been chosen for the discussion about the rule of law because their main function is to guarantee that the government will not abuse its

⁵³⁴ Other constitutional institutions such as the Anti-Money Laundering Office, the National Economic and Social Council and the Public Prosecutor are not discussed.

power. Each institution has a rigorous selection process to secure independence and has been provided with formable powers, which they exercise often.

3.4.1 Election Commission

The Election Commission (“EC”) was established in 1998 under the *Organic Act on the Election Commission* (1998). The EC was recently repealed by the *Organic Act on the Election Commission* (2007) (“EC Organic Act”).⁵³⁵ The EC is an agency responsible for the control of all elections and referenda in Thailand.⁵³⁶ At present, the EC consists of a Chairman and four other Commissioners.⁵³⁷ The Chairman of the EC has charge and control of the execution of the *EC Organic Act* (2007).⁵³⁸ Each Commissioner acts independently and serves a term of seven years in office and cannot be reappointed.⁵³⁹ Prior to appointment, each Commissioner must submit to the National Anti-Corruption Commission an account of their assets and liabilities.⁵⁴⁰ All appointments are made by the King at the advice of the Senate via a rigorous selection process.⁵⁴¹

The EC has the pivotal role of ensuring that elections in Thailand are conducted in an honest and fair manner.⁵⁴² The EC has a duty to determine *all* activities necessary for the execution of the organic law on any election or referenda in Thailand.⁵⁴³ This includes a duty to determine an electorate for each election on a constituency basis and to provide a roll of voters.⁵⁴⁴ The purpose of this is to reduce the likeliness of gerrymander and rigged voting.

⁵³⁵ Section 3 of the *EC Organic Act* (2007).

⁵³⁶ Section 235 of the 2007 Constitution.

⁵³⁷ Section 229 of the 2007 Constitution.

⁵³⁸ Section 5 of the *EC Organic Act* (2007).

⁵³⁹ Section 232 of the 2007 Constitution.

⁵⁴⁰ Section 7 of the *EC Organic Act* (2007).

⁵⁴¹ Section 229 of the 2007 Constitution.

⁵⁴² Section 10(1) of the *EC Organic Act* (2007).

⁵⁴³ Section 10(2) of the *EC Organic Act* (2007).

⁵⁴⁴ Section 10(9) of the *EC Organic Act* (2007).

The EC also has a duty to provide information and education to the public on the democratic process of elections and the regime of the government.⁵⁴⁵ It performs this duty in conjunction with other state agencies and private organisations.

In order to carry out its duties, the EC has been granted formidable investigative and enforcement powers.⁵⁴⁶ First, the EC has the power to conduct and control an election and referenda in Thailand.⁵⁴⁷ This includes the power to determine the amount of expenditure per candidate and for each party at elections.⁵⁴⁸ If these limits are not complied with, the EC has the power to seize cash and/or property belonging to the candidate or party. Secondly, the EC has the power to investigate and conduct an inquiry for fact-finding where an objection is lodged or where there appears to be a violation of election laws.⁵⁴⁹ If the EC determines that a candidate has violated election law, it can revoke the candidate's right to stand for election for up to one year.⁵⁵⁰

Thirdly, if the leader or an executive member of a political party has known of its candidate's act which violates election laws and the leader or an executive member fails to prevent or rectify it, the EC can submit the case to the Constitutional Court to have the party dissolved.⁵⁵¹ Fourthly, the EC has the power to nullify the outcome of an election or referendum if there is a violation of election laws.⁵⁵² In such cases, the EC can also order a new

⁵⁴⁵ Section 10(14) of the *EC Organic Act* (2007); Section 236(8) of the 2007 Constitution.

⁵⁴⁶ Suthep Loonlar, "The Control of the Election Commission's Power" (in Thai) (2006) 62(2) *Journal of the Thai Bar* 154, at 156.

⁵⁴⁷ Section 236 of the 2007 Constitution.

⁵⁴⁸ Section 236(3) of the 2007 Constitution.

⁵⁴⁹ Section 10(10) of the *EC Organic Act* (2007); Section 236(5) of the 2007 Constitution.

⁵⁵⁰ Section 103 of the *Organic Act on Election of Members of the House of Representatives and the Taking of Office of Senators* (2007); Section 237 of the 2007 Constitution.

⁵⁵¹ Section 103 of the *Organic Act on Election of Members of the House of Representatives and the Taking of Office of Senators* (2007); Section 237 of the 2007 Constitution.

⁵⁵² Section 239 of the 2007 Constitution.

election or new voting at a referendum.⁵⁵³ It also has the power to order a re-counting of votes if it suspects that vote-counting was not conducted in an honest and fair manner.⁵⁵⁴ Any person who obstructs the EC from performing its duties under the *EC Organic Act* (2007) is liable to imprisonment for a term up to one year or a fine of twenty thousand baht.⁵⁵⁵

Despite the EC's formidable powers, violations of election laws are evident in Thailand.⁵⁵⁶ In the elections for the Senate held in March 2000, the EC disqualified seventy-eight out of the original two hundred candidates.⁵⁵⁷ Manipulation of ballot sheets and voter registers was widespread as well as unprecedented levels of rigged vote counting. In only fifteen of the seventy-six provinces were no irregularities reported.⁵⁵⁸ In some provinces, violations of the election law affected the result so heavily that the EC suspended the result completely or partially. As a result, the EC called for re-elections in thirty-five constituencies. The entire re-election process for the Senate occurred over five separate rounds and took over five months to complete.⁵⁵⁹

The elections for the House of Representatives in 2001 encountered similar problems. The EC had ordered re-elections in sixty-two constituencies.⁵⁶⁰ Vote buying and electoral manipulation appeared more rampant than ever.⁵⁶¹

⁵⁵³ Section 10(12) of the *EC Organic Act* (2007); Section 236(6) of the 2007 Constitution.

⁵⁵⁴ Section 10(12) of the *EC Organic Act* (2007).

⁵⁵⁵ Section 43 of the *EC Organic Act* (2007).

⁵⁵⁶ Warakorn Chawala, "The Election Commission of Thai Society" (in Thai) (2006) 62(2) *Journal of the Thai Bar* 203, at 219.

⁵⁵⁷ Duncan McCargo, "Democracy under Stress in Thaksin's Thailand" (2002) 13(4) *Journal of Democracy* 112, at 117.

⁵⁵⁸ Aurel Croissant and Jörn Dosch, "Parliamentary Elections in Thailand, March 2000 and January 2001" (2003) 22(1) *Electoral Studies* 153, at 156.

⁵⁵⁹ Orathai Kokpol, "Electoral Politics in Thailand" in Aurel Croissant, Marei Johns, and Gabriele Bruns (eds), *Electoral Politics in Southeast and East Asia*, Friedrich Ebert Stiftung, Singapore FES, 2000, at 291.

⁵⁶⁰ Aurel Croissant and Jörn Dosch, "Parliamentary Elections in Thailand, March 2000 and January 2001" (2003) 22(1) *Electoral Studies* 153, at 157.

⁵⁶¹ Duncan McCargo, "Thailand's 2001 General Elections: Vindicating Reform" in Duncan McCargo (ed), *Reforming Thai Politics*, Nordic Institute of Asian Studies, Copenhagen, 2002, at 247-259.

Some commentators have noted that buying of votes was unprecedented.⁵⁶² The Thai Rak Thai Party appeared to be at the head of the bribery.⁵⁶³ The Thai Rak Thai Party was offering three-hundred baht per vote. This constituted one hundred baht more than any other party. It could be said that the Thai Rak Thai Party succeeded against its opposition by “outspending it”. It has been estimated that some ten billion baht was spent in bribes to voters during the 2001 election campaign.⁵⁶⁴

Vote buying was not the only form of bribery during the 2001 elections. Large sums of money were also spent on enticing other candidates to join the Thai Rak Thai Party to reduce competition.⁵⁶⁵ It is known that members of the Thai Rak Thai Party were paid well by the Party.⁵⁶⁶ The EC responded to the complaints of vote buying by investigating over sixty five candidates. However, the results of the investigations were somewhat disappointing. Only eight of sixty-two invalidated winners were not allowed to contest the run-offs.⁵⁶⁷ As a result, it is clear that most violators of the 2001 elections escaped any penalty or punishment from the EC.⁵⁶⁸

⁵⁶² William Callahan, “The Discourse of Vote Buying and Political Reform in Thailand” (2005) 78(1) *Pacific Affairs* 95, at 102.

⁵⁶³ William Case, “Thai Democracy, 2001 – Out of Equilibrium” (2001) 41(3) *Asian Survey* 525, at 545.

⁵⁶⁴ Peter Symonds, “Thailand’s Right-Wing Populist Wins National Elections”, International Committee of the Fourth International, 10 February 2005 <<http://www.wsws.org/articles/2005/feb2005/thai-f10.shtml>> (13 February 2010).

⁵⁶⁵ Pasuk Phongpaichit and Chris Baker, “Thaksin Dismantles Thailand’s Opposition” (2005) 3 *Far Eastern Economic Review* 25, at 25.

⁵⁶⁶ Sombat Chantornyong, “The 1997 Constitution and the Politics of Electoral Reform” in Duncan McCargo (ed), *Reforming Thai Politics*, Nordic Institute of Asian Studies, Copenhagen, 2002, at 206; Chandina Chanyapate and Alec Bamford, “The Thai Coup, Democracy, and Wearing Yellow on Mondays”, *Focus on the Global South* <<http://focusweb.org/the-thai-coup-democracy-and-wearing-yellow-on-mondays.html?Itemid=93>> (21 March 2010).

⁵⁶⁷ “Thailand: Elections Held in 2001”, Historical Archive of Parliamentary Election Results <http://www.ipu.org/parline-e/reports/arc/2311_01.htm> (14 February 2010).

⁵⁶⁸ Peter Leyland, “Thailand’s Constitutional Watchdogs: Dobermans, Bloodhounds or Lapdogs?” (2007) 2(2) *Journal of Comparative Law* 151, at 167.

The 2001 elections encountered more concerning problems. Violence was widespread across Thailand.⁵⁶⁹ Forty-three politicians and canvassers were killed in the months leading up to the elections.⁵⁷⁰ Violent protests filled the streets of Bangkok and other major cities. Election candidates were constantly harassed, threatened, or beaten. Illegal activities associated with elections increased with what has been described as “gangster-businessmen.”⁵⁷¹ Voting buying took more discreet forms of bribery now that the organic law restricted “cash payouts”.⁵⁷² Tactics often included sponsoring holidays abroad, generous donations for mock funerals and paying farmers inflated prices for their crops.⁵⁷³

Initially, the Commissioners of the EC were blamed for being biased and corrupt.⁵⁷⁴ Accusations of political party affiliation and tampering with long-standing investigations began to emerge in the media.⁵⁷⁵ However, it was later reported that the real problem of the EC in the 2000 and 2001 elections lay with the failure of the Commissioners to reach unanimous decisions.⁵⁷⁶ This is something that is required by the rules prescribed under the *EC Organic Act* (1998) (repealed).⁵⁷⁷ A candidate for elections or a Member of Parliament can

⁵⁶⁹ Aurel Croissant and Jörn Dosch, “Parliamentary Elections in Thailand, March 2000 and January 2001” (2003) 22(1) *Electoral Studies* 153, at 157.

⁵⁷⁰ William Case, “Thai Democracy, 2001 – Out of Equilibrium” (2001) 41(3) *Asian Survey* 525, at 541.

⁵⁷¹ Robert Horn, “Bullets & Ballots”, *Times*, 8 January 2001.

⁵⁷² Section 10(7) of the *EC Organic Act* (2007); Thomas Fuller, “Democracy, and Vote Buying, Returning to Thailand”, *The New York Times*, 25 November 2007.

⁵⁷³ Aurel Croissant and Jörn Dosch, “Parliamentary Elections in Thailand, March 2000 and January 2001” (2003) 22(1) *Electoral Studies* 153, at 157.

⁵⁷⁴ Peter Leyland, “Thailand’s Constitutional Watchdogs: Dobermans, Bloodhounds or Lapdogs?” (2007) 2(2) *Journal of Comparative Law* 151, at 167.

⁵⁷⁵ William Case, “Thai Democracy, 2001 – Out of Equilibrium” (2001) 41(3) *Asian Survey* 525, at 541.

⁵⁷⁶ Wendell Katerenchuk, “Thai Politics Monitor: Thai Politics Chronology November 2001- July2003” in Michael H Nelson (ed), *Thai Politics: Global and Local Perspectives*, King Prajadhipok’s Institute, Nonthaburi, 2003, at 510.

⁵⁷⁷ Section 8 of the *EC Organic Act* (1998). Under section 8 of the *EC Organic Act* (2007), a resolution of a meeting of the EC is made by a majority of votes. In the decision to order a new election or revoke a voting right, the decision must be made not less than four-fifth of the total number of the presiding commissioners.

only be disqualified if all five Commissioners agree to this in writing.⁵⁷⁸ As a result, there was a tendency for the Commissioners of the EC to issue the milder “yellow” suspension cards, instead of “red” disqualification cards.⁵⁷⁹

The reputation of the EC did not improve over the 2005 and 2006 elections in Thailand. In 2005, ex Prime Minister Thaksin and his Thai Rak Thai Party won over three hundred and seventy of the five hundred seats in Parliament.⁵⁸⁰ The collapse of support for the opposition parties was greatly assisted by Thaksin’s control over a substantial section of the media and vote buying.⁵⁸¹ As in the 2000 and 2001 elections, widespread violence plagued Thailand.⁵⁸² One political observer noted that “Thailand was on the path of becoming a one-party state”.⁵⁸³ Again, the EC was accused of political party affiliation, biasness and corruption.⁵⁸⁴ A survey on “*Trust in Social and Political Institutions*” revealed that the public even trusted the military more than the EC.⁵⁸⁵

Consequently, the 2006 elections were boycotted by opposition parties.⁵⁸⁶ The Thai Rak Thai Party succeeded in a landslide “victory”. The EC received an

⁵⁷⁸ Orathai Kokpol, “Electoral Politics in Thailand” in Aurel Croissant, Marei Johns, and Gabriele Bruns (eds), *Electoral Politics in Southeast and East Asia*, Friedrich Ebert Stiftung, Singapore FES, 2000, at 297.

⁵⁷⁹ Saroj Santapan, “The Measure in Providing Fair and Honest Election” (in Thai), in Office of the Constitutional Court (ed), *A Collection of Articles on Public Law from Website www.pub-law.net* (Volume 4), P Press, Bangkok, 2004, at 475-485.

⁵⁸⁰ Aurel Croissant and Daniel J. Pojar, Jr., “Quo Vadis Thailand? Thai Politics after the 2005 Parliamentary Election” (2005) 4(6) *Strategic Insights* 1.

⁵⁸¹ David Martin Jones, “The Southeast Asian Development Model: Non-liberal Democracy with Market Accountability” in Lorraine Carlos Salazar (ed), *Southeast Asian Affairs 2007*, Institute of Southeast Asian Studies, Singapore, 2007, at 68.

⁵⁸² Andrew Walker, “The Rural Constitution and the Everyday Politics of Elections in Northern Thailand” (2008) 38(1) *Journal of Contemporary Asia* 84, at 96.

⁵⁸³ “Leaders: Heading Back-Heading Back Thailand”, *The Economist*, 5 February 2005, at 11.

⁵⁸⁴ Pitch Pongsawat, “Middle Class Ironic Electoral Cultural Practices in Thailand: Observing the 2005 National Assembly Election and Its Aftermath” in Chua Beng Huat (ed), *Elections as Popular Culture in Asia*, Routledge, New York, 2007, at 108.

⁵⁸⁵ Robert B Albritton & Thawilwadee Bureekul, “Measuring Democratisation in Thailand after Political Reform”, a paper presented at *The Comparative Study of Electoral Systems Plenary Session*, Stockholm, 3-4 October 2003.

⁵⁸⁶ “Thai Court suspends By-Elections”, *The BBC*, 28 April 2006.

unprecedented number of complaints. The EC's decision to allow the 2006 election was subsequently challenged in the Constitutional Court. In May 2006, the Court annulled the election results. New elections would have been held in October, but were, in effect, cancelled by the coup against the caretaker government in September. The military coup replaced the Constitutional Court in the interim with the Constitutional Tribunal. The Constitutional Tribunal re-heard the case in mid January 2007.⁵⁸⁷ The Tribunal released its findings in May 2007, which disqualified Thaksin Shinawatra and one hundred and ten executive members of the Thai Rak Thai Party.⁵⁸⁸

The findings of the Constitutional Tribunal sparked new and more damaging criticisms for the EC. In particular, there were questions surrounding why the EC failed to disqualify so many candidates of the Thai Rak Thai Party, despite their being strong evidence of widespread corruption and vote buying.⁵⁸⁹ In response to claims of malpractice, there was little evidence of the EC conducting full investigations that resulted in firm action.⁵⁹⁰ More importantly, new allegations arose of the Thai Rak Thai Party's affiliation with several of the Commissioners of the EC.⁵⁹¹ As a result, three EC Commissioners, including the former Chairperson, Wassana Permlarp, were sentenced to four years imprisonment for mishandling the 2005 and 2006 elections.⁵⁹²

It is regrettable that the ban of the executive members of the Thai Rak Thai Party was activated retrospectively under the interim 2006 Constitution

⁵⁸⁷ "Constitutional Tribunal: Angry Start to Thai Rak Thai's Poll Fraud Case", *The Nation*, 17 January 2007.

⁵⁸⁸ The Constitutional Tribunal Ruling No. 3-5/2550 (2007).

⁵⁸⁹ Wendell Katerenchuk, "Thai Politics 2005: A Year in Review" in Niyom Rathamarit (ed), *Eyes on Thai Democracy: National and Local Issues*, King Prajadhipok's Institute, Nonthaburi, 2006, at 206.

⁵⁹⁰ Wiruch Wiruchnipawan, *Management Administration and Development Administration of Organs under the Constitution* (in Thai), Nititham, Bangkok, 2005, at 98-100.

⁵⁹¹ "Democrats Mull Suit against EC", *The Nation*, 7 April 2006.

⁵⁹² The Criminal Court Decision No. Aor 2343/2549 (2006).

introduced by the military coup.⁵⁹³ The legitimacy of this process has inevitably been called into question. The military coup effectively restricted the political freedom of a democratic process. This coup was seen as a drawback for the rule of law in Thailand.⁵⁹⁴ However, the coup does highlight loopholes and remaining shortcomings of the EC. Some have argued that the 2006 coup was a necessary step back in order for the EC to move forward.⁵⁹⁵ Others argue that, whilst not satisfactory, the EC has made significant progress in the last century in the development of Thai democracy and the rule of law.⁵⁹⁶

3.4.2 National Anti-Corruption Commission

The National Anti-Corruption Commission (“NACC”) was established in 1999 under the *Organic Act on Counter-Corruption* (1999) (“CC Organic Act”).⁵⁹⁷ The NACC is an agency responsible for dealing with national corruption. At present, the NACC is headed by the President who is assisted by eight other members.⁵⁹⁸ Each member serves a term of nine years in office and cannot be reappointed.⁵⁹⁹ These members are appointed by the King on the advice of the Senate.⁶⁰⁰ The persons nominated for election as members must be of apparent integrity and with specific qualifications.⁶⁰¹ Selection of such

⁵⁹³ Vorajet Pakirat, et al, *Decision of the Constitutional Tribunal to Dissolve Thai Rak Thai – A Legal Analysis* <<http://www.truethaksin.com/documents/English/JuntaCharges/DecisionBanofThaiRakThai.pdf>> (15 January 2010).

⁵⁹⁴ Tarnthong Thongwasdi, “Military Intervention in Thai Parliamentary Democracy” in Mitchell O’Brien, et al (eds), *Parliaments as Peacebuilders in Conflict-Affected Countries*, The World Bank, Washington, 2008, at 168.

⁵⁹⁵ James Okey, “Thailand in 2006: Retreat to Military Rule” (2007) 47(1) *Asian Survey* 133, at 138.

⁵⁹⁶ Daniel Arghiros, *Democracy, Development and Decentralisation in Provincial Thailand*, Curzon Press, Surrey, 2001, at 237; Robert B Albritton and Thawilwadee Bureekul, “Developing Democratic Elections under a New Constitution in Thailand” in Christian Schafferer (ed), *Understanding Modern East Asian Politics*, Nova Science, New York, 2005, at 141-142.

⁵⁹⁷ The NACC was originally called the National Counter-Corruption Commission until its resolution 40/2551 (2008) on 15 July 2008.

⁵⁹⁸ Section 246 of the 2007 Constitution; Section 6 of the *CC Organic Act* (1999).

⁵⁹⁹ Section 246 of the 2007 Constitution; Section 12 of the *CC Organic Act* (1999).

⁶⁰⁰ Section 246 of the 2007 Constitution; Section 12 of the *CC Organic Act* (1999).

⁶⁰¹ Section 8 of the *CC Organic Act* (1999).

members is via a rigorous process.⁶⁰² Each member must satisfy a scrupulous criterion⁶⁰³ and disclose to Parliament all financial assets of themselves and family members.⁶⁰⁴

The NACC has enormous responsibility in dealing with national corruption. The NACC has a duty to investigate *all* government officials who have become unusually wealthy or suspected of malfeasance.⁶⁰⁵ It must inspect the accuracy of the finances of these officials and any unusual dealings or behaviour.⁶⁰⁶ The NACC must also prepare the case against the official and either take action,⁶⁰⁷ or refer the matter to another appropriate authority.⁶⁰⁸ At a policy level, the NACC must strive to educate the Thai public of integrity and ethics.⁶⁰⁹ It must aim to create a sustainable and integrated anti-corruption network across the nation.⁶¹⁰ In doing so, the NACC has the duty to develop guidelines and implement mechanisms to reduce bribery and other forms of corruption.⁶¹¹

To assist the NACC with performing its duties, it has been granted wide-ranging investigative and enforcement powers. At the core of its powers, the NACC can instigate criminal proceedings against any government official for corruption.⁶¹² The NACC can file an application with the competent Court for an issuance of a warrant of arrest and custody of the alleged offender.⁶¹³ It can also give an order instructing a government official to perform such acts

⁶⁰² Section 7 of the *CC Organic Act* (1999).

⁶⁰³ Sections 9 and 10 of the *CC Organic Act* (1999).

⁶⁰⁴ Section 15 of the *CC Organic Act* (1999).

⁶⁰⁵ Section 19(3) of the *CC Organic Act* (1999).

⁶⁰⁶ Section 19(4) of the *CC Organic Act* (1999).

⁶⁰⁷ Section 19(10) of the *CC Organic Act* (1999).

⁶⁰⁸ Sections 19(2) and 19(9) of the *CC Organic Act* (1999).

⁶⁰⁹ Section 19(6) of the *CC Organic Act* (1999).

⁶¹⁰ NACC, *Thailand's National Anti-Corruption Strategy*, Office of National Anti-Corruption Commission, Bangkok, 2008, at 8.

⁶¹¹ Section 19(8) of the *CC Organic Act* (1999).

⁶¹² Section 26(1) of the *CC Organic Act* (1999).

⁶¹³ Section 26(2) of the *CC Organic Act* (1999).

as are necessary for the performance of the NACC duties.⁶¹⁴ This includes the power to summons relevant information, documents and testimony from any person for the purpose of the fact inquiry.⁶¹⁵ The NACC also has search warrant powers to enter government premises and seize any relevant material.⁶¹⁶

Even with these extensive powers, the NACC is aware that it cannot overcome corruption in Thailand alone. The NACC is cooperating with other agencies both local⁶¹⁷ and international⁶¹⁸ to increase collaboration and improve the effectiveness of anti-corruption activities. At present, the NACC has signed six international Memorandums of Understanding, including a recent agreement in 2009 with the United Nations Office on Drugs and Crime.⁶¹⁹ Thailand has also signed the United National Convention Against Corruption (“UNCAC”) and is currently in the process of ratifying the international law into domestic legislation.⁶²⁰ The NACC is responsible for implementing the UNCAC, which is considered as the world’s foremost anti-corruption instrument.⁶²¹

However, despite cooperation with other institutions, the NACC was not able to reduce corruption in Thailand over the past five years.⁶²² As shown in the

⁶¹⁴ Section 25(1) of the *CC Organic Act* (1999).

⁶¹⁵ Section 25(1) of the *CC Organic Act* (1999).

⁶¹⁶ Section 25(2) of the *CC Organic Act* (1999).

⁶¹⁷ For example, the Constitutional Court, the Courts of Justice, and the Assets Examination Committee.

⁶¹⁸ For example, the American Bar Association Rule of Law Initiative, the International Association of Anti-Corruption Authorities, the United Nations Office on Drugs and Crime, the World Bank, and the Asia Pacific Economic Cooperation (APEC).

⁶¹⁹ The six organisations which the NACC has signed the Memorandum of Understanding are: (1) The UN Office on Drugs and Crime; (2) The Administrative Control Authority of Egypt; (3) The Anti-Corruption Bureau of Brunei Darussalam; (4) The Corruption Commission of the Republic of Indonesia; (5) The Anti-Corruption Agency of Malaysia; and (6) Corrupt Practices Investigation Bureau of Singapore.

⁶²⁰ “The NACC and the United Nations Work Hand in Hand on Curbing Corruption”

<<http://www.nccc.thaigov.net/nccc/en/Doc/news2.pdf>> (12 February 2010).

⁶²¹ Christopher R Yukins, “Integrating Integrity and Procurement: The United Nations Convention Against Corruption and the UNCITRAL Model Procurement Law” (2007) 36(3) *Public Contract Law Journal* 307.

⁶²² See “World Bank see no progress on Thai corruption”, *Bangkok Post*, 30 September 2009.

Corruption Perceptions Index (“CPI”) table below,⁶²³ between 2005 and 2009, Thailand has dropped in rank from 59 to 84 out of 180 nations which participated in the survey.⁶²⁴ While not situated in the end category of nations that are perceived as the most corrupt, Thailand is not in the top category either. Furthermore, the CPI for Thailand has reduced from 3.8 to 3.4 between 2005 and 2009, where 10 is the cleanest and 1 the most corrupt nation.⁶²⁵ This indicates that the perception of corruption in Thailand has worsened over this period with the confidence range falling moderately.⁶²⁶

Corruption Perception Index

Year	Rank out of 180 countries	CPI Score	Survey Used	Confidence Range
2009	84	3.4	9	3.0-3.8
2008	80	3.5	9	3.0-3.8
2007	84	3.3	9	2.9-3.7
2006	63	3.6	9	3.2-3.9
2005	59	3.8	13	3.5-4.1

In its Global Corruption Barometer 2009, Transparency International found that eleven percent of Thais surveyed had paid a bribe in the past twelve months.⁶²⁷ Furthermore, fifty four percent of Thais surveyed saw political parties as the most corrupt institutions, followed by state officials at twenty

⁶²³ The figures in the Corruption Perceptions Index table have been compiled from the website of Transparency International <http://www.transparency.org/policy_research/surveys_indices/cpi/2009> (2 February 2010).

⁶²⁴ See Corruption Perceptions Index Table.

⁶²⁵ The CPI is based on thirteen independent surveys. However, not all surveys include all countries. The surveys used column indicates how many surveys were relied upon to determine the score for that country.

⁶²⁶ “Poll Indicates Corruption is Acceptable” (in Thai), *Matichon Daily*, 25 October 2009.

⁶²⁷ Transparency International, *Transparency International Global Corruption Barometer Report 2009* <http://www.transparency.org/policy_research/surveys_indices/gcb> (3 February 2010), at 32.

two percent and business at nine percent.⁶²⁸ This gloomy perception was reinforced by a domestic poll - ABAC Poll in July 2009 of one thousand five hundred and eighty-two people nationwide where more than half of respondents regarded corruption as normal practice in Thailand.⁶²⁹ More importantly, only one third of the respondents would lodge a complaint against corruption if an offender was someone they were familiar with.⁶³⁰

Even the NACC admitted that corruption and the perception of it has become more widespread in Thailand over the past five years.⁶³¹ The sheer extent of the problem is demonstrated by the NACC's case-load. At the end of September 2009, the NACC has a backlog of six thousand five hundred and thirty-three cases.⁶³² Each year, two thousand cases are approximately added, giving an average of one new case every four and half hours. In 2007, it was shown that the NACC was overstretched, having only around five hundred staff and receiving around seven hundred million baht funding.⁶³³ In comparison, Hong Kong's Independent Commission Against Corruption has approximately four times the funds of the NACC and deals with a population of around six times smaller than in Thailand.⁶³⁴

Added to the problem of funding, the NACC has faced a number of integrity issues in the past. For example, in 2005, the NACC was itself the subject of heavy criticism and investigated for corruption. Nine Commissioners had

⁶²⁸ Transparency International, *Transparency International Global Corruption Barometer Report 2009* <http://www.transparency.org/policy_research/surveys_indices/gcb> (3 February 2010), at 30.

⁶²⁹ Santibhap Ussavasodhi, "ABAC Poll: Majority Thais Deem Corruption to Be Normal", *National News Bureau of Thailand*, 6 July 2009.

⁶³⁰ Santibhap Ussavasodhi, "ABAC Poll: Majority Thais Deem Corruption to Be Normal", *National News Bureau of Thailand*, 6 July 2009.

⁶³¹ NACC, *Thailand's National Anti-Corruption Strategy*, Office of National Anti-Corruption Commission, Bangkok, 2008, at 6.

⁶³² The statistics of the NACC's performance can be accessed through <<http://www.nacc.go.th/download/article/static2009.jpg>> (18 February 2010).

⁶³³ NACC, *The Annual Report of the NACC 2007*(in Thai), Office of National Anti-Corruption Commission, Bangkok, 2008, at 116.

⁶³⁴ See "Anti-Graft Body Turns 10 and the Cases are Mounting", *Bangkok Post*, 18 November 2009.

awarded themselves substantial salary increases without the requirement of parliamentary scrutiny.⁶³⁵ The matter was referred to the Criminal Division of Holders of Political Positions in the Supreme Court of Justice. The Court ruled that the nine NACC Commissioners had abused their power by not complying with the requirements of salary legislation.⁶³⁶ As a result, the nine NACC Commissioners were removed from their positions and given a two year suspended prison sentence for discrediting themselves and the NACC.⁶³⁷

Despite all of its problems, the NACC has received praise for its performance in the past.⁶³⁸ For example, in 2001 the NACC investigated ex-Prime Minister Thaksin for concealing most of his assets from constitutional disclosure requirements.⁶³⁹ It was alleged that Ex-Prime Minister Thaksin deliberately concealed shares worth thousands of millions of baht.⁶⁴⁰ The NACC found that the shares had been registered in the names of his family members, housekeeper, chauffeur, security guard and business colleagues.⁶⁴¹ The NACC ruled against Thaksin and charged him with concealing assets. However, the Constitutional Court overturned the findings of the NACC.⁶⁴²

⁶³⁵ The Chairman of the NACC received a 45,500 baht increase in meeting allowances, bringing his monthly salary to 154,000 baht. Each of the other members received an extra 42,500 baht, making their monthly salaries 147,000 baht. This increased amount was considerably high comparing with the salary of other public officers. For example, the salary of the President of the Supreme Court is 71,990 baht. With the monthly money for his position of 50,000 baht, the total monthly salary of the President of the Supreme Court is 32,010 baht less than that of the Chairman of the NACC.

⁶³⁶ Section 17 of the *CC Organic Act* (1999).

⁶³⁷ The Criminal Division of Holders of Political Positions Decision No. 1/2548 (2005).

⁶³⁸ Pasuk Phongpaichit, "Corruption: Is There Any Hope At All?", a paper presented at a workshop on *Governance*, King Prajadhipok Institute, Pattaya, November 1999, at 8.

⁶³⁹ James R Klein, "The Battle for Rule of Law in Thailand: The Constitutional Court of Thailand" in Amara Raksasataya and James R Klein (eds), *The Constitutional Court of Thailand: The Provisions and the Working of the Court*, VJ Printing, Bangkok, 2003, at 70-71.

⁶⁴⁰ Jon S T Quah, "Anti-Corruption Agencies in Four Asian Countries: A Comparative Analysis" in Bidhaya Bowornwathana and Clay Wescott (eds), *Comparative Governance Reform in Asia: Democracy, Corruption, and Government Trust*, JAI Press, Bingley, 2008, at 99.

⁶⁴¹ Chris Baker, "Pluto-Populism: Thaksin and Popular Politics" in Peter Warr (ed), *Thailand Beyond the Crisis*, Routledge Curzon, New York, 2005, at 125.

⁶⁴² The Constitutional Court Ruling No. 20/2544 (2001).

This was a surprising result. The Constitutional Court had always endorsed the NACC's ruling in the past on seventeen similar occasions. Nonetheless, the NACC was praised for its investigation with one commentator stating:

“Among the handful of anti-graft institutions set up by the Constitution, the NCCC [as the NACC was then] has demonstrated exceptional mettle in the face of fierce and powerful critics and open enemies.”⁶⁴³

In the past, the NACC has managed to bring down many politicians who failed to fulfil the constitutional assessment of asset statements.⁶⁴⁴ However, the NACC does not delude to the challenges that it faces ahead.⁶⁴⁵ The new Commissioners of the NACC have learned their lesson from the failures of the previous NCCC, including the fact that it cannot combat corruption effectively alone.⁶⁴⁶ In order to reduce the growing spread of corruption in Thailand, the NACC published a National Anti-Corruption Strategy in 2009.⁶⁴⁷ This Strategy is focused on core objectives, including sustainable integrated anti-corruption networks, education of ethics and cooperation with other anti-corruption agencies.⁶⁴⁸ Whether the Strategy is effective remains yet to be seen, but at least it is a step in the right direction.

3.4.3 Office of the Auditor General

⁶⁴³ Thitinan Pongsudhirak “Thailand: Democratic Authoritarianism” in Daljit Singh and Chin Kin Wah (eds), *Southeast Asian Affairs 2003*, Institute of Southeast Asian Studies, Singapore, 2003, at 281.

⁶⁴⁴ James R Klein, “Final Evaluation Report on the Area Promoting Good Governance Project”, a research conducted by Asia Foundation, March 2004.

⁶⁴⁵ For example see, Wichai Vivitsevi and Choompicha Vivitsevi, “The Power of the NACC to Litigate the Low-Ranked Public Officers” (in Thai) (2007) 54(3) *Journal of the Office of the Judiciary* 159, 159-174.

⁶⁴⁶ Wiruch Wiruchnipawan, *Management Administration and Development Administration of Organs under the Constitution* (in Thai), Nititham, Bangkok, 2005, at 1096-108.

⁶⁴⁷ NACC, *Thailand's National Anti-Corruption Strategy*, Office of National Anti-Corruption Commission, Bangkok, 2008.

⁶⁴⁸ NACC, *Thailand's National Anti-Corruption Strategy*, Office of National Anti-Corruption Commission, Bangkok, 2008, at 8.

The Office of the Auditor General (“OAG”) was established in 1979 under the *State Audit Act* (1979).⁶⁴⁹ When the 1997 Constitution came into force, the OAG was reformed. The *State Audit Act* (1979) was repealed and replaced with the *Organic Act on State Audit* (1999) (“SA Organic Act”). The OAG is an agency responsible for the audit of financial accounts of government agencies.⁶⁵⁰ At present, the OAG is headed by the Auditor General who is assisted by six Deputy Auditor Generals.⁶⁵¹ The Auditor General is also assisted by the State Audit Commission, which consists of the Chairman and other six Commissioners.⁶⁵² Each official serves a term of six years in office and cannot be reappointed. These officials are appointed by the King at the advice of the Senate.⁶⁵³

The expertise and experience appears to be necessary for the OAG to perform its duties under the *SA Organic Act* (1999).⁶⁵⁴ As part of its core duties, the OAG carries out the annual audit of the statements of receipts and payments and financial status of the government.⁶⁵⁵ Furthermore, the OAG has responsibility to deal with the collection of taxes, fees and other income of the audited agencies and to the custody and use of government property.⁶⁵⁶ In all auditing circumstances, the OAG has to report to Parliament each fiscal year on whether there is compliance with the law and acceptable accounting standards and to provide appropriate recommendations for its improvement.⁶⁵⁷

⁶⁴⁹ The first “Audit Office” was established in 1875 by King Rama V to audit the Royal Treasury Department.

⁶⁵⁰ Section 252 of the 2007 Constitution.

⁶⁵¹ Section 27 of the *SA Organic Act* (1999).

⁶⁵² Section 252 of the 2007 Constitution.

⁶⁵³ Section 252 of the 2007 Constitution.

⁶⁵⁴ Section 6 of the *SA Organic Act* (1999).

⁶⁵⁵ Section 39(2) of the *SA Organic Act* (1999).

⁶⁵⁶ Section 39(2) of the *SA Organic Act* (1999).

⁶⁵⁷ Sections 39(3) and 48 of the *SA Organic Act* (1999).

In order to carry out its duties, the OAG has been granted formidable auditing powers.⁶⁵⁸ At the forefront of its powers, the OAG can examine money and other property which are the responsibility of an audited agency.⁶⁵⁹ The OAG can also summon an audited official for inquiry and require the production of all relevant documents in possession of the audited agency.⁶⁶⁰ Powers also extend to the entry of any audited premise between working hours in order to search and seize any document or other evidence that is relevant to an audit.⁶⁶¹ Anyone who destroys relevant evidence in possession of the audited agency is liable to a prison term up to five years or a fine up to one hundred thousand baht.⁶⁶²

In the past, the OAG has exercised its auditing powers in relation to some of most significant government projects in Thailand. One well-known example was in relation to operation of the Suvarnabhumi Airport, the new international airport of Thailand.⁶⁶³ The first day of operation of the Suvarnabhumi Airport in 2006 had drastic effects to the surrounding community. Houses in the local area suffered from cracks and noise pollution.⁶⁶⁴ As a result, the local community gathered to protest to the Thai government. At the time, the government was facing enormous compensation payouts up to twelve billion baht.⁶⁶⁵ The government feared that the protests would result in damage to the newly built international airport and irreparable damage to the country's image.

⁶⁵⁸ Section 42 of the *SA Organic Act* (1999).

⁶⁵⁹ Section 39(2) of the *SA Organic Act* (1999).

⁶⁶⁰ Section 42(2) of the *SA Organic Act* (1999).

⁶⁶¹ Section 42(4) of the *SA Organic Act* (1999).

⁶⁶² Section 65 of the *SA Organic Act* (1999). See also Section 64 of the *SA Organic Act* (1999), where a person could be liable to a prison term up to six months or a fine up to ten thousand baht for obstruction of the operation of the Auditor General.

⁶⁶³ Office of the Auditor General, "The Evaluation on Noise Environmental Impact Management: The Case Study on Suvarnabhumi Airport"

<http://www.oag.go.th/Performance_Audit/Suvarnabhume_Airport_Eng.jsp> (19 February 2010).

⁶⁶⁴ Working Group on Environmental Auditing, "Environmental Impacts of Government Policy: Lessons Learned from Thailand's New International Airport" (2009) 12(1) *Greenlines* 1, at 2.

⁶⁶⁵ Working Group on Environmental Auditing, "Environmental Impacts of Government Policy: Lessons Learned from Thailand's New International Airport" (2009) 12(1) *Greenlines* 1, at 2.

In response, the OAG commenced an audit of the Suvarnabhumi Airport. As part of the audit, the OAG requested documents and information from several government agencies responsible for the environmental effects of the Airport. Included in this list were the Department of Aviation, the Ministry for Transport, the Pollution Control Department and the Airports of Thailand Public Company Ltd.⁶⁶⁶ The OAG also commissioned an independent study in relation to noise impact from the Faculty of Environment and Human Science at Mahidol University.⁶⁶⁷ In 2007, cracks in runway raised safety concerns and forced the government to reopen the old airport.⁶⁶⁸

In its report to Parliament, the OAG found that there were undue delays in compensation payments for the residents affected by noise pollution of the Suvarnabhumi Airport. The OAG made three recommendations. The first was the establishment of a compensation plan. Under this plan, payments were to be prioritised according to their importance. The second recommendation was that the government increases its compensation budget to over ten billion baht. The initial package was only forecasted to eight hundred and ninety million baht. This was considered as grossly inadequate.⁶⁶⁹ This third recommendation was the establishment of a noise reduction impact measure and resolving the remaining problems of the local residents.

⁶⁶⁶ Office of the Auditor General, “The Evaluation on Noise Environmental Impact Management: The Case Study on Suvarnabhumi Airport” <http://www.oag.go.th/Performance_Audit/Suvarnabhume_Airport_Eng.jsp> (19 February 2010).

⁶⁶⁷ Office of the Auditor General, “The Evaluation on Noise Environmental Impact Management: The Case Study on Suvarnabhumi Airport” <http://www.oag.go.th/Performance_Audit/Suvarnabhume_Airport_Eng.jsp> (19 February 2010).

⁶⁶⁸ Willie Tan, *Principles of Project and Infrastructure Finance*, Taylor & Francis, New York, 2007, at 246-247.

⁶⁶⁹ Suvarnabhumi Airport Thailand, “Airport of Thailand Estimates B120 Billion for Noise Compensation”, 5 April 2008 <<http://www.airportsuvarnabhumi.com/airport-of-thailand-estimates-b120-billion-for-noise-compensation/>> (19 February 2010).

All three recommendations of the OAG were welcomed by Parliament and the local community. Suvarnabhumi Airport agreed to compensate all local people affected by the noise pollution in a timely manner.⁶⁷⁰ The audit and recommendations of the OAG diverted what could have been a major political disaster. In the 2007 Annual Report, the OAG also exposed political corruption in the construction of the Suvarnabhumi Airport.⁶⁷¹ The OAG reported allegations of politicians from the Thai Rak Thai Party having conflicts of interest in several development projects.⁶⁷² The Auditor General was pushed out of her position when she persisted in carrying out the investigations which were linked to the Airport.⁶⁷³

In the past, the OAG has been pro-active in auditing government agencies and projects.⁶⁷⁴ It is clear that the performance of the OAG has made a positive effect on the rule of law in Thailand. The OAG has power to perform financial audits of governmental units.⁶⁷⁵ Its authority can identify and control corruption that might happen in the government or other state enterprises. In 2007, the OAG completed audits of four thousand six hundred and ninety nine public projects.⁶⁷⁶ One thousand one hundred and forty three of these projects were projects from central and regional authorities. Another three thousand two hundred and ninety two were from local authorities. The

⁶⁷⁰ Suvarnabhumi Airport Thailand, "AOT Affirms Compensation to Residents around Suvarnabhumi Airport", 5 April 2008 <<http://www.airportsuvarnabhumi.com/aot-affirms-compensation-to-residents-around-suvarnabhumi-airport/>> (19 February 2010).

⁶⁷¹ David Jones, "Curbing Corruption in Government Procurement in Southeast Asia: Challenges and Constraints" (2009) 17(2) *Asian Journal of Political Science* 145, at 154.

⁶⁷² Narayanan Ganesan, "Appraising Democratic Consolidation in Thailand under Thaksin's Thai Rak Thai Government" (2006) 7(2) *Japanese Journal of Political Science* 153, at 167-168.

⁶⁷³ Michael H Nelson, "Thailand and Thaksin Shinawatra: From Election Triumph to Political Decline" (2005) 4(2) *Eastasia*. At 1, at 1.

⁶⁷⁴ Laurie J Henry and Panu Attavittakamton, "Governmental Accounting and Auditing in Thailand: An Overview and Some Suggestions for Improvement" (1999) 34(3) *The International Journal of Accounting* 439, at 446-447; Asian Development Bank, "Technical Assistance to the Kingdom of Thailand for Strengthening Post-Evaluation Capability of the Office of the Auditor General", a report prepared for the Asian Development Bank, September 1992.

⁶⁷⁵ Section 39 of the *SA Organic Act* (1999).

⁶⁷⁶ Office of the Auditor General, *The 2007 Annual Report of the Office of the Auditor General* (in Thai), Bangkok, 2007, at 24.

remainder two hundred and sixty four projects were from public funds and other agencies.

In 2007, the OAG discovered from its audits that seven thousand five hundred and sixty one million baht was wasted.⁶⁷⁷ The OAG reported that waste was caused primarily for two reasons. The first being that money was not accounted for and government agencies were not meeting their targets in collecting taxes and revenue. The OAG reported that this constituted one thousand six hundred and forty two million baht of the total waste. The second reason for waste was caused by non-economic decision-making and managerial inefficiencies. The OAG reported that this constituted five thousand nine hundred and nineteen million baht of the total waste, all of which could have been avoided.⁶⁷⁸

Accordingly, the OAG made a number of recommendations to the appropriate government units on how waste could be reduced.⁶⁷⁹ First, government agencies should be held responsible for money not accounted for. Secondly, government agencies should adopt proper accounting standards and conduct regular audits of individual departments. Thirdly, government agencies should be more careful in project choices and estimates of expenditure. An embarrassing example of which was the Smart Identity Card project in 2006. Without a proper budgeting, the type of the card was not according to the speculation. Not only was the card unusable. The price of

⁶⁷⁷ Office of the Auditor General, *The 2007 Annual Report of the Office of the Auditor General* (in Thai), Bangkok, 2007, at 25.

⁶⁷⁸ Office of the Auditor General, *The 2007 Annual Report of the Office of the Auditor General* (in Thai), Bangkok, 2007, at 25.

⁶⁷⁹ Office of the Auditor General, *The 2007 Annual Report of the Office of the Auditor General* (in Thai), Bangkok, 2007, at 25.

this type of card was one thousand thirty five million baht more expensive than the usable one.⁶⁸⁰

While the OAG has no enforcement powers, it has a pivotal role in referring matters to the appropriate authorities. For example, the OAG has referred a number of controversial government projects to the NACC. Included in this list of projects referred are the road and irrigation construction projects in many rural areas of Thailand by the local authorities.⁶⁸¹ The OAG also plays an important role in reducing corruption in government agencies by exposing interference of politicians. The OAG appears to have a solid track record in performing this duty. Indeed, the duties of the OAG have extended beyond its previous mandate of mere financial auditing and into the wider areas of responsible and effective government performance.⁶⁸²

3.4.4 National Human Rights Commission

The National Human Rights Commission (“NHRC”) was established in 1999 under the *National Human Rights Commission Act* (1999). The NHRC is an agency responsible for the protection of human rights in Thailand.⁶⁸³ The NHRC consists of a Chairman and six other Commissioners.⁶⁸⁴ Each Commissioner serves a term of six years in office and cannot be reappointed.⁶⁸⁵ These officials were appointed by the King at the advice of the

⁶⁸⁰ Office of the Auditor General, *The 2007 Annual Report of the Office of the Auditor General* (in Thai), Bangkok, 2007, at 214-215.

⁶⁸¹ Office of the Auditor General, *The 2007 Annual Report of the Office of the Auditor General* (in Thai), Bangkok, 2007, at 117-118, 125-126, 133-134.

⁶⁸² Sirikanchana Karikanchana, “Identification of Environmental Risks for Long-term Audit Planning”, a paper written as part of the Canadian Comprehensive Auditing Foundation Fellowship 2006/2007, <<http://www.ccaf-fcvi.com/fellows/reports/Thailand2006.pdf>> (19 February 2010).

⁶⁸³ “Human rights” means human dignity, right, liberty and equality of people, which are guaranteed or protected, under the Thai Constitution or under Thai laws or under treaties which Thailand has obligations to comply. See Section 3 of the *National Human Rights Commission Act* (1999).

⁶⁸⁴ Section 256 of the 2007 Constitution.

⁶⁸⁵ Section 256 of the 2007 Constitution; Section 10 of the *National Human Rights Commission Act* (1999).

Senate.⁶⁸⁶ The Chairman and other Commissioners must have extensive knowledge and experience in the protection of the rights and liberties of the people.⁶⁸⁷ No member of the NHRC is allowed to be a member of another independent institution.⁶⁸⁸

The duties of the NHRC are extensive.⁶⁸⁹ The NHRC is responsible first and foremost for the protection of human rights in Thailand. The standards for protection applicable are not only domestic, but also international.⁶⁹⁰ At present, the NHRC is a member of the Asia Pacific Forum of National Human Rights Institutions and Thailand party to seven major international human rights treaties.⁶⁹¹ The NHRC is also a member of the “Framework of Cooperation” with at least five major Asian human rights institutions.⁶⁹² Moreover, previous members of the NHRC actively participated in other associated human rights programs and institutions, such as the International Council on Social Welfare.⁶⁹³ It is also not uncommon for the NHRC to be the host of international human rights forums and conventions.⁶⁹⁴

⁶⁸⁶ Section 5 of the *National Human Rights Commission Act* (1999).

⁶⁸⁷ Section 256 of the 2007 Constitution.

⁶⁸⁸ Section 6(12) of the *National Human Rights Commission Act* (1999).

⁶⁸⁹ Section 257 of the 2007 Constitution.

⁶⁹⁰ Section 15(1) of the *National Human Rights Commission Act* (1999).

⁶⁹¹ Thailand has ratified all seven treaties: (i) International Covenant on Economic, Social and Cultural Rights; (ii) International Covenant on Civil and Political Rights; (iii) International Convention on the Elimination of All Forms of Racial Discrimination; (iv) Convention on the Elimination of All Forms of Discrimination Against Women; and Convention on the Rights of the Child; (vi) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and (vii) Convention on the Rights of Persons with Disabilities.

⁶⁹² The NHRC is a member of all five institutions: (i) Framework of Cooperation with Asia Pacific Forum of National Human Rights Institutions; (ii) Framework of Cooperation for an ASEAN Human Rights Mechanism; (iii) Framework of Cooperation on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region; (iv) Framework of Cooperation for International Coordinating Committee of National Human Rights Institutions; (v) Framework of Cooperation of National Human Rights Commission in Southeast Asia.

⁶⁹³ Ambhorn Meesuk was a member of the first NHRC during 2001-2007. She was previously appointed the President of the International Council on Social Welfare during 1987-1992.

⁶⁹⁴ For example, Thailand hosted the ASEAN Summit on “ASEAN Charter for ASEAN Peoples” from 28 February 2009-1 March 2009. The NHRC will host the 16th Asia Pacific Forum Annual General Meeting and Biennial Conference in 2011.

The NHRC must report on any acts which violate human rights to the Parliament.⁶⁹⁵ This includes violations of any obligations under international treaties to which Thailand is a party. If the circumstances also concern questions of constitutionality, the NHRC must refer the matter to the Constitutional Court, along with their opinion.⁶⁹⁶ Similarly, if the circumstances concern questions of administration, the NHRC must refer the matter, along with their opinion, to the Administrative Courts.⁶⁹⁷ The NHRC also has the duty to recommend to the Parliament changes to any laws, by-law and policies which concern human rights.⁶⁹⁸ The NHRC must also prepare an annual report to the Parliament for review.⁶⁹⁹

In order to perform its duties, the NHRC has been granted considerable powers. At the vanguard of these powers is the power to demand relevant documents or evidence from any person or agency suspected of human rights violations.⁷⁰⁰ These powers require the human rights violator or agency to provide a responded statement of facts within a reasonable period of time.⁷⁰¹ If the NHCR considers that the human rights violator or agency has violated other laws, the matter will be referred to another responsible agency.⁷⁰² If the other responsible agency has not proceeded with or has rejected to consider the matter, the NHCR may bring the matter back for further consideration or file a lawsuit in the Courts of Justice on behalf of the injured person(s).⁷⁰³

⁶⁹⁵ Section 257(1) of the 2007 Constitution; Section 15(2) of the *National Human Rights Commission Act* (1999).

⁶⁹⁶ Section 257(2) of the 2007 Constitution.

⁶⁹⁷ Section 257(3) of the 2007 Constitution.

⁶⁹⁸ Section 257(5) of the 2007 Constitution.

⁶⁹⁹ Section 257(8) of the 2007 Constitution.

⁷⁰⁰ Section 257 of the 2007 Constitution.

⁷⁰¹ Section 25 of the *National Human Rights Commission Act* (1999).

⁷⁰² Section 25 of the *National Human Rights Commission Act* (1999).

⁷⁰³ Section 257(4) of the 2007 Constitution of Thailand; Section 25 of the *National Human Rights Commission Act* (1999).

The NHRC has also been given the power to promote co-operation and co-ordination amongst government agencies and private organisations.⁷⁰⁴ In these situations, the NHRC has the power to act as a mediator between the parties.⁷⁰⁵ After mediation, if it is clear that the matter involves genuine violations of human rights, the NHRC must prepare a report of the mediation, along with remedial measures for solving the violations.⁷⁰⁶ If the remedial measures have not been complied with by the human rights violator or agency, the NHCR must report the matter to the Prime Minister for consideration.⁷⁰⁷ The Prime Minister is under a duty to order an implementation of the remedial measures sought within sixty days as from the date the report is received.⁷⁰⁸

If the Prime Minister fails to act within the sixty day period, the NHRC must report the matter to the Parliament.⁷⁰⁹ If the NHRC is still dissatisfied, it may disseminate to the local and international public the details of the matter, including any responses that were made by the Prime Minister or by the Parliament.⁷¹⁰ Before the NHRC goes public with this information, it may summon any government or state agency to provide a written statement of facts or opinions concerning the performance of any official under question.⁷¹¹ The NHRC may also request from the court a search warrant to enter any premises and gather any relevant documents or evidence.⁷¹² This power extends to government and state agencies as well as private organisations.⁷¹³

⁷⁰⁴ Section 257(7) of the 2007 Constitution of Thailand.

⁷⁰⁵ Section 27 of the *National Human Rights Commission Act* (1999).

⁷⁰⁶ Section 28 of the *National Human Rights Commission Act* (1999).

⁷⁰⁷ Section 30 of the *National Human Rights Commission Act* (1999).

⁷⁰⁸ Section 30 of the *National Human Rights Commission Act* (1999).

⁷⁰⁹ Section 31 of the *National Human Rights Commission Act* (1999).

⁷¹⁰ Section 31 of the *National Human Rights Commission Act* (1999).

⁷¹¹ Section 32(1) and (2) of the *National Human Rights Commission Act* (1999).

⁷¹² Section 32(3) of the *National Human Rights Commission Act* (1999).

⁷¹³ Section 32(3) of the *National Human Rights Commission Act* (1999).

Previously, the NHRC has exercised its powers in relation to some of the most horrific violations of human rights in Thailand. One well-known case was in relation to the Thai-Malaysian gas pipeline project in 2002. The violent incident arose from a peaceful protest against the building of a gas pipeline in Songkhla, a southern province of Thailand.⁷¹⁴ The local people of the area were concerned that the project would cause environmental effects to the surrounding area.⁷¹⁵ Despite their concerns, the government approved the project without any meaningful participation from the local people.⁷¹⁶ This was quite evident from the lack of consultation with the representative people from the local area in the Environmental Impact Assessment Report.⁷¹⁷

At the protest, the officers used batons and shields to disperse the crowds of thousands.⁷¹⁸ In a violent clash, hundreds of people were beaten and many were taken to hospital for serious injuries.⁷¹⁹ The officers arrested and detained twelve non-government organisation members. These members were denied access to their lawyers. All twelve members were interrogated unlawfully during detention, with reports of threats and misbehaviour from the officers.⁷²⁰ The police later charged all twelve members with several criminal offences and as a result all twelve members had lawsuits brought

⁷¹⁴ Adam Simpson, "Gas Pipelines and Security in South and Southeast Asia: A Critical Perspective" in Timothy Doyle and Melissa Risely (eds), *Crucible for Survival: Environmental Security and Justice in the Indian Ocean Region*, Rutgers, New Jersey, 2008, at 218-219.

⁷¹⁵ Kusuma Snitwongse, "Thai Foreign Policy in the Global Age: Principle or Profit?" (2001) 23(2) *Contemporary Southeast Asia* 189, at 191.

⁷¹⁶ Human Rights Committee, "Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee –THAILAND" <[http://www.unhchr.ch/tbs/doc.nsf/0/e860ca7730edc51ec125706900453a28/\\$FILE/G0543504.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/e860ca7730edc51ec125706900453a28/$FILE/G0543504.pdf)> (21 February 2010), at 7.

⁷¹⁷ NHRC, "Summary report on the investigation of human rights violations: The case of violence related to the Thai-Malaysian Gas Pipeline Project", 11 June 2003, at 1.

⁷¹⁸ Glen Lewis, *Virtual Thailand: Media and Culture Politics in Mainland Southeast Asia*, Routledge Curzon, New York, 2005, at 55.

⁷¹⁹ Ponglert Pongwanan, "Under Siege: Villagers in southern Thailand fight a gas pipeline", *New Internationalist*, 1 January 2005.

⁷²⁰ Asian Centre for Human Rights, "A Good Case: NHRC of Thailand" <www.achrweb.org/Review/2005/83-05.htm> (13 February 2010), at 3.

against them at the Songkhla Provincial Court. The incident prompted the NHRC to appoint a sub-committee to investigate the violence.

The sub-committee reported that the government denied the people of the Songkhla province the opportunity to participate in the process of the decision making for the gas pipeline project.⁷²¹ The report further showed that the government's use of force to disperse the peaceful and unarmed protesters was disproportion and unjust.⁷²² In regards to the twelve detainees, the report showed that the police officers denied them their natural right to be contacted by family and lawyers.⁷²³ The sub-committee made recommendations including that the government compensate *all* victims of the incident and to review the practices of the police in protest situations.⁷²⁴ Later, the protesters were also acquitted by the Songkhla Provincial Court.⁷²⁵

Another recognised example of the NHRC utilising its powers is the Tak Bai riot in October 2004. There were around two thousand people peacefully demonstrating for the release of six detainees in prison.⁷²⁶ The security forces resorted to firing to quell the protestors.⁷²⁷ Seven protesters were killed on the spot and many others were seriously injured.⁷²⁸ The security forces arrested the protesters and loaded them onto army vehicles for transport to Pattani, a southern province next to Songkhla.⁷²⁹ Upon arrival, at least seventy eight

⁷²¹ This was in contravention of sections 46, 56, 58, 59, 60, 76 and 79 of the 1997 Constitution.

⁷²² This was in contravention of sections 31, 44 and 48 of the 1997 Constitution.

⁷²³ This was in contravention of sections 237, 239 and 241 of the 1997 Constitution.

⁷²⁴ NHRC, "Summary report on the investigation of human rights violations: The case of violence related to the Thai-Malaysian Gas Pipeline Project", 11 June 2003, at 3.

⁷²⁵ Songkhla Provincial Court Decision No. 2321/2547 (2004).

⁷²⁶ Asian Centre for Human Rights, "A Good Case: NHRC of Thailand"

<www.achrweb.org/Review/2005/83-05.htm> (13 February 2010), at 3.

⁷²⁷ Tyrell Haberkorn, "In Bangkok; Remembering the Tak Bai Massacre", *Open Democracy*, 3 November 2009 <<http://www.opendemocracy.net/tyrell-haberkorn/in-bangkok-remembering-tak-bai-massacre>> (24 February 2010).

⁷²⁸ "Thailand; Three Years on, No Justice for Massacre", *Human Rights Watch*, 24 October 2007 <<http://www.hrw.org/en/news/2007/10/23/thailand-three-years-no-justice-massacre>> (24 February 2010).

⁷²⁹ Duncan McCargo, "Thailand" in Sanja Kelly, Christopher Walker, and Jake Dizard (eds), *Countries at the Crossroads*, Freedom House, Maryland, 2008, at 676.

demonstrators were killed.⁷³⁰ Due to a shortage of vehicles, the security forces had piled the protesters on top of each other. It was reported later that these protesters either suffocated or were crushed to death.⁷³¹

On 4 May 2005, the NHRC published a report and made recommendations to the government on the Tak Bai massacre.⁷³² As part of the report, the NHRC found that the security forces involved in the massacre grossly violated the human rights of the protesters.⁷³³ The report recommended that the government must provide compensation to each victim for their loss or suffering.⁷³⁴ The report also recommended that the government should make a clear policy statement not to use violence in solving peaceful demonstrations.⁷³⁵ Concrete measures to redress the situation must be installed to prevent any recurrence of the Tak Bai massacre.⁷³⁶ Any security officer violating these measures should be held accountable in a court of law.

In the past, it is clear that the NHRC has adopted a strong stance against human rights violations in Thailand.⁷³⁷ From its establishment in 1999 to 2009, the NHRC has investigated over four thousand complaints.⁷³⁸ These

⁷³⁰ Human Rights Watch, “No One is Safe”, a report reproduced from “The Power of Reconciliation: Report of the National Reconciliation Commission”, August 2007, at 36.

⁷³¹ Duncan McCargo, *Tearing Apart the Land: Island and Legitimacy in Southern Thailand*, Cornell University Press, Ithaca, 2008, at 112.

⁷³² Andrew Harding, “Thailand’s Reforms: Human Rights and the National Commission” (2006) 1(1) *Journal of Comparative Law* 88, at 88.

⁷³³ Human Rights Committee, “Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding observations of the Human Rights Committee –THAILAND” <[http://www.unhchr.ch/tbs/doc.nsf/0/e860ca7730edc51ec125706900453a28/\\$FILE/G0543504.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/e860ca7730edc51ec125706900453a28/$FILE/G0543504.pdf)> (21 February 2010), at 2.

⁷³⁴ See “Reply of the Kingdom of Thailand on the List of Issues to be taken up by the Human Rights Committee in connection with the consideration of the initial report of Thailand under Article 40 of the International Covenant on Civil and Political Rights-ICCPR” <http://www2.ohchr.org/english/bodies/hrc/docs/thailand_reply.doc> (24 February 2010), at 7.

⁷³⁵ Asian Centre for Human Rights, “A Good Case: NHRC of Thailand” <www.achrweb.org/Review/2005/83-05.htm> (13 February 2010), at 3.

⁷³⁶ “Rights Panel Faults Government on Four Counts”, *The Nation*, 2 December 2003.

⁷³⁷ Subhatra Bhumiprabha, et al, *Freedom of Expression and the Media in Thailand*, Article 19, London and Forum-Asia, Bangkok, 2005, at 40-41.

⁷³⁸ The statistics could be accessed through the website of NHRC <http://www.nhrc.or.th/kcontent.php?doc_id=repStat> (24 February 2010).

complaints covered not only civil and political rights, but also economic, social and cultural rights.⁷³⁹ The NHRC has reported trenchantly on the unstable situation in the south of Thailand and the problems it is facing with cultural diversity.⁷⁴⁰ There are literally hundreds of examples where the NHRC has acted independently of the government.⁷⁴¹ From these examples, like the Thai-Malaysian gas pipeline project and the Tak Bai massacre, the NHRC has normally issued statements critical of government policies.⁷⁴²

However, despite its attempt to be an independent institution, the NHRC has recently come under severe criticism for bias selection. The main criticism is from the Asian Human Rights Commission. It accuses the NHRC for non-compliance with the Paris Principles for the recent appointment of seven Commissioners in 2007.⁷⁴³ In particular, section one of the Paris Principles requires independence and pluralism in appointment of senior members of a national human rights institution.⁷⁴⁴ The Asian Human Rights Commission claims that the appointment of the seven Commissioners to the NHRC in 2007 was undemocratic, opaque, secretive and contrary to an internationally accepted fundamental human rights principle.⁷⁴⁵

⁷³⁹ NHRC, *Human Rights Situation in 2009* (in Thai)

<<http://www.nhrc.or.th/webdoc/report25521213.pdf>> (24 February 2010), at 1-2.

⁷⁴⁰ Andrew Harding, "Thailand's Reforms: Human Rights and the National Commission" (2006) 1(1) *Journal of Comparative Law* 88, at 99.

⁷⁴¹ For further examples of NHRC independent performance of human rights protection, see NHRC, "Recommendations of the National Human Rights Commission of Thailand concerning the deaths related to the government's drugs suppression policy", 12 December 2003; NHRC, "Assessing Thailand's Compliance with the Obligations under the International Covenant on Civil and Political Rights", July 2005; NHRC, "Statement Urging the Government to Comply with the Provisions of the Constitution and the Convention on the Rights of the Child in the Case of Master Maung Thongdee", 3 September 2009.

⁷⁴² King Prajadhipok's Institute, *Monitoring and Assessing the Operations of Independent Public Agencies* (in Thai), Siriroj Karn Pim, Bangkok, 2005, at 50.

⁷⁴³ Asian Human Rights Commission, "Thailand: New NHRC Chief promises to ensure that human rights body is meaningful and relevant", 20 August 2009 <http://www.ahrc-thailand.net/index.php?option=com_content&task=view&id=318&Itemid=127> (24 February 2010).

⁷⁴⁴ "Professor Amara Pongsapich", Asia Pacific Forum <<http://www.asiapacificforum.net/news/professor-amara-pongsapich-thailand-nhrc.html>> (24 February 2010).

⁷⁴⁵ Asian Human Rights Commission, "Thailand: New NHRC Chief promises to ensure that human rights body is meaningful and relevant", 20 August 2009 <http://www.ahrc-thailand.net/index.php?option=com_content&task=view&id=318&Itemid=127> (24 February 2010).

In a pejorative press release, the Asian Human Rights Commission called for all seven Commissioners of the NHRC to resign immediately from their positions.⁷⁴⁶ The press release states that during the selection of the Commissioners, no effort was made to publicise the process.⁷⁴⁷ Moreover, the Selection Committee did not bother to interview any of the candidates. In its report to the Senate, the Selection Committee did not give any reasoning for its selection of the seven nominees.⁷⁴⁸ It is clear that out of the seven Commissioners appointed, only two have actual experience on human rights and one has experience on specific economic and social rights. The other four Commissioners appointed have no human rights experience at all.⁷⁴⁹

Human Rights Watch has also noted that many candidates who have solid records in defending human rights in Thailand were rejected.⁷⁵⁰ More concerning is the fact that three of the other seven Commissioners appointed in 2007 are from state agencies.⁷⁵¹ In particular one Commissioner is a former senior policeman, which is of concern as the Royal Thai Police are at the top of the list of human rights violators in Thailand.⁷⁵² The negative image of the Thai police is usually linked with high level of corruption and the use of force in interrogating the accused. As a result, the NHRC has now been

⁷⁴⁶ Asian Legal Resource Centre, "NHRC not independent nor composed according to international standards", 4 June 2009 <http://www.ahrc-thailand.net/index.php?option=com_content&task=view&id=306> (24 February 2010).

⁷⁴⁷ Asian Human Rights Commission-Thailand, "NHRC no longer complies with Paris Principles, must lose status in United Nations forums", 8 May 2009 <http://www.ahrc-thailand.net/index.php?option=com_content&task=view&id=301&Itemid=127> (24 February 2010).

⁷⁴⁸ Asian Legal Resource Centre, "NHRC not independent nor composed according to international standards", 4 June 2009 <http://www.ahrc-thailand.net/index.php?option=com_content&task=view&id=306> (24 February 2010).

⁷⁴⁹ Asian Legal Resource Centre, "NHRC not independent nor composed according to international standards", 4 June 2009 <http://www.ahrc-thailand.net/index.php?option=com_content&task=view&id=306> (24 February 2010).

⁷⁵⁰ "Thailand Replace Flawed Rights Panel", *Human Rights Watch*, 13 May 2009 <<http://www.hrw.org/en/news/2009/05/13/thailand-replace-flawed-rights-panel>> (24 February 2010).

⁷⁵¹ "Thailand Replace Flawed Rights Panel", *Human Rights Watch*, 13 May 2009 <<http://www.hrw.org/en/news/2009/05/13/thailand-replace-flawed-rights-panel>> (24 February 2010).

⁷⁵² NHRC, *Human Rights Situation in 2009* (in Thai) <<http://www.nhrc.or.th/webdoc/report25521213.pdf>> (24 February 2010), at 7-8.

downgraded from an “A” status human rights institution to a “C” status for non-compliance with the Paris Principles and the Constitution.

The selection of the current Commissioners in a manner contrary to the very principles that the NHRC is supposed to represent is a major setback for human rights progress in Thailand. Not only has the NHRC been relegated to a third-class agency of little importance to the state, but also government agencies in Thailand continue to treat human rights as at best irrelevant to their work.⁷⁵³ The manner of selection and appointment of the current NHRC as well as its composition are indicators of the deep anti-human rights culture that pervades official institutions in Thailand.⁷⁵⁴ It now seems that this culture has managed to penetrate the NHRC itself. The unfortunate consequence is that the NHRC today is not as significant as it was before 2007.⁷⁵⁵

3.4.5 Ombudsman

The Ombudsman was established for the first time in Thailand under the 1997 Constitution.⁷⁵⁶ The Ombudsman is an agency responsible for the investigation of complaints made by citizens against the Thai government. According to the 2007 Constitution and the *Organic Act on the Ombudsman* (2009) (“OM Organic Act”), there are three Ombudsman officials in Thailand.⁷⁵⁷ Each official serves a term of six years in office and cannot be reappointed.⁷⁵⁸ These officials were appointed by the King at the advice of the

⁷⁵³ For example see, “Amata Upbeat on Map Ta Phut Ruling”, *Bangkok Post*, 3 December 2009; NHRC, *Human Rights Situation in 2009* (in Thai) <<http://www.nhrc.or.th/webdoc/report25521213.pdf>> (24 February 2010), at 3-13.

⁷⁵⁴ Philip J Eldridge, *The Politics of Human Rights in Southeast Asia*, Routledge Curzon, New York, 2002, at 70-71.

⁷⁵⁵ James R Klein, “Final Evaluation Report on the Area Promoting Good Governance Project”, a research conducted by Asia Foundation, March 2004, at 58-62; Pasuk Phongpaichit, “Good Governance: Thailand’s Experience”, a paper presented at the *Asia Pacific Finance Association Annual Conference*, Bangkok, July 2001, at 4.

⁷⁵⁶ Sections 196-198 of the 1997 Constitution.

⁷⁵⁷ Section 242 of the 2007 Constitution.

⁷⁵⁸ Section 242 of the 2007 Constitution.

Senate.⁷⁵⁹ The selection process of appointment of these officials is as complex as that of the EC⁷⁶⁰, the NACC⁷⁶¹, the OAG⁷⁶² and the NHRC.⁷⁶³ Each official is required to be recognised by the public as an individual of “honesty and integrity” and must be “experienced in public administration”.⁷⁶⁴

To avoid affiliation with a political party, an Ombudsman must not be a member of the House of Representatives or the Senate or hold any elected office.⁷⁶⁵ Furthermore, the Ombudsman cannot be a member or an ex member of any political party within three years before applying for the Ombudsman’s candidacy.⁷⁶⁶ The Ombudsman cannot hold a position in other independent institutions.⁷⁶⁷ All three current Ombudsman officials are well-respected figures in Thai society and have a great deal of civil service experience.⁷⁶⁸ Interestingly, it seems that there is no criticism directly toward the qualification or the behaviour of each previous or present Ombudsman official.

The experience appears to be necessary for the Ombudsman to perform their duties under the *OM Organic Act* (2009). These duties are considered as substantial and go beyond the basic investigations of violations of law or questions of legality.⁷⁶⁹ Investigations are possible whether or not there is a question of *ultra vires* or an abuse of position or process.⁷⁷⁰ Investigations may be triggered simply by an action or inaction of a government official or

⁷⁵⁹ Section 242 of the 2007 Constitution.

⁷⁶⁰ Section 231 of the 2007 Constitution.

⁷⁶¹ Section 246 of the 2007 Constitution.

⁷⁶² Section 252 of the 2007 Constitution.

⁷⁶³ Section 256 of the 2007 Constitution.

⁷⁶⁴ Section 7 of the *OM Organic Act* (2009).

⁷⁶⁵ Section 8(6) of the *OM Organic Act* (2009).

⁷⁶⁶ Section 8(7) of the *OM Organic Act* (2009).

⁷⁶⁷ Section 8(8) of the *OM Organic Act* (2009).

⁷⁶⁸ For background experience of each official see <http://www.ombudsman.go.th/2008/th1_3.html> (25 February 2010).

⁷⁶⁹ Section 13 of the *OM Organic Act* (2009).

⁷⁷⁰ Section 13(1) of the *OM Organic Act* (2009).

agency.⁷⁷¹ The new 2007 Constitution also confers an additional duty on the Ombudsman to conduct the proceedings in relation to ethics of persons holding political positions and of state officials.⁷⁷² It is the first time in the Thai Constitution where the code of conduct or the ethical standards of these persons is included.⁷⁷³

The Ombudsman also has the responsibility of ensuring compliance with the terms of the Constitution, legislation and other regulations.⁷⁷⁴ This duty is not exercised solely, but jointly with the judiciary. If the Ombudsman believes that a law or regulation is unconstitutional or contradicting other law, he or she can refer the matter to either the Constitutional Court⁷⁷⁵ or the Administrative Courts.⁷⁷⁶ In this regard, the Ombudsman must also monitor, evaluate and prepare recommendations on the compliance with the Constitution, including considerations for amendment of the Constitution as deemed necessary.⁷⁷⁷ Annually, the Ombudsman must report the results of its investigation and performance to the Cabinet, the House of Representatives and the Senate.⁷⁷⁸

In the past, the Ombudsman has exercised its referral powers in relation to controversial matters of the highest constitutional importance. One of those matters was in relation to the political crisis before the 2006 coup. At this time, Thailand was experiencing a wave of anti-government demonstrations.⁷⁷⁹ In response, a snap election was called by ex Prime Minister Thaksin. The election was boycotted by the main opposition parties and as a result the Thai

⁷⁷¹ Section 13(1)(b) of the *OM Organic Act* (2009).

⁷⁷² Section 244(2) of the 2007 Constitution.

⁷⁷³ Sections 279 and 280 of the 2007 Constitution.

⁷⁷⁴ Section 14 of the *OM Organic Act* (2009).

⁷⁷⁵ Section 14(1) of the *OM Organic Act* (2009).

⁷⁷⁶ Section 14(2) of the *OM Organic Act* (2009).

⁷⁷⁷ Section 13(3) of the *OM Organic Act* (2009).

⁷⁷⁸ Section 13(4) of the *OM Organic Act* (2009).

⁷⁷⁹ Oliver Pye and Wolfram Schaffer, "The 2006 Anti-Thaksin Movement in Thailand: An Analysis" (2008) 38(1) *Journal of Contemporary Asia* 38, at 40.

Rak Thai Party succeeded office for another term.⁷⁸⁰ In response to the result of the election, several complaints were made to the Ombudsman. These complaints were focused on the irregularities in the way the EC arranged the election and in particular the short timeframe imposed.

The complaints were investigated initially by the Ombudsman and then referred to the Constitutional Court for resolution. Due to the sensitive political climate of the time and the increasing number of demonstrations, the Constitutional Court heard the case in a timely manner. However, before deliberations on the case began, King Bhumibol intervened personally in order to defuse the political unrest.⁷⁸¹ On 8 May 2006, the Constitutional Court delivered its judgment and held that the general election was void.⁷⁸² It is a good example of how the Ombudsman helps maintain the accountability of other independent institutions like the EC and other government agencies.

In 1993, a farmer in a central province of Thailand was forced to give his land to the Irrigation Department for the construction of land drainage system.⁷⁸³ According to the law on appropriation of land, the farmer was entitled to the compensation from the Department. Having contacted the irrigation officials for several times since 1993, he had not succeeded in getting compensation. The farmer then filed a complaint with the Ombudsman. Upon the receipt of the farmer's complaint, the Ombudsman asked the Irrigation Department for clarification. Shortly after, the farmer received the compensation from the Department with interest from 1993 to 2001. Clearly, lack of accountability

⁷⁸⁰ Global Investment Centre, *Thailand: Country Study Guide*, International Business Publications, Washington, DC, 2008, at 44.

⁷⁸¹ Tarnthong Thongwasdi, "Military Intervention in Thai Parliamentary Democracy" in Mitchell O'Brien, et al (eds), *Parliaments as Peacebuilders in Conflict-Affected Countries*, The World Bank, Washington, 2008, at 167.

⁷⁸² The Constitutional Court Ruling No. 9/2549 (2006).

⁷⁸³ Pichet Soontornpipit, "Is a Culture of Accountability Developing in Thailand?", a paper presented in the International Conference, Centre for Democratic Institutions, Canberra, 23 April 2002.

among the government officials requires the independent institution like the Ombudsman to investigate their performance.

In order to carry out their duties, the Ombudsman has been granted investigative powers. An Ombudsman has the power to demand *any* documents relevant to an investigation from any government official or agency.⁷⁸⁴ If the official refuses to do so, he or she may be subject to a prison term up to six months or a fine up to ten thousand baht.⁷⁸⁵ An Ombudsman also has the power to enter *any* premises where a complaint has occurred provided that the owner has been given prior notice.⁷⁸⁶ Anyone who resists or obstructs an Ombudsman in performing this duty is subject to a prison term up to one year or a fine up to twenty thousand baht.⁷⁸⁷ When an investigation is completed, a summary report must be sent to the relevant agencies.⁷⁸⁸

While the Ombudsman has no enforcement power, there is an expectation that the recommendations will be followed.⁷⁸⁹ However, there is no legal requirement for a government official or agency to comply with the recommendations. An Ombudsman has no authority to discipline officials. However, if an Ombudsman suspects that a government official is corrupt or engaging in other criminal behaviour, he or she shall instruct the relevant authority to investigate.⁷⁹⁰ The failure to comply with the recommendations of the Ombudsman will result in the government official or agency being reported to the Cabinet, the House of Representatives and the Senate.⁷⁹¹ The findings will be also widely publicised by the Ombudsman.⁷⁹²

⁷⁸⁴ Section 15(1) of the *OM Organic Act* (2009).

⁷⁸⁵ Section 45 of the *OM Organic Act* (2009).

⁷⁸⁶ Section 15(4) of the *OM Organic Act* (2009).

⁷⁸⁷ Section 46 of the *OM Organic Act* (2009).

⁷⁸⁸ Section 32 of the *OM Organic Act* (2009).

⁷⁸⁹ Section 29 of the *OM Organic Act* (2009).

⁷⁹⁰ Section 34 of the *OM Organic Act* (2009).

⁷⁹¹ Section 33 of the *OM Organic Act* (2009).

⁷⁹² Section 33 of the *OM Organic Act* (2009).

The fact that the Thai Ombudsman does not have enforcement powers should not be considered as a weakness.⁷⁹³ Ombudsmen across the world do not generally have powers to grant remedies similar to those granted by the courts.⁷⁹⁴ Such authority would have the effect of given them an executive role. This might also undermine or conflict with the position of the decision-making bodies. It is for this reason as to why the Thai Ombudsman has no power to investigate cases currently under consideration in a court of law.⁷⁹⁵ Furthermore, the Ombudsman cannot intervene in policies announced by the Cabinet in the Parliament, except when the exercise of these policies violates the duties of the Ombudsman or are considered as unconstitutional.⁷⁹⁶

There is little doubt that the Ombudsman in Thailand has made a contribution to the rule of law.⁷⁹⁷ The benefits of bestowing wide powers on three independent officials with great expertise and experience are clear. Since the introduction of the Thai Ombudsman in 1997, a large number of complaints have been investigated. At the end of 2007, fifteen thousand six hundred and fifty-three cases have been examined.⁷⁹⁸ From this figure, twenty four complaints were referred to the Constitutional Court and the Administrative Courts. The Ombudsman has also forwarded six hundred and eighty-four complaints to other relevant agencies, which include investigations of corruption and other criminal behaviour of the officials from such

⁷⁹³ Stuart Weir and David Beetham, *Political Power and Democratic Control in Britain*, Routledge, London, 1999, at 354.

⁷⁹⁴ Peter Leyland, "The Ombudsman Principle in Thailand" (2006) 2(1) *Journal of Comparative Law* 1, at 10.

⁷⁹⁵ Section 28(2) of the *OM Organic Act* (2009).

⁷⁹⁶ Section 28(1) of the *OM Organic Act* (2009).

⁷⁹⁷ Orapin Sopchokchai, Ryratana Suwanraks, and Panniya Binsri, *The Thai Constitution and New Mechanisms for Transparent and Anti-Corruption Society*, Thailand Development Research Institute, Bangkok, 2000, at 10-11.

⁷⁹⁸ See Office of the Ombudsman, "Complaints Statistic"

<www.ombudsman.go.th/2008/Eng/Eng6_2.html> (26 February 2010).

agencies. These results have improved public confidence in redressing the unfair treatment of citizens.⁷⁹⁹

3.4.6 Performance of the constitutional institutions

It appears that the independent institutions have performed their duties as constitutional oversight bodies. Their main objectives are to provide a basis for stable government, tackle corruption and protect human rights. Upon the examination, the institutions have achieved these objectives *at various degrees* by exercising a range of powers that have been granted to them. Investigations of violations of the Constitution continue to increase each year. These investigations are often conducted without any influence of politicians or the military. A great deal of effort has been placed into securing the independence of the institutions. This is evident from the rigorous selection process and demanding eligibility criteria for appointment.⁸⁰⁰

In terms of rule of law development, the independent institutions have achieved an admirable level of success.⁸⁰¹ The restraint on the exercise of arbitrary power over the last decade is clear not only in the central government, but also at the local government level.⁸⁰² This is partially evident from the reportedly high degree of public satisfaction with the manner of investigations conducted by the independence institutions.⁸⁰³ These institutions provide Thai citizens with an independent mechanism to

⁷⁹⁹ King Prajadhipok's Institute, *Monitoring and Assessing the Operations of Independent Public Agencies* (in Thai), Siriroj Karn Pim, Bangkok, 2005, at 119.

⁸⁰⁰ Tom Ginsburg, "Constitutional Afterlife: The Continuing Impact of Thailand's Postpolitical Constitution" (2009) 7(1) *International Journal of Constitutional Law* 83, at 93.

⁸⁰¹ "Public Confidence in Independent Organisations", King Prajadhipok's Institute, 2006.

⁸⁰² See, "Dialogue on Implementing the Local Government Provisions of the New Constitution in Thailand", a seminar jointly organised by King Prajadhipok's Institute and World Bank, Bangkok, 11-13 December 2007; Weerasak Krueathep, "Local Government Initiatives in Thailand: Cases and Lessons Learned" (2004) 26(2) *The Asia Pacific Journal of Public Administration* 217, at 221.

⁸⁰³ See, Visit Chatchawantipakorn and Niyom Rathamarit, "Transparency and Accountability" in King Prajadhipok's Institute, Nonthaburi, 2007; Curtis N Thomson and Thawilwadee Bureekul, *Monitoring the Pulse of the Nation: Indicators of Good Governance and Development in Thailand*, King Prajadhipok's Institute, Nonthaburi, 2003, at 51.

investigate routine grievances against public bodies. Their presence also encourages a more open climate of public administration in many areas.⁸⁰⁴ Such changes have improved public confidence and “customer satisfaction” in the routine processes of the government.

However, despite their achievements, there are many deep-rooted problems that continue to plague the institutions. Lack of funding, malpractice and corruption are only a few to be named.⁸⁰⁵ While the OAG and the Ombudsman have a solid reputation and strong track record of performance, the EC, the NACC and the NHRC have, at times, been criticised for misconduct and other forms of unprofessional behaviour. As a result, several Commissioners from the EC and NACC have been dismissed, while the NHRC is currently demoted in rating to a C-class institution. Yet, despite these drawbacks, the independent institutions have played a pivotal role in protecting the Constitution and are considered as crucial for promoting democracy and the rule of law in Thailand.

3.5 CONCLUSION

It is clear that the judiciary and the independent institutions in Thailand have encountered a number of challenges in the past. Not all of these challenges have been overcome. Some of them will continue to plague the institutions in the future. Corruption, for instance, is a deep-rooted problem. At times, it has been the cause of great controversy and embarrassment for various sections of the judiciary and some institutions. There is nothing to suggest that it will not continue to remain or even spread in the future. Most independent studies

⁸⁰⁴ All independent institutions conduct regular public conferences and publish annual reports, which are read in Parliament and are available to the general public. For example see, Thawilwadee Bureekul, “Participation of Civil Society in Decentralisation in Thailand: Lessons Learned from Natural Resource Management and Community Economic Development” in Niyom Rathamarit (ed), *Eyes on Thai Democracy: National and Local Issues*, King Prajadhipok’s Institute, Nonthaburi, 2006, at 73-102.

⁸⁰⁵ See, Wiruch Wiruchnipawan, *Management Administration and Development Administration of Organs under the Constitution* (in Thai), Nititham, Bangkok, 2005.

indicate that corruption has worsened in the Thailand over the past five years. The challenge that lies ahead for the judiciary and other independent institutions is to perform their constitutional duties well and remain corruption free.

On the other hand, it is understood that this challenge may never be resolved. Corruption has been an ongoing problem in Thailand for centuries. It appears to spread like “cancer” from one agency to another. To minimise its impact, the judiciary and the independent institutions need to act as “check and balance” mechanisms for other agencies in Thailand *and* for themselves. Most importantly, they need to preserve the core principles of the Constitution and above all promote the rule of law. Since the major political reform in 1997, the judiciary and the independent institutions of Thailand have made significant progress towards achieving this. Yet, there is still some way to go before a full congratulation can be made.

CHAPTER FOUR

KEY INFLUENCES ON THE RULE OF LAW IN THAILAND

4.1 INTRODUCTION

The rule of law in Thailand does not operate in a vacuum. The Thai judiciary and other independent institutions are influenced by their surroundings. The key influences identified in this chapter include: (i) the political influence; (ii) the military influence; (iii) social classification and social norms; (iv) the King; and (v) the religion. These selected influences are by no means a complete representation of what has shaped and continues to shape Thailand's rule of law. They are considered as the main influences on the Thai judiciary and other independent institutions. In exploring these influences and how they relate to the rule of law in Thailand, the chapter applies the methodology of the *new approach*, where appropriately.

This chapter is focused on analysing selected key influences on the rule of law in Thailand. More specifically, this chapter seeks to answer the question to what extent, if any, has the selected influences supported or disrupted the proper function of the rule of law in Thailand and how they have influenced it over time. In answering this question, it is necessary to begin by examining the historical and institutional influences on the rule of law. Then, having exposed what may lie behind (and thus may influence) the approach of this subject, seek to identify the content and minimum conditions of Thailand's rule of law. Only by revealing the content of that expression, one can identify the true relationship between the rule of law and its unique origin.

4.2 THE FICTION IS REALLY A FACT

This chapter is divided into five main sections. The first section of the chapter focuses on the level of influence that Thai politics has on the rule of law. The section begins with a short background of Thai politics. This is followed by an outline of the general relationship between democracy and the rule of law. In particular, the outline explains what is meant by a “Thai-style democracy” and why it suffers from imperfections. Two flaws explored in detail are vote buying and conflicts of interest. In both respects, Thai politics has negatively impacted on the rule of law. To overcome these imperfections and more, Thailand has begun a process of political reform through constitutional changes. One way it hopes to achieve this is by increasing public participation in politics and greater access to freedom of information.

The second section of the chapter identifies the level of influence that the military has on the rule of law in Thailand. On one view, the military argued that their intervention into politics is essential to strengthen the rule of law. Since corrupt politicians cannot be removed by the law itself, it is necessary to have them removed by “force”. On the other view, critics argue that each time the military stages a coup; it damages the rule of law beyond repair. No one should be above the law, at least of all the military. This is so, even if the coup is conducted in good faith. This section examines this on-going debate, and the history and extent of the positive and negative impacts the military has on the rule of law in Thailand.

The third section attempts to gauge the level of influence that Thai tradition and culture has on the rule of law. The discussion about social classification is also analysed in this section. It is to point out how class distinction can pose a negative effect on the rule of law. In doing so, the section begins with an examination of the historical background to the different classes of the Thai

people and the basis for their social ranking. The focus of the section then shifts towards a selected examination of social norms and traditional values. These are: (i) “patronage relationship”; (ii) the “respect for those who are superior”; and (iii) “social harmony”. While these social norms and values are so distinctive for Thai society, their presence arguably forms a negative correlation to the way the rule of law functions in Thailand.

The fourth section is focused on the level of influence that the King of Thailand has on the rule of law. The section begins with a brief examination of the background to the Thai King and why the King is so influential in Thai politics. This is even so despite the King’s power is restrained by the Thai Constitution. Here, the examination is split into three sub-sections. Each sub-section serves to illustrate the relationship between the King and three branches of government: the legislature; the executive; and the judiciary. From this analysis, it is concluded that while the image of the King goes slightly beyond that of a constitutional monarch, the King does not generally have a negative impact on the rule of law. Rather the rule of law seems to receive the royal support in many occasions.

The last section of the chapter takes into account of the level of influence that religion has on the rule of law in Thailand. Since approximately ninety-five percent of the Thai people are Buddhists, the focus of this section is on Buddhism. However, other religions such as Islam and Hinduism are also briefly discussed. The section begins with an examination of general Buddhist teachings and how these teachings have created a moral framework for the rule of law. This leads into further analysis of a specific teaching for Buddhist rulers - the Buddhist political theory. The role of the sangha or the Buddhist monk is also discussed with the purpose to affirm why religion has helped limit the exercise of arbitrary power of leaders in Thailand.

4.3 POLITICAL INFLUENCE ON THE RULE OF LAW

4.3.1 Introduction: Political influence

Politics includes the activities of the government, members of law-making organisations or people who try to influence the way a country is governed. According to the rule of law principle, these activities must comply with the law. No one is allowed to be above the law and those who are involved in politics should not use their position unlawfully to manipulate the law. This is the case of a society which has the rule of law that is robust. Where politics is unreliable and corrupt, the rule of law is adversely affected. The situation in Thailand may not fall far from such scenario. Although Thailand is classified as democratic, the state of politics is considered as dirty business, as politicians are generally untrustworthy.⁸⁰⁶

In fact, corrupt politics is a main reason why it is argued that Thailand is not governed by the rule of law.⁸⁰⁷ Political parties grasping for power exhibit a distressing tendency to become cesspools of corrupt financing and influence.⁸⁰⁸ Giving such circumstances, Thailand is a classic example where failed attempts at mass electoral politics left a legacy of military populism.⁸⁰⁹ Such failure usually makes a democratising country struggle hard with rule-of-law development.⁸¹⁰ However, it may be misleading to conclude that a democratising country does not possess the rule of law by only relying upon the current political situation. The rule-of-law development might face obstacles from democratisation but there are means to overcome such hurdles. While the recent coup and political corruption have weakened the

⁸⁰⁶ Anand Panyarachun, "Sustainable Democracy" (in Thai), *Transitional Democracy*, Openbooks, Bangkok, 2009, at 11.

⁸⁰⁷ International Crisis Group, "Calming the Political Turmoil" (in Thai), *Asia Briefing* No. 82, 22 September 2008

<http://www.crisisgroup.org/library/documents/asia/south_east_asia/thai_versions/b82_thailand_calming_the_political_turmoil_thai.pdf> (23 June 2009).

⁸⁰⁸ Thomas Carothers, "The Sequencing Fallacy" (2007) 18(1) *Journal of Democracy* 12, at 18.

⁸⁰⁹ Edward D Mansfield & Jack Snyder, "The Sequencing Fallacy" (2007) 18(3) *Journal of Democracy* 5, at 8.

⁸¹⁰ Thomas Carothers, "The Sequencing Fallacy" (2007) 18(1) *Journal of Democracy* 12, at 18.

image of democracy and the rule of law in Thailand, there have been several attempts to restore or introduce constitutional measures to detect and prevent the use of such arbitrary power.

Political reform has been Thailand's top agenda. The introduction of the 1997 Constitution was widely regarded as a major step towards democratic government.⁸¹¹ The Constitution provided Thailand with mechanisms to reduce corruption and establish good governance.⁸¹² While the 1997 Constitution was abolished after the 2006 coup, the new 2007 Constitution mirrored the previous one with additional provisions to block the loophole of the previous version.⁸¹³ For example, the requirement of code of ethics is now incorporated to eliminate conflicts of interest.⁸¹⁴ Despite the fact that democracy remains somewhat imperfect in Thailand, the reform has raised awareness about politics and good governance amongst the Thai people. It is certainly a step towards a stronger rule-of-law.

What follows is the analysis of how politics can influence the rule of law according to the sociological approach. The approach which is continued throughout the thesis is set to analyse certain social factors which influence the operation of the rule of law in Thailand. While Thai-style democracy may not offer a stable platform for the rule of law, the sociological approach can help identify political culture, ethics and governance in Thailand.⁸¹⁵ This in

⁸¹¹ Tom Ginsburg, "Constitutional Afterlife: The Continuing Impact of Thailand's Postpolitical Constitution" (2009) 7(1) *International Journal of Constitutional Law* 83, at 83.

⁸¹² Peter Leyland, "Constitutional Design and the Quest for Good Governance in Thailand", a paper presented at a conference, *Asian Constitutionalism in Transition: A Comparative Study*, Italy, 14-15 December 2007.

⁸¹³ Peter Leyland, "Thailand's Constitutional Watchdogs: Dobermans, Bloodhounds or Lapdogs?" (2007) 2(2) *Journal of Comparative Law* 151.

⁸¹⁴ Chapter XIII of the 2007 Constitution.

⁸¹⁵ Francis Fukuyama, "Liberalism Versus State-Building" (2007) 18(3) *Journal of Democracy* 10.

turn, provides the basic understanding of what are the weaknesses and what should be done in developing the rule of law in Thailand.⁸¹⁶

4.3.2 Democracy and the rule of law

Whether the rule of law is necessary for liberal democracy is separately discussed in chapter two of this thesis. However, whether the reverse is true is crucial here - is democracy indispensable for the rule of law? It is crucial because democracy is the political regime which Thailand chose. If democracy is imperfect, does it mean that the rule of law will never flourish?⁸¹⁷ It is generally agreed that democracy and the rule of law share certain principles.⁸¹⁸ For example, free and fair electoral democracy is a channel for citizens to ensure that corrupt politicians will never be re-elected.⁸¹⁹ Protection of basic rights and liberties is also a guarantee that state officials have to comply with the law.⁸²⁰ Idealistically, electoral democracy should warrant the concept of the rule of law.

In reality, this may not be the case. Democracy does not necessarily ensure governmental legitimacy or the rule of law.⁸²¹ It is especially so when the electoral process is exclusionary where it is controlled by alliance of professional politicians, provincial crooks, unsavoury business interests, ex-soldiers and bureaucrats.⁸²² Accordingly, as Fareed Zakaria noted, the

⁸¹⁶ Marc F Plattner, "From Liberalism to Liberal Democracy" (1999) 10(3) *Journal of Democracy* 121, at 132.

⁸¹⁷ Gerardo L Munck, *Measuring Democracy: A Bridge between Scholarship and Politics*, The Johns Hopkins University Press, Maryland, 2009, at 124.

⁸¹⁸ Thomas Carothers, "The Sequencing Fallacy" (2007) 18(1) *Journal of Democracy* 12, at 18.

⁸¹⁹ Barry Weingast, "The Political Foundations of Democracy and the Rule of Law" (1997) 91(2) *The American Political Science Review* 245, at 246.

⁸²⁰ J G Merrills, *The Development of International Law by the European Court of Human Rights*, Manchester University Press, Manchester, 1988, at 116.

⁸²¹ Thomas M Frank, "Democracy, Legitimacy, and the Rule of Law: Linkages" in Norman Dorsen & Prosser Gifford, *Democracy and the Rule of Law*, CQ Press, Washington, 2001, at 170-171.

⁸²² Surin Maisirikrod & Duncan McCargo, "Electoral Politics: Commercialisation and Exclusion" in Kevin Hewison (ed), *Political Change in Thailand: Democracy and Participation*, Routledge, London, 1997, at 132-148.

inferiority of illiberal democracy is in comparison with liberal autocracy.⁸²³ In the recent history of East Asia, the latter has accorded their citizens a widening sphere of civil, religious and political rights.⁸²⁴ The experience of several East Asian countries has shown that democracy may harm minority interests by promoting a form of nation building centred on the culture of the minority group.⁸²⁵

However, it is not a purpose of the thesis to evaluate the superiority of each political regime. Rather the focus of thesis is on the analysis of a particular political regime and how such regime interacts with the operation of the rule of law. For Thailand, this is a question of how democracy and democratisation might challenge the ideology of “government of law”. Despite the fact that democracy may not always yield the perfect result for the rule of law, certain democratic components unquestionably support the functioning of the rule of law. One particular component is the lines of accountability between citizens and the state that elections help to create.⁸²⁶ Yet, such component requires citizens to be sufficiently competent and acknowledge the importance of their votes.⁸²⁷

4.3.3 Democracy in Thailand: Thai-style democracy

In 1932, democracy was imported to Thailand by the revolution which replaced absolute monarchy with constitutional monarchy. As predicted by the government of that time, democracy could not take root immediately after

⁸²³ Marc F Plattner, “From Liberalism to Liberal Democracy” (1999) 10(3) *Journal of Democracy* 121, at 122.

⁸²⁴ Fareed Zakaria, “The Rise of Illiberal Democracy” (1997) 76(6) *Foreign Affairs* 22, at 27-28.

⁸²⁵ Daniel A Bell, *Beyond Liberal Democracy: Political Thinking for an East Asian Context*, Princeton University Press, New Jersey, 2006, at 13.

⁸²⁶ Thomas Carothers, “The Sequencing Fallacy” (2007) 18(1) *Journal of Democracy* 12, at 18.

⁸²⁷ Swiss Agency for Development and Cooperation, *Democratisation-Fundamental for Effective Aid* <http://www.sdc.admin.ch/en/Home/Themes/Rule_of_Law_Democracy/Democratization> (2 July 2009).

the revolution.⁸²⁸ However, it is now almost eighty years and democracy is still being developed. While Thailand provides its citizens with a chance to elect their representatives, other infrastructures of democracy are not inefficient or ineffective mechanisms to ensure proper process. To begin with a basic requirement, democracy requires an informed electorate. Education helps ensure that people can form a sound decision and understand why they cast their votes.⁸²⁹ Unfortunately, the statistics showed that the educational system was not consistent throughout the country in supplying such basic requirement.⁸³⁰ This prompted the Thai government to carry out the reform for the educational system in 1999.⁸³¹

According to an Asian Barometer survey in 2003, the understanding of democracy varied not only across individuals in the population, but also, dramatically, across regions in Thailand.⁸³² In fact, Thailand was labelled “a tale of two democracies”. The first democracy belongs to well-educated urban elite while the second belongs to a rural, often with isolated parochial interest.⁸³³ The difference between two democracies is that:

[v]oting in farming areas is not guided by political principle, policy issues, or what is perceived to be in the national interest, all of which is the only legitimate rationale

⁸²⁸ Boonsri Mewongukote, “Political Reform in Thailand” in Piruna Tingsabudh (ed), *Law, Justice & Open Society*, a proceeding of Regional Symposium on Law, Justice and Open Society in ASEAN, Bangkok, 6-9 October 1997, at 128.

⁸²⁹ Richard Johnston, André Blais, Elisabeth Gidengil, and Neil Nevitte, *The Challenge of Direct Democracy*, McGill-Queen’s University Press, Canada, 1996, at 219-223.

⁸³⁰ Duncan McCargo, “Democracy under Stress in Thaksin’s Thailand” (2002) 13(4) *Journal of Democracy* 112, at 123.

⁸³¹ Gerald W Fry, “Synthesis Report: From Crisis to Opportunity, The Challenges of Educational Reform in Thailand”, a report prepared for the Office of the National Education Commission and the Asian Development Bank (TA 3585-THA), 8 August 2002.

⁸³² Robert B Albritton, Thawilwadee Bureekul, and Gang Guo, “Impacts of Rural-Urban Cleavages and Cultural Orientations on Attitudes toward Elements of Democracy: A Cross-National, Within Nation Analysis”, *Asian Barometer Working Paper Series* No. 6, Asian Barometer Project, Taipei, 2003.

⁸³³ Robert B Albritton & Thawilwadee Bureekul, “Measuring Democratisation in Thailand after Political Reform”, a paper presented at *The Comparative Study of Electoral Systems Plenary Session*, Stockholm, 3-4 October 2003.

for citizens casting their ballots in a democratic election. The ideal candidates for rural voters are those who visit them often...⁸³⁴

The differences between urban and rural voters further form a chain of electoral problems. While people inside and outside urban areas may sell their votes, a number of sources showed that rural voters are more willing or more prepared to engage in vote buying and selling.⁸³⁵ Unsurprisingly, vote buying and selling becomes common practices during election.⁸³⁶ Since almost sixty-seven per cent of the people live in villages, rural democracy always wins.⁸³⁷ It is a repetitive cycle where the Thai government is always elected in the country side and then failed by urban public opinion exercised through the media and personal networks.⁸³⁸ The exit of the fraction between the two groups either ends in the form of the dissolution of Parliament or a military coup.⁸³⁹ This is so called “Thai-style democracy”.

4.3.4 Imperfect democracy and the delay of the rule of law

The problems in democratising a state are recognised worldwide. The ex United Nations Secretary-General Kofi Annan once observed that democracy would be a wonderful thing if only it were not for the elections.⁸⁴⁰ The observation is very much true for Thailand where there is a polarised conflict

⁸³⁴ Anek Laothamatas, “A Tale of Two Democracies: Conflicting Perceptions of Elections and Democracy in Thailand” in R H Taylor (ed), *The Politics of Elections in Southeast Asia*, Cambridge University Press, New York, 1996, at 202.

⁸³⁵ Daniel Arghiros, *Democracy, Development and Decentralisation in Provincial Thailand*, Curzon Press, Surrey, 2001, at 237; William Callahan, *Cultural Governance and Resistance in Pacific Asia*, Routledge, New York, 2006, at 137; Suchit Bunbongkarn, *State of the Nation; Thailand*, Institute of Southeast Asian Studies, Singapore, 1996, at 71; Yumei Zhang, *Pacific Asia: The Politics of Development*, Routledge, London, 2003, at 87; Vinay Bhargava and Emil Bolongaita, *Challenging Corruption in Asia: Case Studies and a Framework for Action*, The World Bank, Washington, 2004, at 175.

⁸³⁶ *Report on the Electoral Process and Factors behind the Election of Representatives*, King Pajadhipok’s Institute, Bangkok, 2002.

⁸³⁷ UNICEF, *Thailand Statistics* <http://www.unicef.org/infobycountry/Thailand_statistics.html#57> (12 July 2009).

⁸³⁸ Pasuk Phongpaichit and Chris Baker, *Thailand’s Crisis*, Silkworm Books, Chiang Mai, 2000, at 110.

⁸³⁹ Suchit Bunbongkarn, “Thailand: Democracy under Siege” in James Morley (ed), *Driven by Growth: Political Change in the Asia-Pacific Region*, An East Gate Book, New York, 1999, at 167.

⁸⁴⁰ Thomas M Frank, “Democracy, Legitimacy, and the Rule of Law: Linkages” in Norman Dorsen & Prosser Gifford, *Democracy and the Rule of Law*, CQ Press, Washington, 2001, at 171.

between urban middle class and the countryside.⁸⁴¹ For that reason, a military coup is followed by a revision of the Constitution, elections are then held, but a political crisis develops which precipitates a further coup, and so on.⁸⁴² What follows is how this cycle of imperfect democracy can hinder the rule-of-law development. The problems identified might not currently support the function of the rule of law. However, they are acknowledged and the attempt to rectify them can be used as a platform for political reform and the rule-of-law development in Thailand.

4.3.4.1 Vote buying and patron-client relationship

In Thailand, rural voters have controlled as many as ninety per cent of the seats in Parliament.⁸⁴³ To win an election by the support from rural voters, political candidates must tailor their policies and tactics to fulfil what the rural population needs – the financial assistance.⁸⁴⁴ Who will be elected seems to depend upon how much money each candidate can offer for rural electorates.⁸⁴⁵ The evidence shows that the cash hand-out, a very simple form of vote buying, constitutes a large amount of money spent in each election.⁸⁴⁶ It was estimated that up to one hundred million baht was spent for one constituency during the general election in February 2005.⁸⁴⁷

⁸⁴¹ “Asian Democracy in Trouble?”, a discussion of a book, *How East Asians View Democracy*, Carnegie Endowment for International Peace, 14 November 2008
<http://www.carnegieendowment.org/files/1114_transcript_asiandemocracy.pdf> (1 July 2009).

⁸⁴² Duncan McCargo, “Alternative Meanings of Political Reform in Contemporary Thailand” (1998) 13 *Copenhagen Journal of Asian Studies* 5, at 6.

⁸⁴³ Katherine A Bowie, “Vote Buying and Village Outrage in an Election in Northern Thailand: Recent Legal Reforms in Historical Context” (2008) 67(2) *Journal of Asian Studies* 469.

⁸⁴⁴ Suwattana Thadaniti, “Urban Poverty and Social Safety Nets in Thailand”, a report on EADN Regional Project on *Urban Poverty and Social Safety Net in East Asia*, East Asian Development Network, 2004 <<http://www.eadn.org/reports/urbanweb/u06.pdf>> (3 July 2009), at 2.

⁸⁴⁵ Seeda Sornsri, *Elections in Southeast Asia: Case Studies of Indonesia, Malaysia, Philippines, and Thailand* (in Thai), Chulalongkorn University Press, Bangkok, 2004, at 467-468.

⁸⁴⁶ Akarames Thongnual, “The Summary of the Research: Vote Buying and Selling of the 2 July 1995 Election” (in Thai), a proceeding of workshop on *Problems and System of Election in Thailand*, Bangkok, 1997.

⁸⁴⁷ Pornpol Eak-uttaporn, *Reveal... Tactics of Cheating in an Election* (in Thai), Khor Kid Duay Khon, Bangkok, 2005, at 90; See also, Somchai Phatharathananunth, *Civil Society and Democratisation*, Nordic Institute of Asian Studies, Denmark, 2006, at 4-5.

Another form of vote buying is taken place on the patron-client relationship. Anek Laothamatas explained that rural voters expect their MP patrons to address their parochial issues, leading to direct benefits such as roads, bridges, or schools.⁸⁴⁸ In delivering the promise of these mega projects, an elected MP needs to fight for the budget from the government.⁸⁴⁹ However, due to the budgetary limitation, it opens more channels for many Thai capitalists to take over and run their own political fractions.⁸⁵⁰ It is not surprising that by 1990 nearly half of the members of the Cabinet were identified as provincial businessmen.⁸⁵¹ Traders or businesspersons still constitute the majority of candidates in the 1995, 1996 and 2001 elections.⁸⁵²

The threat posed by this money politics lies not only in the enthusiasm for democracy, but also its capability to hinder the concept of the rule of law.⁸⁵³ The money spent in buying votes or entering into the political patronage system is the investment the politicians must recoup.⁸⁵⁴ Once these politicians are in Parliament, the political power allows them access to favoured subsidies and other privileges such as permits and licences.⁸⁵⁵ It is the clearest form of the abuse of power. When the legal system fails to deal with these political abuses, it effectively surrenders its power to those people who hold political

⁸⁴⁸ Anek Laothamatas, "A Tale of Two Democracies: Conflicting Perceptions of Elections and Democracy in Thailand" in R H Taylor (ed), *The Politics of Elections in Southeast Asia*, Cambridge University Press, New York, 1996, at 220-223.

⁸⁴⁹ Daniel King & Jim LoGerfo, "Thailand: Toward Democracy Stability" (1996) 7(1) *Journal of Democracy* 102, at 115.

⁸⁵⁰ Mushtaq H Khan, "Patron-Client Networks and the Economic Effects of Corruption in Asia" (1998) 10(1) *The European Journal of Development Research* 15, at 35.

⁸⁵¹ John T Sidel, "Siam and Its Twin?: Democratisation and Bossism in Contemporary Thailand and the Philippines" (1996) 27(2) *IDB Bulletin* 56, at 59.

⁸⁵² Orathai Kokpol, "Electoral Politics in Thailand" in Aurel Croissant, Marei Johns, and Gabriele Bruns (eds), *Electoral Politics in Southeast & East Asia*, Friedrich-Ebert-Stiftung, Singapore, 2002, at 296.

⁸⁵³ Robert B Albritton & Thawilwadee Bureekul, "Development Democracy under a New Constitution in Thailand", *Asian Barometer Working Paper Series* No. 28, Asian Barometer Project, Taipei, 2004.

⁸⁵⁴ John Laird, *Proposals for Constitutional Reform*, Craftsman Press, Bangkok, 1997, at 2.

⁸⁵⁵ Richard F Doner & Ansil Ramsay, "Rents, Collective Action and Economic Development in Thailand" in Mushtaq H Khan & Kwame Sundaram Jomo (eds), *Rents, Rent-Seeking and Economic Development: Theory and Evidence in Asia*, Cambridge University Press, Cambridge, 2000, at 154.

power within those patronage networks.⁸⁵⁶ It is circumstances like these which are considered as hostile to rule-of-law development.

Money politics has further caused the present political struggle in Thailand. The emergence of the “yellow shirts” and the “red shirts” was argued to be the product of money politics.⁸⁵⁷ Corrupt politicians use money and other gifts for buying votes to get into powerful positions. When corrupt politicians are losing their power, they use this money to pay for the public support. The street demonstration fighting for Thaksin’s return may not have happened if there was no financial support.⁸⁵⁸ It was recorded that at least one thousand baht has been paid to each of the “red shirts” in joining the street protest.⁸⁵⁹ This is a large sum of money for an average Thai citizen, considering that the minimum daily wage is around two hundred baht.⁸⁶⁰ Admittedly, Thai society is profoundly polarised because of this kind of politics.⁸⁶¹

4.3.4.2 Conflicts of interest

When the political leadership mingles with commercial incentive, conflicts of interest emerge and become the negative chain reaction in developing the rule of law. While former Prime Minister Thaksin Shinawatra was in office, Shin Satellite, a company in which his family holds a majority stake, won a tax concession worth sixteen billion baht from Thailand’s Board of Investment.⁸⁶² His mobile phone company, AIS, also won the contract to supply its service

⁸⁵⁶ John Laird, *Proposals for Constitutional Reform*, Craftsman Press, Bangkok, 1997, at 3.

⁸⁵⁷ Bertil Linter, “The Battle for Thailand: Can Democracy Survive?” (2009) 88(4) *Foreign Affairs* 108, at 113.

⁸⁵⁸ Sapon Onkgara, “More Money Needed to Keep the Red-Shirt Rallies Going”, *The Nation*, 16 March 2010.

⁸⁵⁹ The video record of the “red shirts” receiving their payment can be seen through <<http://www.manager.co.th/Politics/ViewNews.aspx?NewsID=9530000035243>> (23 March 2010).

⁸⁶⁰ Utain Vichalpairojwong and Punnaros Tintanorm, “Thailand: New Minimum Daily Wage Increase in Thailand”, 4 February 2010 <<http://www.mondaq.com/article.asp?articleid=92556>> (29 March 2010).

⁸⁶¹ Jean-Philippe Leblond, “Thailand: An Impossible Reconciliation”, *Canadian Council for Southeast Asian Studies* <<http://canadianasianstudies.concordia.ca/htm/BulletinSpring09-Eng.pdf>> (24 March 2010), at 5.

⁸⁶² Shawn W Crispin, “Thailand: Prime Minister Mixes Business and Politics”, *Far Eastern Economic Review*, 11 December 2003.

for senior officials including judges in the Courts of Justice. Even if AIS entered into the price war with other service providers, it did not lose any profit.⁸⁶³ Supportively, the Cabinet raised the mobile phone monthly allowance for senior officials to “increase efficiency and mobility in the CEO-style management”.⁸⁶⁴

Unfortunately, the 1997 Constitution failed to fully recognise the problem of conflicts of interest. While it required the Members of Parliament to personally divest all holdings when they entered government, their families were not required to do so.⁸⁶⁵ It was a loophole in the law which prevented the application of the rule of law. As a result of this, Thaksin was able to escape many suspicions of conflicts of interest.⁸⁶⁶ Ironically, it was Thaksin himself who unintentionally turned the situation around to his own disadvantage.⁸⁶⁷ He introduced legislation which allowed him to sell his family business-Shin Corporation to the Singaporean government’s company for two US billion dollars without paying taxes.⁸⁶⁸ Once the transaction was made public, the middle class in Bangkok withdrew their support from his party.⁸⁶⁹

Thai politics is often considered as the lure of “winner-take-all” politics.⁸⁷⁰ The various types of electoral cheats were enough to produce a book called

⁸⁶³ Khettiya Jittapong, “Thailand’s AIS Q4 Profit Rises Less Than Expected”, *Reuters*, 19 February 2004.

⁸⁶⁴ The mobile phone monthly allowance was raised from twelve hundred baht to four thousand baht in 2008; See also, Pasuk Phongpaichit and Chris Baker, *Thaksin: The Business of Politics in Thailand*, Silk Worm Books, Chiang Mai, 2004, at 203-205.

⁸⁶⁵ Section 110 of the 1997 Constitution.

⁸⁶⁶ Frederik Balfour, “Under Suspicion in Thailand”, *Business Week*, 15 April 2002.

⁸⁶⁷ Michael H Nelson, “Thaksin Overthrown: Thailand’s Well-Intentioned Coup” in Thang Nguyen (ed), *The Thai Challenge: Unity, Stability, and Democracy in Times of Uncertainty*, Nova Science Publishers, New York, 2008, at 12.

⁸⁶⁸ Nimal Ghosh, “Thailand: Thaksin’s family sells Shin stake to Temasek”, *Straits Times*, 24 January 2006.

⁸⁶⁹ Tom Ginsburg, “Constitutional Afterlife: The Continuing Impact of Thailand’s Postpolitical Constitution” (2009) 7(1) *International Journal of Constitutional Law* 83, at 97.

⁸⁷⁰ Thomas M Frank, “Democracy, Legitimacy, and the Rule of Law: Linkages” in Norman Dorsen & Prosser Gifford, *Democracy and the Rule of Law*, CQ Press, Washington, 2001, at 171.

“Revealing...Tactics of Electoral Cheating”.⁸⁷¹ Some may wonder as to why Thai people let such cheats blur the will of free and fair election. Money, of course, is one way to answer the question. After all, Thailand is a developing country where a majority of the population is poor.⁸⁷² However, it does not mean that the rule of law cannot be developed because of such immature democracy. Gradually, the negative impact of Thai-style democracy would be reduced by the rise of civil society.⁸⁷³ In Thailand, such a rise has recently arrived with the emergence of the Thai middle class because of education and economic growth. The new middle class is a “big push” for political reform as these educated people become well-equipped in using the people’s power to control political corruption and restrain the exercise of arbitrary power.

4.3.5 Political reform through constitutional reform

Reforming politics is certainly not a new idea for the Thai people. The attempts in the past clearly illustrate an advocacy for the concept of “no one can be above the law”. The attempts included the revolution in 1932 which was to depart Thailand from a long history of absolute monarchy. The student demonstration in 1973 was to overthrow the military regime. The massive protests against the military-backed government occurred again in 1992. This time though, they also managed to push Parliament to democratise the Constitution.⁸⁷⁴ The end result is the 1997 Constitution which was adopted by widespread public involvement.⁸⁷⁵ It represented a rise of the civil society

⁸⁷¹ Pornpol Eak-uttaporn, *Reveal...Tactics of Cheating in an Election* (in Thai), Khor Kid Duay Khon, Bangkok, 2005.

⁸⁷² AusAID, *List of Developing Countries*, July 2009 <http://www.aisaid.gov.au/ngos/devel_list.cfm> (16 July 2009).

⁸⁷³ James Ockey, *Making Democracy: Leadership, class, gender, and political participation in Thailand*, University of Hawaii Press, Honolulu, 2004, at 151.

⁸⁷⁴ Daniel King & Jim LoGerfo, “Thailand: Toward Democracy Stability” (1996) 7(1) *Journal of Democracy* 102, at 102.

⁸⁷⁵ Tom Ginsburg, “Constitutional Afterlife: The Continuing Impact of Thailand’s Postpolitical Constitution” (2009) 7(1) *International Journal of Constitutional Law* 83, at 89-90.

which demanded for an active participation in political and national decision-making process.⁸⁷⁶

The rise of the civil society corresponds to the rule-of-law development. The more the Thai people become involved in the activities of their government, the less abuses of power slip away. The 1997 Constitution provided the Thai people with many mechanisms which could shift Thai-style democracy towards participatory democracy.⁸⁷⁷ In addition, various guardian institutions were established to promote accountability and transparency.⁸⁷⁸ Despite certain deficiency (i.e. the prevention of conflicts of interest), the 1997 Constitution provided a constructive framework for the rule of law.⁸⁷⁹ This is supported by the following analysis of certain constitutional mechanisms. Most remain intact in the present 2007 Constitution.

4.3.5.1 Participatory democracy

Public involvement was made both state policy and a civic right in the 1997 Constitution.⁸⁸⁰ Such recognition is re-enforced in the 2007 Constitution.⁸⁸¹ The underlying concept of public participation is simple. People who are affected or may be affected by an administrative act should have sufficient opportunities to express their interests. In the decision-making process, public participation also means that people have right to demand for justification or explanation from the government or state officials. In this way, citizen participation can be a safeguard against an arbitrary decision of those with

⁸⁷⁶ Ministry of Foreign Affairs, *Political Reform in Thailand: From Representative Democracy Towards Participatory Democracy*, Bangkok, 1997, at 6.

⁸⁷⁷ Borwornsak Uwanno, *The Intention of the Constitution* (in Thai), King Prajadhipok's Institute, Nonthaburi, 2001, at 42.

⁸⁷⁸ Pinai Nanakorn, "Re-Making of the Constitution in Thailand" (2002) 6 *Singapore Journal of International and Comparative Law* 90, at 110-115.

⁸⁷⁹ Thanet Aphornsuvan, "The Search for Order: Constitutions and Human Rights in Thai Political History", a paper delivered for *The 2001 Symposium: Constitutions and Human Rights in a Global Age: An Asia Pacific Perspective*, Australian National University, Canberra, December 2001.

⁸⁸⁰ Section 76 of the 1997 Constitution.

⁸⁸¹ Sections 78 and 87 of the 2007 Constitution.

authorities. In other words, public participation is capable of improving the quality and legitimacy of decisions in governments.⁸⁸²

Through the process of political reform, several forms of citizen participation were recognised in the 1997 Constitution. These included public participation in public policy, in local resource management, or through administrative decentralisation. The starting point was the drafting process of the 1997 Constitution itself. Elected by the Parliament, the Constitution Drafting Assembly, consisting of representatives from all seventy six provinces and academics, participated in the Constitution drafting process.⁸⁸³ The Assembly conducted a survey of public opinion through hearings before finalising the draft. The survey showed that people's awareness of their rights and the importance of the Constitution as a legal framework for controlling politicians was developing.⁸⁸⁴

4.3.5.1.1 Public participation in natural resource management

Thailand is one of the global natural resource-rich countries. In terms of natural resource management, corruption takes two main forms: rent-seeking and patronage.⁸⁸⁵ For Thailand, the latter appears to have much greater negative effect to the operation of the rule of law. By allowing local communities to express their views, it increased transparency of government or state enterprise projects which have concessions, permits and licences to exploit natural resource. These projects, on numerous occasions, proved to be

⁸⁸² Marian Barnes, Janet Newman, and Helen Sullivan, *Power, Participation, and Political Renewal*, The Policy Press, Bristol, 2007, at 1.

⁸⁸³ Ministry of Foreign Affairs, *Political Reform in Thailand: From Representative Democracy Towards Participatory Democracy*, Bangkok, 1997, at 7.

⁸⁸⁴ Pasuk Phongpaichit, "Good Governance: Thailand's Experience", a paper prepared for the *Asia Pacific Finance Association Annual Conference*, Bangkok, July 2001, at 3.

⁸⁸⁵ Ivar Kolstad and Tina SØreide, "Corruption in National Resource Management: Implications for Policy Makers" (2009) *Resource Policy*, doi:10.1016/j.resourpol.2009.05.001, at 1-2.

a channel for politicians to recoup their loss in money politics.⁸⁸⁶ Illegal logging is a classic example in Thailand, where forest area dropped drastically from 1961 to 2006.⁸⁸⁷ According to *Illegal-logging.info*, deforestation in Thailand is a symptomatic of corruption which involves relevant ministries, politicians and local officials.⁸⁸⁸ Since forests are held by the government – Royal Forest Department, the abuse was difficult to detect.⁸⁸⁹

When Royal Forest Department was established in 1896, forests were regarded as sufficiently abundant.⁸⁹⁰ During 1991-1998, the forest area was below half of what it used to be, especially in the north of Thailand where most forest area was.⁸⁹¹ After introducing the 1997 Constitution, a study of the Community Forest Network was conducted in the northern part of Thailand.⁸⁹² It was to measure whether a provision allowing public participation in natural resource management was effective.⁸⁹³ The study showed a number of interesting findings. Included in those findings were: an increase in number of local people attending the meetings organised by the network; an increase in number of people proposing projects; an increase in

⁸⁸⁶ Pasuk Phongpaichit and Chris Baker, *Thailand's Boom and Bust*, Silkworm Books, Chiang Mai, 1998, at 254-259; Philip S Robertson Jr, "The Rise of the Rural Network Politician: Will Thailand's New Elite Endure?" (1996) 36(9) *Asian Survey* 924, at 925.

⁸⁸⁷ Royal Forest Department, *Forestry Statistics of Thailand* <<http://www.forest.go.th/stat/stat50/TAB1.htm>> (29 July 2009).

⁸⁸⁸ "Asia: Deforestation Symptomatic of Corrupt Regimes" <http://www.illegal-logging.info/item_single.php?item=news&item_id=2379&approach_id=1> (31 July 2009); See also "Thailand Country Profile: Environment, Natural Resources, and Extractive Industry" <<http://www.business-anti-corruption.com/en/country-profiles/east-asia-the-pacific/thailand/corruption-levels/environment-natural-resources-and-extractive-industry/>> (31 July 2009).

⁸⁸⁹ Pearmsak Makarabhirom, "Constraints on People's Participation in Forest Management in Thailand" (2002) 2 *Kyoto Review of Southeast Asia* <<http://kyotoreview.cseas.kyoto-u.ac.jp/issue/issue1/index.html>> (4 September 2009).

⁸⁹⁰ Royal Forest Department, *History of Royal Forest Department* <http://www.forest.go.th/rfd/history/history_e.htm> (31 July 2009).

⁸⁹¹ Royal Forest Department, *Forestry Statistics of Thailand* <<http://www.forest.go.th/stat/stat50/TAB1.htm>> (29 July 2009).

⁸⁹² The study was conducted in Chiang Mai, a province in the northern part of Thailand and a source of teakwood.

⁸⁹³ Section 79 of the 1997 Constitution; Section 85 of the 2007 Constitution.

number of people disagreeing with commercial trading; and an increase in use of social sanctions against people who misused the community forest.⁸⁹⁴

The positive participatory appraisal is also seen in other studies such as the fisher-folk communities and the coastal resource management in the southern part of Thailand.⁸⁹⁵ The recent success of public participation in natural resource management can be seen from the Map Ta Phut case in 2009.⁸⁹⁶ Map Ta Phut is the industrial estate in Rayong, an eastern province of Thailand. The villagers had been calling on the government to declare their communities a pollution control area. This was refused by the government for fear of damaging the investment climate.⁸⁹⁷ In opposition, the villagers filed a petition to the Administrative Court where it ruled in favour of the villagers, ordering the National Environmental Board to declare the area a pollution control zone.⁸⁹⁸

4.3.5.1.2 Public participation through decentralisation

The underlying objective of public participation does not only apply to the national government but also to local government.⁸⁹⁹ For this, true democracy cannot emerge unless citizens have the right to control issues of immediate

⁸⁹⁴Thawilwadee Bureekul, "Participation of Civil Society in Decentralisation in Thailand: Lessons Learned from Natural Resource Management and Community Economic Development" in Niyom Rathamarit (ed), *Eyes on Thai Democracy: National and Local Issues*, King Prajadhipok's Institute, Nonthaburi, 2006, at 90-93.

⁸⁹⁵ May Tan-Mullins, "The State and Its Agencies in Coastal Resources Management: The Political Ecology of Fisheries Management in Pattani, Southern Thailand" (2007) 28(3) *Singapore Journal of Tropical Geography* 348, at 352; Ladawan Kumpa, "Coastal Resource Management with Local Participation: Case Study of Surat Thani, Thailand", a study for *The World Bank/WBI's CBNRM Initiative*, 29 January 1998 <<http://srdis.ciesin.columbia.edu/cases/thailand-001.html>> (31 July 2009); Thawilwadee Bureekul, "Participation of Civil Society in Decentralisation in Thailand: Lessons Learned from Natural Resource Management and Community Economic Development" in Niyom Rathamarit (ed), *Eyes on Thai Democracy: National and Local Issues*, King Prajadhipok's Institute, Nonthaburi, 2006, at 83.

⁸⁹⁶ "Court Suspends 76 Projects in Map Ta Phut Industrial Estate", *MCOT*, 29 September 2009 <<http://enews.mcot.net/view.php?id=12059>> (29 January 2010).

⁸⁹⁷ Apinya Wipatayotin, "Thai Villagers Win Pollution Case", *Global Community Monitor*, 4 March 2009.

⁸⁹⁸ The Supreme Administrative Court Ruling No. 586/2552 (2009).

⁸⁹⁹ Orapin Sopchokchai, "Good Local Governance and Anti-Corruption Through People's Participation: A Case of Thailand", a paper presented at the 10th *International Anti-Corruption Conference*, Prague, 8 October 2001.

interest and impact in their local communities.⁹⁰⁰ The promotion of civil participation in local government also ensures that the rule of law can be developed among the grassroots of Thai society. For centuries, Thailand was a highly centralised state.⁹⁰¹ This was changed by the 1997 Constitution which for the first time articulated the importance of decentralisation.⁹⁰² In 1999, a subordinate law, the *Decentralisation Plan and Process Act* (1999) was implemented.⁹⁰³ The law introduced several initiatives which public participation is encouraged by local government through its local public-policy making and implementation.

Regular town hall meetings in Khon Kaen Municipality are one of those initiatives.⁹⁰⁴ A study of local government in Thailand revealed that self dealing was the most common form of resolving conflicts of interest in local administration.⁹⁰⁵ This included a person holding a public position becoming a contractor for a project; buying one's own land; providing services to one's own municipality.⁹⁰⁶ To minimise self dealing projects, Khon Kaen Municipality holds town hall meetings on a regular basis to discuss and agree on any municipal project that might include self dealing issues. The mayor chairs the meeting and asks the persons in charge of the projects to elaborate on the issues in more details. In the past few years, more than one hundred

⁹⁰⁰ James R Klein, "The Constitution of the Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy", *The Asia Foundation Working Paper* No. 8, March 1998, at 25.

⁹⁰¹ One World Action, "Citizens' Participation and Local Governance in South East Asia", May 2008 <http://www.oneworldaction.org/papers_documents_archives/reports/cplg_report_2008.htm> (1 August 2009), at 7.

⁹⁰² Section 282 of the 1997 Constitution; Section 272 of the 2007 Constitution.

⁹⁰³ For more detailed discussion on the overall decentralisation reforms in Thailand, see "JICA Program on Capacity Building of Thai Local Authorities", a study report of Japan International Cooperation Agency, October 2007.

⁹⁰⁴ Khon Kaen is the north-eastern province in Thailand.

⁹⁰⁵ Orathai Kokpol, "Conflict of Interest in Local Government" in Niyom Rathamarit (ed), *Eyes on Thai Democracy: National and Local Issues*, King Prajadhipok's Institute, Nonthaburi, 2006, at 144.

⁹⁰⁶ Pairote Pathranarakul, "Conflict of Interest: An Ethical Issue in Public and Private Management", a paper presented at the 5th Regional Anti-Corruption Conference on *the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific*, Beijing, 28-30 September 2005, at 3.

and forty representatives of civic communities participated in those meetings.⁹⁰⁷

To warrant the success in decentralisation, the Constitution and the subordinate law ensures that share of the local budget is appropriately allocated.⁹⁰⁸ Local officers are also trained on decentralising issues such as participatory planning, mobilising and managing resources, and anti-corruption mechanisms.⁹⁰⁹ They also formed their own networks to support their own personnel. One of the networks fought against the government's policy which ordered each sub-district to send and pay for a delegation to travel to a temple to show support for Thaksin Shinawatra.⁹¹⁰ Politics at the local level after political reform in 1997 appears to follow a right path in building transparency and accountability for their local community.⁹¹¹

4.3.5.1.3 Other citizen participation in participatory democracy

There were three other forms of people's direct political participation which were recognised for the first time in the 1997 Constitution.⁹¹² To begin with, eligible voters of no fewer than fifty thousand had the right to sign a petition asking Parliament to consider certain legislation.⁹¹³ The draft community forest bill was one of the early pieces of legislation to use this constitutional

⁹⁰⁷ Weerasak Krueathep, "Local Government Initiatives in Thailand: Cases and Lessons Learned" (2004) 26(2) *The Asia Pacific Journal of Public Administration* 217, at 222-223.

⁹⁰⁸ Sutapa Amornvivat, "Fiscal Decentralisation: The Case of Thailand", a paper presented at the International Symposium on *Fiscal Decentralisation in Asia Revisited*, Hitotsubashi University, Tokyo, 20-21 February 2004.

⁹⁰⁹ A keynote speech from Secretary-General of the Office of the Public Sector Development Commission at the *Enhancing Citizen Participation in Public Governance* Conference, Bangkok, 28 May 2008.

⁹¹⁰ One World Action, "Citizens' Participation and Local Governance in South East Asia", May 2008 <http://www.oneworldaction.org/papers_documents_archives/reports/cplg_report_2008.htm> (1 August 2009), at 8.

⁹¹¹ Alex M Mutebi, "Government and Citizen Engagement at the Local Level in Thailand: Nan Municipality's Roundtables and Expert Panels" (2005) 5(2) *Asia Pacific: Perspectives* 16.

⁹¹² James R Klein, "The Constitution of the Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy", *The Asia Foundation Working Paper* No. 8, March 1998, at 26.

⁹¹³ Section 170 of the 1997 Constitution. The number of 50,000 was reduced to 10,000 as stated in section 163 of the 2007 Constitution.

mechanism.⁹¹⁴ The draft bill recognised the legal status of communities living in and around Thailand's National Forest Reserves. It proposed the establishment of community forests by rural communities to manage forest area in cooperation with the Royal Forestry Department.⁹¹⁵ Local people gathered almost fifty three thousand signatures and presented the bill to the Parliament in early 2000.⁹¹⁶

Secondly, a petition by the same number of fifty thousand voters could initiate a process to remove office-holders suspected of corruption or abuse of power.⁹¹⁷ Such office-holders are a member of the House of Representatives, the Prime Minister or any other minister, a judge, a public prosecutor, an election commissioner, a state audit commissioner, an ombudsman, or any high-ranking officials.⁹¹⁸ The impeachment through the channel of voters' signatures was initiated in Thaksin's assets concealment case.⁹¹⁹ With the controversial acquittal of Thaksin, the signature of sixty one thousand people was submitted to the Senate to remove judges who voted in favour of Thaksin.⁹²⁰ Concerns about judicial independence and political interference were raised in such petition.⁹²¹

⁹¹⁴ Thawilwadee Bureekul and Stithorn Thananithichot, "The Thai Constitution of 1997: Evidence of Democratisation", a paper presented at an International Conference on *Governance in Asia: Culture, Ethics, Institutional Reform and Policy Change*, City University of Hong Kong, 5-7 December 2002, at 13.

⁹¹⁵ Rajesh Daniel, "Thailand: Senate Blocks Draft Community Forest Bill" (2002) 57 *World Forest Movement Bulletin* <<http://www.wrm.org.uy/bulletin/57.html#Thailand>> (2 August 2009).

⁹¹⁶ Regina Birner and Heidi Wittmer, "Converting Social Capital into Political Capital: How Do Local Communities Gain Political Influence – A Theoretical Approach and Empirical Evidence from Thailand and Columbia", a paper submitted to the 8th Biennial Conference of the International Association for the Study of Common Property on *Constituting the Commons: Crafting Sustainable in the New Millennium*, Bloomington, 31 May – 4 June 2000, at 10.

⁹¹⁷ Surin Maisrikrod, "Changing Forms of Democracy in Asia?: Some Observations on the Thai and Philippine Constitutions" (1999) 23(3) *Asian Studies Review* 355, at 369.

⁹¹⁸ Sections 303-305 of the 1997 Constitution. The number of 50,000 was reduced to 20,000 as stated in section 164 of the 2007 Constitution.

⁹¹⁹ Niyom Rathamarit, et al, "Corruption Inquiry and the Impeachment Process in Thailand" in Niyom Rathamarit (ed), *Eyes on Thai Democracy: National and Local Issues*, King Prajadhipok's Institute, Nonthaburi, 2006, at 60.

⁹²⁰ James R Klein, "Final Evaluation Report on the Area Promoting Good Governance Project", a research conducted by Asia Foundation, March 2004.

⁹²¹ Darryl Jarvis, "Thailand" in Darryl Jarvis (ed), *International Business Risk: A Handbook for the Asia Pacific Region*, Cambridge University Press, Cambridge, 2002, at 398.

Last but not least, the 1997 Constitution allowed Thai people to participate in public policy debate on issues of significant public interest.⁹²² The process was carried out in a form of referendum which can be proposed in the case where the Cabinet viewed that there was an issue concerning public interests.⁹²³ A recent example was a referendum on a new draft Constitution which now becomes the eighteenth Constitution of Thailand. Sixty per cent of eligible voters turned out and seventy per cent voted for the eighteenth Constitution.⁹²⁴ Prior to voting day, the sub-committees of the Constitution Drafting Committee already organised public hearings in many provinces.⁹²⁵ There were also written submissions from local communities, non-governmental organisations and other social groups.⁹²⁶

For the reformers, participatory democracy certainly has the potential to re-orient the political process away from the inherently destructive money politics.⁹²⁷ It also appears that different forms of public participation can corroborate the concept of “no one can be above the law”. This is because people are well-equipped with more knowledge and power to question transparency and accountability of the government. The study showed that the Thai people are more interested in making their voices heard and believe it is important to play an active role in politics.⁹²⁸ In addition to participatory democracy, a number of independent institutions were either restructured or

⁹²² James R Klein, “The Constitution of the Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy”, *The Asia Foundation Working Paper* No. 8, March 1998, at 26.

⁹²³ Section 214 of the 1997 Constitution; Section 165 of the 2007 Constitution.

⁹²⁴ “Thai Voters Approve New Charter”, *BBC News*, 19 August 2007.

⁹²⁵ Press Release No. 2 by Constitution Drafting Committee on 29 January 2007.

⁹²⁶ Budit Thanachaisethavut, *Thai Labour Movement Action and Development*, Friedrich-Ebert-Stiftung, Bangkok, 2007, at 7.

⁹²⁷ Michael Kelly Connors, “Political Reform and the State in Thailand” (1999) 29(2) *Journal of Contemporary Asia* 202, at 222.

⁹²⁸ Curtis N Thomson and Thawilwadee Bureekul, *Monitoring the Pulse of the Nation: Indicators of Good Governance and Development in Thailand*, King Prajadhipok’s Institute, Nonthaburi, 2003, at 57-70.

newly established. These institutions, as explored in chapter three, play a pivotal role in participatory democracy and developing Thailand's rule of law.

4.3.5.2 Right to information and freedom of expression

To achieve the goal of participatory democracy, information must be adequately provided to the public.⁹²⁹ For instance, whether to approve a development project on natural resources, information about the project must be disseminated. It also means that those affected people are given a sufficient opportunity to express their views about such project. At the core of participatory democracy is the right to information and freedom of expression.⁹³⁰ The benefit of which is clear in providing a platform for the rule of law.⁹³¹ Guarding against the abuse of power, information about the conduct of the government must be accessible. Freedom to exchange such information allows public to scrutinise and express their views about any arbitrariness of the government.

During the course of political reform in Thailand, there was an attempt to put an end to state and private monopolies of radio, television and telecommunication.⁹³² To support right to information and freedom of expression, the 1997 Constitution also required the government to provide twelve years of free education throughout the country.⁹³³ As previously argued, lack of education was a major setback for Thai democracy. For this, political reform in Thailand appears to show the long term commitment in

⁹²⁹ Gerardo L Munck, *Measuring Democracy: A Bridge between Scholarship and Politics*, The Johns Hopkins University Press, Maryland, 2009, at 125-126.

⁹³⁰ Joseph Stiglitz, "Participation and Development; Perspectives from the Comprehensive Development Paradigm" in Farrukh Iqbal & Jong -Il You (eds), *Democracy, Market Economics & Development*, World Bank, Washington D.C., 2001, at 53.

⁹³¹ T R S Allan, "Common Law Constitutionalism and Freedom of Speech" in Jack Beatson and Yvonne Cripps (eds), *Freedom of Expression and Freedom of Information*, Oxford University Press, Oxford, 2000, at 25.

⁹³² Borwornsak Uwanno and Wayne D Burns, "The Thai Constitution of 1997: Sources and Process" (1998) *University of British Columbia Law Review* 227, at 241.

⁹³³ Section 43 of the 1997 Constitution; Section 49 of the 2007 Constitution.

building educated and informed civil society. It thus, in turn builds a fundamental condition of the rule of law.

“By creating opportunities for the democratic formation of public opinion, transparency of government actions will make it possible for society, whether by appealing to the press or resorting to mobilisations or protests, at least exercise post-facto control over the government apparatus through social pressures. Making information available at the moment that decisions or policies are formed opens up opportunities for public deliberation and, therefore, preventive control by society.”⁹³⁴

The development of the rule of law through right to information and freedom of expression can be seen from the following key attempts in political reform.

4.3.5.2.1 *Official Information Act (1997)*

To implement the constitutional provision of the rights to freedom of information and expression, the *Official Information Act* was passed in 1997 (the “Act”).⁹³⁵ The *Act* enables citizens to gain access to official information and thus creates the accountability of the administration.⁹³⁶ The *Act* sets up the Information Disclosure Tribunal which has power to review the order of any state agency refusing the disclosure of information.⁹³⁷ The *Act* is seen as a part of political reform mechanism in encouraging political participation and thus reducing corruption. The *Act* and the Tribunal were put to test by the journalists and non-government organisations (“NGO”) during the drug corruption case. The journalists and the NGO submitted the appeal to the Disclosure Tribunal after the National Anti-Corruption Commission refused

⁹³⁴ Nuria Cunill Grau, “Critical Junctures of Social Accountability: Lessons from Latin America” in Enrique Peruzzotti and Catalina Smulovitz (eds), *Enforcing the Rule of Law: Social Accountability in the New Latin American Democracies*, University of Pittsburgh Press, Pittsburgh, 2006, at 125.

⁹³⁵ Section 58 of the 1997 Constitution; Section 56 of the 2007 Constitution.

⁹³⁶ Pichet Soontornpipit, “Is a Culture of Accountability Developing in Thailand?”, a paper presented in the International Conference, Centre for Democratic Institutions, Canberra, 23 April 2002.

⁹³⁷ Sections 35-39 of the *Official Information Act* (1997).

the disclosure of the investigative report of the corruption in the Ministry of Public Health.⁹³⁸

The case soon became one of the biggest corruption scandals in 1998.⁹³⁹ It involved the allegation of hospitals which were forced to buy drugs from certain companies at very high prices.⁹⁴⁰ The National Anti-Corruption Commission argued that the report should not be disclosed because of the safety of the witnesses. However, the Disclosure Tribunal disagreed. The witnesses were high ranking officials and it was their duties to report their activities to any investigating commission. It would be unreasonable to argue for their safety when the witnesses were doing their public routine work.⁹⁴¹ The Tribunal finally ordered the National Anti-Corruption Commission to disclose the report of the corruption investigation.⁹⁴²

The corruption in the Ministry of Public Health was certainly an early example of a successful application under the *Act*.⁹⁴³ Private citizens, government officers and journalists were the top three categories who respectively made a good use of the *Act*.⁹⁴⁴ The most popular information requested included official information related to concessions, contracts, projects and investigative documents.⁹⁴⁵ It was a promising start for the right to

⁹³⁸ The National Anti-Corruption Commission (NACC) used to name the National Counter Corruption Commission (NCCC) before 15 July 2008.

⁹³⁹ Nakorn Serirak, "Challenges of Thailand Freedom of Information", a paper presented at a conference on *Freedom of Information and Civil Society in Asia*, Aoyama University, Tokyo, 13 April 2001.

⁹⁴⁰ Pasuk Phongpaichit, "Corruption: Is There Any Hope At All?", a paper presented at a workshop on *Governance*, King Prajadhipok Institute, Pattaya, November 1999, at 3-4.

⁹⁴¹ Kittisak Prokati, "Information Access and Privacy Protection in Thailand", a paper presented in a conference on *Freedom of Information and Civil Society in Asia*, Aoyama University, Tokyo, 13 April 2001, at 13.

⁹⁴² Disclosure Tribunal on Social and Administrative Issues Decision 17/2542 (1999).

⁹⁴³ Somphon Potisophon, "Citizen Mobilization in the Fight against Corruption: The Case of Health Care Funding in Thailand", a paper presented at the *Open Government Forum*, Seoul, 6-7 February 2003, at 1.

⁹⁴⁴ Office of Official Information Commission, *1997-1998 Annual Report*, at 4-7.

⁹⁴⁵ Kittisak Prokati, "Information Access and Privacy Protection in Thailand", a paper presented in a conference on *Freedom of Information and Civil Society in Asia*, Aoyama University, Tokyo, 13 April 2001, at 11.

information and the development of government accountability.⁹⁴⁶ Even Prime Minister Thaksin Shinawatra in his 2003 anti-corruption campaign, urged the public to make more use of the *Act*.⁹⁴⁷ However, the use of the *Act* by the journalist group has decreased sharply. In 2005, less than five per cent of complaints and appeals were initiated by the media.⁹⁴⁸ The statistics suggested that political reform might face some hurdles if the media itself struggles to advocate for freedom of information.⁹⁴⁹

4.3.5.2.2 The role of the media and censorship

In building an informed and engaged civil society, an independent media is indispensable for its service in gathering, processing and disseminating information to the public.⁹⁵⁰ Right to information and freedom of expression will not be secured unless the media were free from the dictatorial state's control. As part of political reform, right to freedom of expression and media professional's right to conduct their work free from state interference were included.⁹⁵¹ In addition, transmission frequencies for radio and television and telecommunication were recognised as national communication resources for public interest. An independent state agency was called upon to allocate the frequencies.⁹⁵² This was seen as a direct challenge to the state's control over telecommunications frequencies.⁹⁵³

⁹⁴⁶ Vitit Muntarbhorn, "Human Rights in the Era of Thailand Inc." in Randall Peerenboom, et al (eds), *Human Rights in Asia*, Routledge, Oxford, 2006, at 329.

⁹⁴⁷ Thaksin Shinawatra, "The Importance of Public Participation in Developing the Country and Combating Corruption" in Office of Official Information Commission, *2003 Annual Report*, at 29-36.

⁹⁴⁸ Subhatra Bhumiprabha, et al, *Freedom of Expression and the Media in Thailand*, Article 19, London and Forum-Asia, Bangkok, 2005, at 110.

⁹⁴⁹ Office of Official Information Commission, *Summary of the Seminar for the Executives Responsible for Official Information in the Public Agencies* (in Thai), 23 December 2005, at 3-4.

⁹⁵⁰ Lung-chu Chen, "Human Rights Protection Needs Rule of Law and Independence of Judiciary to Succeed" in Uwe Johannsen and James Gomez (eds), *Democratic Transitions in Asia*, Select Publishing, Singapore, 2001, at 79.

⁹⁵¹ Sections 37 and 39 of the 1997 Constitution; Sections 36 and 45 of the 2007 Constitution.

⁹⁵² Section 40 of the 1997 Constitution; Section 47 of the 2007 Constitution.

⁹⁵³ Ubonrat Siriyuvasak, "A Genealogy of Media Reform in Thailand and Its Discourses" in Sopit Wangvivatana (ed), *Media Reform Going Backwards?*, Thai Broadcast Journalists Association, Bangkok, 2005, at 50-74.

During the same period of political reform, the then government awarded a licence to the private sector for thirty years, in reaction to the strong demands by civil society for media reform.⁹⁵⁴ As a result, an independent television station named iTV was created in 1995. It was the first television channel which was not owned by the government. iTV focused its programs on news and documentaries rather than the usual soap opera or game shows. Surprisingly, its ratings soared.⁹⁵⁵ It was again a promising start as the channel could offer Thais independent news, free of political influence. Unfortunately, iTV later faced a serious financial problem and it was Shin Corp (Thaksin Shinawatra's family business) which took over iTV just before the elections of 2001.⁹⁵⁶ The takeover while prolonged the life of iTV, arguably brought an end to its independence.⁹⁵⁷

The reporters at iTV were fired after they criticised iTV of being in favour of Thaksin's Party (Thai Rak Thai Party) in the election coverage.⁹⁵⁸ However, the report of the connection between Thai Rak Thai Party and the profits made by Shin Corp were continued.⁹⁵⁹ In July 2003, a journalist was sued for her interview alleging that Shin Corp's profits have increased enormously since its founder Thaksin became Prime Minister.⁹⁶⁰ In dismissing both criminal and civil defamation cases, the judges held that the defendant had studied the company and the Party in detail and commended in good faith and

⁹⁵⁴ Subhatra Bhumiprabha, et al, *Freedom of Expression and the Media in Thailand*, Article 19, London and Forum-Asia, Bangkok, 2005, at 52.

⁹⁵⁵ "Shutdown of iTV a Blow to Thailand's Free Media", *Media Asia*, 6 March 2007.

⁹⁵⁶ "Shin Corp Takes First Step into iTV", *The Nation*, 31 May 2000.

⁹⁵⁷ Nidhi Aeusrivongse, "Building Popular Participation: Sustainability of Democracy in Thailand" in Michael H Nelson (ed), *Thai Politics: Global and Local Perspectives*, King Prajadhipok's Institute, Nontburi, 2003, at 19.

⁹⁵⁸ Lee Kim Chew, "Thailand: Taking the Bite out of the Thai Press", *The Straits Times*, 27 February 2004.

⁹⁵⁹ "Thailand: Nation Chief Says Shin Corp Interfered in iTV", *Bangkok Post*, 18 August 2005.

⁹⁶⁰ Asian Legal Resource Centre, "Institutionalised Torture, Extrajudicial Killings and Uneven Application of Law in Thailand" (2005) 4(2) *Article 2* 1, at 47.

in the public interest.⁹⁶¹ Advocates for freedom of expression acclaimed the ruling as an important victory for freedom of expression globally.⁹⁶²

Although defamation allegation was not successful in intervening freedom of expression in such case, it urged the media to be aware of the growing use of both civil and criminal defamation law against the press. Since Shin Corp defamation lawsuit, other politicians and businesses have chosen to pursue the same path in undermining the media profession and freedom of expression.⁹⁶³ In the year 2007 alone, one newspaper which its main readers are well-educated, urban middle class was facing forty-eight civil and criminal defamation charges.⁹⁶⁴ Criminal defamation in particular, was the most popular tool for politicians to silence any critics about them.⁹⁶⁵ Inevitably, activists for democracy have called for the defamation provisions in the Criminal Code to be repealed.⁹⁶⁶

In Thailand, criminal defamation law was also closely linked to the *lèse majesté* law which is a separate defamation law in the Thai Criminal Code. The *lèse majesté* law aims to prosecute those who defame, insult, or threaten the royal institution.⁹⁶⁷ While there is some genuine attempt to reform defamation law, those who advocate for the change often found themselves a target of the *lèse majesté* law. Their loyalty to the royal institution was questioned by politicians

⁹⁶¹ The Criminal Court Decision No. Aor 685/2549 (2006).

⁹⁶² "Human Rights Award Recognised Thai Freedom-of-Expression Advocate", 21 September 2006 <<http://www.uq.edu.au/news/index.html?article=10528>> (8 August 2009); Lawyers Council of Thailand and Asian Legal Resource Centre, "Human Rights Judgments under the 1997 Constitution of Thailand" (2007) 6(3) *Article 2* 1, at 25.

⁹⁶³ Subhatra Bhumiprabha, et al, *Freedom of Expression and the Media in Thailand*, Article 19, London and Forum-Asia, Bangkok, 2005, at 86.

⁹⁶⁴ Silpha Tansarawut, "The Impact of Defamation Law on Freedom of Expression in Thailand" (in Thai), a report for Article 19, July 2009, at 7.

⁹⁶⁵ Veera Prateepchaikul, "Thailand: Press Council Criticises Defamation Law", *Bangkok Post*, 21 April 2005.

⁹⁶⁶ "Thailand: Press Council Says Defamation Law Biased Against Defendants", *The Nation*, 19 April 2005; Silpha Tansarawut, "The Impact of Defamation Law on Freedom of Expression in Thailand" (in Thai), a report for Article 19, July 2009, at 89.

⁹⁶⁷ Section 112 of the Criminal Code.

who are against such reform.⁹⁶⁸ In disguise, the *lèse majesté* law became effective censorship to anyone who disagrees with government policies. Currently, further reform – media reform together with political reform is called upon to target the issue of *lèse majesté* law and people's media.⁹⁶⁹

4.3.5.3 Qualification of politicians and conflicts of interest

It is admitted that political reform in the form of constitutional reform may not yield the perfect outcome to protect freedom of expression. However, in the context of making politics transparent, constitutional reform managed to insert new measures to prevent conflicts of interest. As previously argued, conflicts of interest is correlated with the Thai political structure, where the patronage system allows the businessmen to be involved in politics and to siphon benefits from society.⁹⁷⁰ The first constitutional attempt to tackle conflicts of interest was the provisions in the 1997 Constitution disallowing a Member of Parliament to receive any concession from the state or to become a shareholder in a company receiving such concession.⁹⁷¹ A minister may not hold any other position in a company or any organisation which engages in a business and shall not be a shareholder of a company up to the limit permitted by law.⁹⁷²

⁹⁶⁸ “Restrictions on Freedom of Expression through the Lèse Majesté Law in Thailand”, *Prachatai*, 7 February 2009.

⁹⁶⁹ Andrew Walker and Nicholas Farrelly, “International Scholars Call for Reform of Thailand’s *Lèse Majesté* Law”, 4 March 2009 <<http://rspas.anu.edu.au/rmap/newmandala/2009/03/04/international-scholars-call-for-reform-of-thailands-lese-majeste-law/>> (13 August 2009); Committee to Protect Journalists, “Thai Press Club’s Board Charged with *Lèse Majesté*” <<http://cpj.org/2009/07/thai-press-clubs-board-charged-with-lese-majeste.php>> (12 September 2009); Lisa Brooten and Supinya Klangnarong, “People’s Media and Reform Efforts in Thailand” (2009) 5 *International Journal of Media and Cultural Politics* 103, at 108.

⁹⁷⁰ Pairote Pathranarakul, “Conflict of Interest: An Ethical Issue in Public and Private Management”, a paper presented at the 5th Regional Anti-Corruption Conference on the *ADB/OECD Anti-Corruption Initiative for Asia and the Pacific*, Beijing, 28-30 September 2005, at 20.

⁹⁷¹ Section 110 of the 1997 Constitution.

⁹⁷² Sections 208, 209 of the 1997 Constitution.

This attempt failed when the 1997 Constitution underestimated the ability of business-minded politicians to get around the constitutional clause.⁹⁷³ In escaping the enforcement of the 1997 Constitution, it was their spouses and children who the businessmen Members of Parliament turned over their company shares to. In Thaksin's cabinet, there were ministers who were founders of the telecommunication company, the multimedia company and the auto part company.⁹⁷⁴ Not surprisingly, the study showed that on average ten major family businesses received almost twenty three per cent of their income from concessions, compared to non-political tycoon families, which received a mere two and a half per cent.⁹⁷⁵ Even though conflicts of interest constituted a major part of corruption in Thailand, the issue was kept away from the public.⁹⁷⁶

By the time the Constitution Drafting Assembly was established after the 2006 Coup, a new measure against conflicts of interest was vastly publicised as one of the highlights in the new Constitution.⁹⁷⁷ In sum, the 2007 Constitution prohibits the Prime Minister, ministers, spouse and minor offspring to be a shareholder in companies or to retain shares in companies in amounts as specified by law.⁹⁷⁸ For the Prime Minister, the 2007 Constitution mirrored the 1997 Constitution in prohibiting him from carrying out business

⁹⁷³ Prime Minister Abhisit Vejjajiva, "Thailand on Track toward Democracy", a speech delivered at St. John's College, Oxford, 14 March 2009
<http://thailand.prd.go.th/democracy/view_democracy.php?id=4240> (23 June 2009).

⁹⁷⁴ Shawn W Crispin, "Thailand: Prime Minister Mixes Business and Politics", *Far Eastern Economic Review*, 11 December 2003.

⁹⁷⁵ Kitti Prasirtsuk, "From Political Reform and Economic Crisis to Coup D'État in Thailand" (2007) 47(6) *Asian Survey* 872, at 886; Somkiat Tangkitvanich, "Concession, Capitalism, and Economic Governance" (in Thai), a paper presented at the Thailand Development Research Institute Annual Conference on *Toward a Decade after Economic Crisis: Lesson Learned and Adjustment?*, Chonburi, December 2006, at 4-7.

⁹⁷⁶ Pasuk Phongpaichit, "Money Politics and Its Impact", a keynote address presented at the Political Economy Centre's Annual Seminar on *Money Politics*, Chulalongkorn University, Bangkok, 7 December 2005; Transparency Thailand, "Ten Myths about Corruption in Thailand" <http://www.transparency-thailand.org/english/index.php?option=com_content&task=view&id=16&Itemid=37> (13 August 2009).

⁹⁷⁷ Constitutional Drafting Committee, "Highlights of the Draft Constitution B.E..." <http://library2.parliament.go.th/giventake/content_cons/con2550_highlights.pdf> (13 August 2009).

⁹⁷⁸ Section 269 of the 2007 Constitution.

with a view to sharing profit or income, or from being an employee of a person of company.⁹⁷⁹ Ironically, the first Prime Minister after the first general election held after the 2006 Coup, Samak Sundaravej, was also the first Prime Minister whose premiership was ended by the new law on conflicts of interest.

Samak was hosting a TV cookery show “Tasting and Grumbling” prior to and during his premiership. He was held to have broken rules by accepting payments to appear on the show, thereby breaching law that bar ministers having business links.⁹⁸⁰ Prior to the decision of the Constitutional Court, his TV program sparked a heated debate over the issue of conflicts of interest.⁹⁸¹ Samak claimed the program had been done on a freelance basis.⁹⁸² There was an investigation by the Election Commission whether he had a contract to work for the cooking program.⁹⁸³ It was a debate which Thai society needed since most Thai people had not paid attention to the severity of the conflicts of interest subject.

4.3.6 Conclusion: The will to reform politics

It was evident that several conditions of democracy had not been met in Thailand. Perhaps one basic element – a fair election could tell the whole story that democratisation in Thailand seemed to lead to nowhere. Electoral process in a mature democratic state can offer a chance to maintain the rule of law. It is more likely that corrupt politicians are not re-elected. This is contrary to what happened in Thailand. Vote buying and patron-client relationship in Thai politics discourage the development of the rule of law. It is more likely that corrupt politicians are re-elected. For this, it is argued that Thai politics does not confer the positive influence on the rule of law. Given such

⁹⁷⁹ Section 267 of the 2007 Constitution.

⁹⁸⁰ “Profile: Samak Sundaravej”, *BBC News*, 12 September 2008.

⁹⁸¹ The Constitutional Court Ruling No. 12-13/2551 (2008).

⁹⁸² “PM Denies He Violates Charter by Hosting Cooking Shows”, *The Nation*, 8 September 2008.

⁹⁸³ “EC to Probe Samak’s Business Ties with Sponsors of His Cooking Shows”, *The Nation*, 20 May 2008.

circumstance, however, it does not dispirit the Thai people to make political reform a country's top agenda.

Since the 1997 Constitution came into force, it provided the country with a framework to deliver good governance and prevent the abuse of power. Participatory democracy has been encouraged with the constitutional guarantee of right to freedom of information and freedom of expression. Even though the 1997 Constitution could not prevent the military coup in 2006, the will to reform politics continues. The present 2007 Constitution fortifies such framework with additional provisions focusing on making politics more transparent and closing some loophole on conflicts of interest. With the will to eliminate any forms of abuse of power, it is hoped that any future political change will be a constructive platform and positive influence on developing the rule of law in Thailand.

4.4 MILITARY INFLUENCE ON THE RULE OF LAW

4.4.1 Introduction: Military influence

Unlike the King and religion, the military is not an institution which the Thai Constitution requires everyone to respect and uphold. However, it is seen as one of the most powerful institutions in Thailand. It is not because it has power of men and guns. Rather it is because the military has dominated in the political arena without real challenges from the civil bureaucracy, political parties, or other societal groups.⁹⁸⁴ Although the military leaders continue asserting that “there will be no more of that army versus government conflict”, the latest coup in September 2006 proved that there is no such assurance. To justify the incident, coup leaders and their supporters argued

⁹⁸⁴ Suchit Bunbongkarn, “The Thai Military and Its Role in Society in the 1990s” in Viberto Selochan (ed), *The Military, the State, and Development in Asia and the Pacific*, Westview Press, Boulder, 1991, at 67.

that their action could limit an abuse of power and thus restore the rule of law for Thailand.

More often than not, military interference is condemned especially by international leaders. A statement issued after the 2006 coup by the US State Department said it hopes “the Thai people will resolve their political differences in accord with democratic principles and the rule of law”.⁹⁸⁵ This is of course contradictory to what coup supporters announced. The rule of law seems to be an anchor of claims from both sides. The difference of the claims on the rule of law is a result of how history and tradition have shaped the mindset of the Thai military as well as civilian.⁹⁸⁶ To understand how these factors have interacted with the rule law in Thailand, the concept is examined through a sociological approach.

The sociological approach is a methodology in investigating the legal concept by taking into account social structures, social process and interest groups.⁹⁸⁷ The examination may render that there are other aspects of rule of law which can specifically be interpreted in a country where democracy is not mature. This is particularly so where there is a belief that interest groups such as the military can provide the Thai people with an opportunity to wipe the slate clean and a new government can be set up after the coup. In relying upon the sociological approach, the thesis does not ignore the universality of the rule of law. Even though Thai citizens increasingly came to view their government no longer legitimate, it should not be the military that seized control of the government. The sociological approach perhaps offers the in-depth

⁹⁸⁵ “Coup Ousting Thailand’s Premier Tests Democracy in Key US Ally”, *The Wall Street Journal*, 20 September 2006.

⁹⁸⁶ James Ockey, “Thailand: The Struggle to Redefine Civil-Military Relations” in Muthiah Alagappa (ed), *Coercion and Governance: The Declining Political Role of the Military in Asia*, Stanford University Press, California, 2001, at 189.

⁹⁸⁷ For example see, Marcelo Gomes Justo and Helena Singer, “Sociology of Law in Brazil: A Critical Approach” (2001) 32(2) *The American Sociologist* 10.

understanding as to why the universality of the rule of law is not entirely followed in Thailand.

4.4.2 The Thai military as a professional soldier?

Those who believe that soldiers primarily deal with national security matters, may wonder how the military can be involved in the administration of the country. It is even more interesting as to how military can be influential to the rule of law - whether to promote or demote a use of arbitrary power.⁹⁸⁸ As a professional soldier, *restoring peace* into the country seems to be the focus of men in uniform. In Thailand, however, it does not appear to be the case. To start out with the recent coup, General Surayud Chulanont, the 2006-2008 interim Prime Minister and former Commander-in-Chief, stated that his military-appointed government is committed to *restoring the rule of law*.⁹⁸⁹ Surely, he has not disapproved the military involvement in the political arena.

Indeed, politics has been a battlefield for high-ranked soldiers in Thailand since absolute monarch was rescinded in 1932. To sum up the level of military involvement in politics, the latest coup in 2006 is coup number eighteen.⁹⁹⁰ From 1932 to 2009, Thailand had twenty-seven Prime Ministers and more than ten were army officers.⁹⁹¹ An attempt to break away the military from politics was carried out in during 1993 – 2002, calling for a plan to increase military professionalisation.⁹⁹² The military leaders launched several programs in acquiring sophisticated weapon systems, raising the quality of its personnel and setting up

⁹⁸⁸ Asian Human Rights Commission, “UN HRCouncil/ Thailand: Military Coup a Disaster for Rule of Law and Human Rights in Thailand”, 12 April 2007
<<http://www.hrsolidarity.net/mainfile.php/2006vol16no02/2519/>> (25 March 2009).

⁹⁸⁹ Asian Human Rights Commission, “Thailand: Military Rule Must End before the Rule of Law Begins”, 9 November 2006 <<http://www.ahrchk.net/statements/mainfile.php/2006statements/818>> (25 March 2009).

⁹⁹⁰ Thitinan Pongsudhirak, “Thailand since the Coup” (2008) 19(4) *Journal of Democracy* 140.

⁹⁹¹ The Secretariat of Cabinet, *History of Thai Prime Ministers*
<http://www.cabinet.thaigov.go.th/eng/pm_his.htm> (1 September 2009).

⁹⁹² Surapan Poomkaew, *The Decision of the Commander-in-Chief of the Royal Thai Army* (in Thai), Offset, Bangkok, 2007, at 143, 153.

new special force divisions.⁹⁹³ The attempt in separating military from politics proved unsuccessful. Rather the military involvement in politics and other civilian affairs was identified as “role expansion”.⁹⁹⁴ Recently, the inseparable connection between the military and politics might not be seen in a clear form like a coup. Indeed, such connection becomes more sophisticated.

Leading members of the armed forces are now appointed board members of state enterprises and private firms including major banks, hotels and brewery business.⁹⁹⁵ Some were appointed senators or privy councillors of the King. Some became executive members of political parties. Some led the people for the street demonstration. As long as the military’s role in politics is on an expansion, it is difficult to see the Thai military portraits an image of professional soldiers. However, for some, military professionalism also incorporates concern over political, social and economic problems.⁹⁹⁶ The interview of contemporary elite revealed that they did not mind the military’s participation in politics if the military did not employ tanks, a show of force, or a threat of coup.⁹⁹⁷

4.4.3 Military role and the rule of law: Past and present

The Thai people are quite familiar with the military involvement in politics. Usually, a military coup has been used as terms of reference when identifying what the military’s participation is in politics. Undoubtedly, it leads to the

⁹⁹³ Suchit Bunbongkarn, “The Thai Military in the 1990s: A Declining Political Force?” in Wolfgang Heinz, Werner Pfenning, and Victor King (eds), *The Military in Politics: Southeast Asian Experiences*, Centre for South-East Asian Studies, The University of Hull, 1990, at 117.

⁹⁹⁴ See, Moshe Lissak, *Military Roles in Modernisation: Civil-military Relations in Thailand and Burma*, Sage Publication, California, 1976; Muthiah Alagappa, “Military Professionalism and the Development Role of the Military in Southeast Asia” in J Soedjati Djiwandono and Yong Mun Cheong (eds), *Soldiers and Stability in Southeast Asia*, Institute of Southeast Asian Studies, Singapore, 1988.

⁹⁹⁵ Suchit Bunbongkarn, “The Thai Military and Its Role in Society in the 1990s” in Viberto Selochan (ed), *The Military, the State, and Development in Asia and the Pacific*, Westview Press, Boulder, 1991, at 67.

⁹⁹⁶ Suchit Bunbongkarn, “The Military and Development for National Security in Thailand” in J Soedjati Djiwandono and Yong Mun Cheong (eds), *Soldiers and Stability in Southeast Asia*, Institute of Southeast Asian Studies, Singapore, 1988, at 137.

⁹⁹⁷ Pongsan Puntularp, “Political Stability: The Role of Political Culture in Thailand”, a paper presented at the 5th *International Conference on Thai Studies*, SOAS, London, 1993, at 11.

military being labelled a demolisher of the rule of law.⁹⁹⁸ Coups bring Thailand into the state where the stability of law is rare.⁹⁹⁹ Each coup has inspired a new Constitution.¹⁰⁰⁰ Furthermore, when exploring the military affairs in Southeast Asia, it is difficult to see the military as a promoter of the rule of law.¹⁰⁰¹ While Burma is ruled under the military dictatorship, the Philippine army continued to plot against President Gloria Arroyo until 2010.¹⁰⁰² Despite the downfall of Suharto, the Indonesian military remains politically active especially in the vast archipelago.¹⁰⁰³

These foreign illustrations are not meant to be an excuse of the Thai military in interfering in politics. They are addressed to illustrate that historically and contemporarily, the military institution can play a vital role in administering a country. However, the outcomes of each military involvement are varied. Whether the involvement produces positive or negative outcomes depends on the real reason behind each military engagement. In Thailand, it is believed that the cause of military involvement is mainly linked to immature democracy which is surrounded by election fraud, vote buying and corrupt politicians.¹⁰⁰⁴ The soldiers may believe that they need to act beyond their typical peace keeping role. Some of these unchartered actions are discussed below.

4.4.3.1 Coup

⁹⁹⁸ Asian Legal Resource Centre, "Thailand: Continued Threats to Rule of Law and Human Rights under Elected Government", 22 February 2008, <<http://www.alrc.net/doc/mainfile.php/hrc7/475>> (28 March 2007).

⁹⁹⁹ Wendell Blanchard, *Thailand: Its People, Its Society, Its Culture*, Hraf Press, Connecticut, 1970, at 155.

¹⁰⁰⁰ Vitit Muntarbhorn, "Deconstructing Thailand's (New) Eighteenth Constitution" (2009) 12(1) *Thailand Law Journal* <<http://www.thailawforum.com/articles/Thailand-Eighteenth-Consitution.html>> (25 March 2009).

¹⁰⁰¹ "Thailand's Dangerous Coup", *The Economist*, 23 September 2006, at 11.

¹⁰⁰² "Philippines Military Discovers Plot to Kill President Arroyo", *VOA News*, 14 February 2008.

¹⁰⁰³ See, Damien Kingbury, *Power, Politics, and the Indonesian Military*, Routledge Curzon, London, 2003.

¹⁰⁰⁴ See, Suchit Bunbongkarn, "The Military and Democracy in Thailand" in R J May and Viberto Selochan (eds), *The Military and Democracy in Asia and the Pacific*, Crawford House Publishing, Sydney, Australia, 1998, at 47-58.

A coup is probably one of the most intrusive actions the military could employ to interrupt the administration.¹⁰⁰⁵ An interview with the coup leader in 2006 reveals why military perceives coup as a legitimate role. He said the coup was necessary in order to resolve the conflict and bring back normalcy and harmony among people.¹⁰⁰⁶ It is also the same reason which was repeated to justify other previous coups. Although such reason is not entirely agreed by all Thais, some do genuinely believe that coup is a viable option to eradicate a corrupt government. This was once articulated by a leading journalist - “the military is well-organised and the line of command is clear. They can make an immediate decision...”¹⁰⁰⁷

One would wonder why coup is somewhat popular in Thailand. Non-violence may not represent an entire picture. Yet, it certainly reduces the chance of the people objecting to the coup.¹⁰⁰⁸ Those who have not had much experience with Thailand may consider coup as a dated role of military.¹⁰⁰⁹ Yet, those who have studied Thai political culture may regard coup as another wave of political engineering in Thailand.¹⁰¹⁰ “Vote buying” and “corruption” are Thai political cultures which are against the rule of law.¹⁰¹¹ To control the abuse of

¹⁰⁰⁵ Brian Clive Smith, *Understanding Third World Politics: Theories of Political Change and Development*, 2nd ed, Indiana University Press, Bloomington, 2003, at 173.

¹⁰⁰⁶ “Military Coup in Thailand: General Promises a Quick Return to Democracy”, *Spiegel Online*, 20 September 2006.

¹⁰⁰⁷ Pongsan Puntularp, “Political Stability: The Role of Political Culture in Thailand”, a paper presented at the 5th *International Conference on Thai Studies*, SOAS, London, 1993, at 11.

¹⁰⁰⁸ Yeshua Moser-Puangsuwan, “September’s Inevitable Coup”, *Nonviolence International South East Asia*, 4 October 2009

<http://www.nonviolenceinternational.net/seasia/index.php?option=com_content&task=view&id=62&Itemid=71> (2 September 2009).

¹⁰⁰⁹ See, Victor Hansen, “Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?” (2008) 16 *Tulane Journal of International and Comparative Law* 419.

¹⁰¹⁰ Mark Askew, “The Thing Called Culture in Thailand’s Politics: Reflections on Categories, Symbol, and Trust”, a paper presented at the United Nations Conference Centre on *Political Culture, Ethics, and Governance*, Bangkok, 8-10 November 2007, at 120-121.

¹⁰¹¹ Orapin Sopchokchai, Ryratana Suwanraks, and Panniya Binsri, *The Thai Constitution and New Mechanisms for Transparent and Anti-Corruption Society*, Thailand Development Research Institute, Bangkok, 2000.

power and counteract a corrupt government, a coup is invented.¹⁰¹² This coincides with the fact that immature democracy is a key factor for the military involvement into politics.¹⁰¹³ This is especially true when the history of the first coup is revealed.

4.4.3.1.1 The first coup

The politics of Thailand took a significant turn in 1932 when a group of young intellectuals, educated abroad and imbued with the concept of democracy from Western countries, staged a bloodless coup.¹⁰¹⁴ The members of the coup composed of both soldiers and civilians. They demanded a change from absolute to a constitutional monarchy. For good cause, the first coup was expected to realign Thailand with a Western democratic country. Unfortunately, almost eighty years have been passed. The culture of coup is deeply inherited. Dream of well-established democracy and stability of law has not fully arrived.¹⁰¹⁵ This generates the mixture of feeling towards the role of military coup, including whether it had done a good deed for the country.

The first coup was expected to establish the fundamental principle of the rule of law - equality before the law. The coup leaders justified their action by emphasising the injustice of the monarch being above the law and having the special rights given to royal family members.¹⁰¹⁶ It was accentuated that the King only appointed those who were closely related to him in his

¹⁰¹² Suchit Bunbongkarn, "The Thai Military and Its Role in Society in the 1990s" in Viberto Selochan (ed), *The Military, the State, and Development in Asia and the Pacific*, Westview Press, Boulder, 1991, at 81.

¹⁰¹³ Elinore Bartak, *The Student Movement in Thailand 1970-1976*, Centre of Southeast Asian Studies, Monash University, Australia, 1993, at 34.

¹⁰¹⁴ The National Identity Board, *Thailand in the 2000's*, Office of the Prime Minister, Bangkok, 2000, at 196.

¹⁰¹⁵ James C Ingram, *Economic Change in Thailand 1850-1970*, Stanford University Press, California, 1971, at 3.

¹⁰¹⁶ Akin Rabibhadana, "The Organisation of Thai Society in the Early Bangkok Period, 1782-1873" in Clark D Neher (ed), *Modern Thai Politics: From Village to Nation*, Schenkman, Massachusetts, 1979, at 10-11.

government.¹⁰¹⁷ This created the unsatisfactory situation among the Thai people since administration of the country solely depended upon a small group of royal members and elite.¹⁰¹⁸ The King was accused of turning a blind eye to the elite who were abusing their power.¹⁰¹⁹ It was a circumstance in which the implementation of the rule of law could help rectify.

In marking a major step towards developing the rule of law in Thailand, the coup overthrew absolute monarchy. The First Constitution was then introduced as a safeguard against arbitrary governance.¹⁰²⁰ All members of society were expected to be treated equally under the one constitutional regime. Indeed, the Coup Declaration stated that the revolutionary change would:

“provide the people with equal rights (so that those of royal blood do not have more rights than the people as at present)... Everyone will have equal rights and freedom from being...slaves of royalty. The time has ended when those of royal blood farm on the backs of the people”.¹⁰²¹

The question then arises as to what went wrong in establishing the rule of law by way of coup. If the concept were properly functioned, why were there a number of successive coups? Perhaps the answer lies in the dilemma of having to adapt the ideals of Western constitutionalism to the realities of Thai society and politics. Thailand is a highly stratified society with a large number

¹⁰¹⁷ Visanu Krau-ngam, *Constitutional Law* (in Thai), Sawaengsuthi Karnpim, Bangkok, 1987, at 194.

¹⁰¹⁸ Sornthong, *The Life of the Country* (in Thai), Mitnara Karnpim, Bangkok, 1969, at 25-31.

¹⁰¹⁹ Pasuk Phongpaichit and Chris Baker, *Economy and Politics during the Bangkok Period* (in Thai), Silkworm Books, Chiang Mai, 2003, at 323.

¹⁰²⁰ The First Constitution came into force on 10 December 1932. Prior to the First Constitution, Thailand had a temporary Charter which was introduced after the Coup seized the power of the royal government on 24 June 1932.

¹⁰²¹ For the original Thai announcement, see Charnvit Kasetsiri, *1932: Siam's Revolution* (in Thai), Foundation for the Promotion of Social Sciences and Humanities Textbooks Project, Bangkok, 2000, at 125-126.

of undereducated people.¹⁰²² The political and economic resources were concentrated in the hands of a small percentage of the population.¹⁰²³ To superimpose the concept of democracy on the society where “Constitution”, “election”, “rule of law” were unknown to the majority of the people, was simply to put the cart before the horse.

The first coup did not suddenly turn Thailand to be fully developed democratic, but it surely develops the relationship between the bureaucracy and the military. Since the first coup actually consisted of soldiers as well as government officials, it contributed to the military’s attitude in trying to stabilise political unrest. Until now, whenever there is a confrontation between the people and the government, the reporters usually turn to the military leaders and seek for their comment.¹⁰²⁴ It is further argued that such attitude was an explanation as to why the military has frequently interfered in politics without entrenching itself in the political system as in Burma or Indonesia.¹⁰²⁵ A most recent example would be the promise from General Sonthi Boonyaratglin, the 2006 coup leader who assured to “set up a civilian government within two weeks”.¹⁰²⁶

At a first glance, the first coup appeared to be a promising way to provide Thailand with democracy and laid down the concept of the rule of law. By portraying absolute monarchy as aristocratic, the coup promoted equality before the law. By assisting the government officers in planning the coup, the

¹⁰²² Thanet Aphornsuwan, “The Search for Order: Constitutions and Human Rights in Thai Political History”, a paper delivered for *The 2001 Symposium: Constitutions and Human Rights in a Global Age: An Asia Pacific Perspective*, Australian National University, Canberra, December 2001, at 1.

¹⁰²³ Seksarn Prasertkul, “Thailand and Sustainability of People-Based Politics” in Niyom Rathamarit (ed), *Eyes on Thai Democracy: National and Local Issues*, King Prajadhipok’s Institute, Bangkok, 2006, at 320.

¹⁰²⁴ Thak Chaloemtiarana, *Thailand: The Politics of Despotic Paternalism*, Cornell Southeast Asia Program, New York, 2007, at ix.

¹⁰²⁵ James Ockey, “Thailand: The Struggle to Redefine Civil-Military Relations” in Muthiah Alagappa (ed), *Coercion and Governance: The Declining Political Role of the Military in Asia*, Stanford University Press, California, 2001, at 191-192.

¹⁰²⁶ “Sonthi: Civilian govt in two weeks”, *The Nation*, 2 October 2006.

military believed they had to enter into politics in support of democracy. By raising the concept of righteousness, the coup helped remove an illegitimate government which was abusing their power. However, for almost eighty years after the first coup, a new so-called democratic system has been faced with military supremacy. With the first coup having highly political origin, the later coups seem to follow the footsteps.

4.4.3.1.2 The later coups

It has often been said that democracy will flourish where people hold democratic attitudes.¹⁰²⁷ Since the common Thai people could not relate themselves to this ideology, it led them to strongly believe that politics was a battle to seize public administration positions and therefore was unrelated to their everyday lives.¹⁰²⁸ The evidence of this is clear when the number of people who had casted their votes was relatively low.¹⁰²⁹ It was not until the 1997 Constitution which made it compulsory for an eligible person to exercise their right to vote in an election.¹⁰³⁰ With the low level of participation in election, it is more difficult to use democratic means to eradicate corrupt politicians.¹⁰³¹ At the same time, this gives rise to the military in interfering into politics to support democracy.

Throughout the successive seventeen coups, the theme of being a “democracy guardian” has been portrayed.¹⁰³² Such guardian role implies a right to intervene whenever the military feels that national security is threatened and

¹⁰²⁷ Gabriel Almond and Sidney Verba, *The Civic Culture*, Sage, California, 1989, at 135.

¹⁰²⁸ Nidhi Eoseewong, “Thai Political Cultures”, a paper presented at the United Nations Conference Centre on *Political Culture, Ethics, and Governance*, Bangkok, 8-10 November 2007, at 29.

¹⁰²⁹ Bart Engelen, *The Disease of Democracy and the Remedial Role of Compulsory Voting*, Centre of Economics and Ethics, K.U. Leuven <<http://perswww.kuleuven.be/~u0042398/Bart%20Engelen%20-%20compulsory%20voting.doc>> (21 June 2009).

¹⁰³⁰ Section 68 of the 1997 Constitution; Section 72 of the 2007 Constitution.

¹⁰³¹ Michael Backman, *The Asian Insider: Unconventional Wisdom for Asian Business*, Palgrave Macmillan, New York, 2004, at 17-18.

¹⁰³² Suchit Bunbongkarn, “The Thai Military in the 1990s: A Declining Political Force?” in Wolfgang Heinz, Werner Pfenning, and Victor King (eds), *The Military in Politics: Southeast Asian Experiences*, Centre for South-East Asian Studies, The University of Hull, 1990, at 118.

the civilian government could not correct the situation.¹⁰³³ For example, from the early 1960s, growing fears of communist insurgency which followed Maoist increased.¹⁰³⁴ The then Thai government failed to tackle the threat of the communist insurgency which had gone beyond a small-scale terrorist movement. The military was allowed to step in, hoping that it would “clear up” the socialist influence.¹⁰³⁵ Although it was a mission to save democracy, it again, shapes the attitude of military in intervening with the civilian government whenever pure politics could not solve political problems.

Such attitude along with the role in safeguarding democracy was later extended to the role in eliminating corruption among government officials. By the time the seventeenth coup occurred in 1991, the military was fully comfortable in relying on “corruption among government officials” as a cause of their action.¹⁰³⁶ At the end of 2002, the data collected by the Asia Barometer Centre illustrated the military enjoys the highest level of trust in public institutions (eighty per cent) while the courts and the Parliament received seventy four per cent and sixty one per cent respectively.¹⁰³⁷ When Thaksin’s corruption allegations were evident in late 2005 (such as an air force plane was used to take guests for a party hosted by one of Thaksin’s sisters), coup rumours were at a fourteen-year high.¹⁰³⁸

¹⁰³³ Suchit Bunbongkarn, “The Military and Democracy in Thailand” in R J May and Viberto Selochan (eds), *The Military and Democracy in Asia and the Pacific*, Crawford House Publishing, Sydney, 1998, at 56.

¹⁰³⁴ Suchit Bunbongkarn, “The Communist Insurgency and Military-Initiated Liberalisation: The Military and Democracy in Thailand” in R May, et al, *The Military and Democracy in Asia and the Pacific*, ANU E Press Publication, Canberra, 2004 <http://epress.anu.edu.au/mdap/mobile_devices/ch03s05.html> (20 January 2010).

¹⁰³⁵ Suchit Bunbongkarn, “Thailand: Democracy under Siege” in James Morley (ed), *Driven by Growth: Political Change in the Asia-Pacific Region*, An East Gate Book, New York, 1999, at 167.

¹⁰³⁶ “February 1991 Coup” <<http://www.globalsecurity.org/military/world/thailand/coup-1991.htm>> (16 April 2009); Pasuk Phongpaichit and Chris Baker, *Economy and Politics during the Bangkok Period* (in Thai), Silkworm Books, Chiang Mai, 2003, at 441.

¹⁰³⁷ Rick Stapenhurst, “Political Culture, Ethics, and Governance in Comparative Perspective”, a paper presented at the United Nations Conference Centre on *Political Culture, Ethics, and Governance*, Bangkok, 8-10 November 2007, at 120-121.

¹⁰³⁸ Wendall Katerenchuk, “Thai Politics 2005: A Year in Review” in Niyom Rathamarit (ed), *Eyes on Thai Democracy: National and Local Issues*, King Prajadhipok’s Institute, Bangkok, 2006, at 249-250.

Indeed, the talk of coup is considered as a normal conversation in an average Thai household. Wherever it becomes apparent that the elected government is corrupt, suddenly coup is inferred.¹⁰³⁹ Since most coups were bloodless, the Thai people become immune or even more willing to allow the military to overthrow corrupt politicians. For some, the coup is only “a restart button” and it can be pressed whenever something is out of control. In the 1991 Coup, it was pressed because the then elected government was highly corrupt.¹⁰⁴⁰ The same reason was also applied to the 2006 Coup with an emphasis on Thaksin’s abuse of power. The following allegations justified the claim that the coup supported the rule of law concept. These included:

- “(1) co-optation of neutral monitoring agencies such as Election Commission, the Constitutional Court, and the Bank of Thailand through the personnel control;
- (2) a series of harsh security measures including the emergency law applied in the southern border provinces, that can threaten fundamental human rights;
- (3) intervention into the media to stifle the criticisms against his policies”.¹⁰⁴¹

Thaksin Shinawatra made his fortune through political connections which enabled him to win lucrative concessions for the first Thai mobile network, and then later to control Thailand’s original telecoms satellite.¹⁰⁴² He also owned stakes in airlines and luxury hotel groups or even an English football club.¹⁰⁴³ In 2001, Thaksin was tried for failing to declare his assets in the

¹⁰³⁹ “Old Soldiers, Old Habits”, *The Economist*, 23 September 2006, at 27.

¹⁰⁴⁰ Frank Munger, “Culture, Power, and Law: Thinking about the Anthropology of Rights in Thailand in an Era of Globalisation” (2007) 51 *New York Law School Law Review* 817, at 820.

¹⁰⁴¹ Takeshi Inguchi & Satoru Mikami, “Measuring Changes in Thailand Before and After the Coup: Using Asia Barometer Survey 2003, and 2007”, a paper presented at the United Nations Conference Centre on *Political Culture, Ethics, and Governance*, Bangkok, 8-10 November 2007, at 71-96.

¹⁰⁴² Pasuk Phongpaichit and Chris Baker, *Thaksin: The Business of Politics in Thailand*, Nordic Institute of Asian Studies, Denmark, 2004, at 180.

¹⁰⁴³ Sriram Srinivasan, “Thailand Diary”, *Outlook Business*, 9 August 2008.

Constitutional Court.¹⁰⁴⁴ Fortunately for him, he was vindicated in an eight – seven vote.¹⁰⁴⁵ In 2003, his cousin, General Chaisit Shinawatra was made Commander-in-Chief. His former classmates were also promoted to head the Third Army in the north and the Fourth Army in the south.¹⁰⁴⁶ What would be a way to remove a Prime Minister who was able to control almost everything in Thailand?

According to the democratic ideology, election would be a right solution – to replace the corrupt politicians with the honest ones. This may not be achieved in Thailand where poverty is prevalent and thus buying and selling votes is epidemic.¹⁰⁴⁷ As long as this is still the case, there is little room to resolve the political differences in accord with democratic principles. By this, it means that the military would continue to inserting themselves in politics. This may well be interpreted that what the later coups were trying to do is to support democracy in the way their military ancestors firstly started. At least, it could be said that military interruption helps disempowering destructive actors. The fact that the coup brought a charge of corruption against Thaksin under the trial of the Courts of Justice also shows that leaders with political and economic clout are not above the law.¹⁰⁴⁸

While the initial poll showed that almost eighty-four per cent of the respondents approved the military takeover in 2006, the Thai people have not

¹⁰⁴⁴ Brian Brewer, “Thailand: Building the Foundations for Structural and Systematic Transformation” in Anthony Cheung and Ian Scott (eds), *Governance and Public Sector Reform in Asia*, Routledge Curzon, London, 2003, at 206.

¹⁰⁴⁵ The Constitutional Court Ruling No. 20/2544 (2001).

¹⁰⁴⁶ Glen Lewis, *Virtual Thailand: Media and Culture Politics in Mainland Southeast Asia*, Routledge Curzon, New York, 2005, at 71.

¹⁰⁴⁷ Narayanan Ganesan, “Appraising Democratic Consolidation in Thailand under Thaksin’s Thai Rak Thai Government” (2006) 7(2) *Japanese Journal of Political Sciences* 153, at 164.

¹⁰⁴⁸ Jane Stromseth, David Wippman, and Rosa Brooks, *Can Might Make Rights?: Building the Rule of Law after Military Intervention*, Cambridge University Press, Leiden, 2006, at 307.

disregarded that coup is not always a right way to uphold the rule of law.¹⁰⁴⁹ Indeed, a coup has its negative side effect. For example, the generals did not face any resistance to their non-democratic measures. There were clauses in both the 2006 Constitution (Interim) and the 2007 Constitution giving the junta blanket amnesty for the events leading the demise of the 'Thaksin's government'.¹⁰⁵⁰ It would be naive not to recognise that a coup is a medicine which its side effect can have a more severe adverse impact on the rule of law. This is especially so where the military tried to prolong their power after the coup.

After the successful overthrow of the then highly – corrupt government of General Chatichai Choonhavan in 1991, the military did not step down.¹⁰⁵¹ General Suchinda Kraprayoon, a member of the coup was appointed Prime Minister. In May 1992, the Bangkok middle class rebelled against his premiership and the Constitution which was promulgated by the military junta.¹⁰⁵² The uprising was seen as the growth of a middle class with an interest in clean politics and democracy, albeit without the military involvement.¹⁰⁵³ With the large-scale demonstrations against the military, the military started to realise that their service of coup may no longer be required. Until 2006, it was a fifteen-year gap where Thailand did not experience any

¹⁰⁴⁹ Thak Chaloemtiarana, *Thailand: The Politics of Despotic Paternalism*, Cornell Southeast Asia Program, New York, 2007, at xviii.

¹⁰⁵⁰ Vitit Muntarbhorn, "Deconstructing Thailand's (New) Eighteenth Constitution" (2009) 12(1) *Thailand Law Journal* <<http://www.thailawforum.com/articles/Thailand-Eighteenth-Constitution.html>> (25 March 2009); Awzar Thi, "Thailand's Rights Reputation in the Sewer", *UPI Asia Online*, 19 February 2009; Asian Human Rights Commission, "Thailand: Military Rule Must End Before the Rule of Law Begins", 9 November 2006 <<http://www.ahrchk.net/statements/mainfile.php/2006statements/818>> (25 March 2009).

¹⁰⁵¹ John Hirschfeld, "Thai Politics" (1994) 1(1) *Culture Mandala: The Bulletin of the Centre for East-West Cultural and Economic Studies* 63, at 64-65.

¹⁰⁵² James P LoGerfo, "Beyond Bangkok: The Provincial Middle Class in the 1992 Protests" in Ruth McVey (ed), *Money and Power in Provincial Thailand*, University of Hawaii Press, Hawaii, 2000, at 221.

¹⁰⁵³ Pasuk Phongpaichit and Chris Baker, "Power in Transition" in Kevin Hewison (ed), *Political Change in Thailand*, Routledge, New York, 1997, at 28, 34.

military coup. Yet, military influence continued to exist with some transformation.¹⁰⁵⁴

4.4.3.2 The declining of military coup and the rise of “going behind the scenes”

The departure of coup results in the increase of soldiers using more legitimate or more subtle channel to insert their power into politics. This includes establishing their own political parties, joining the existing political parties, or creating their alliance with businessmen who become main contributors for political parties.¹⁰⁵⁵ This means a lesser chance of having a soldier as Prime Minister in militarist authoritarianism but more soldiers who can manipulate a parliament democracy.¹⁰⁵⁶ Those strategies are believed to help the military retain political power.¹⁰⁵⁷ However, the tasks are much more difficult when people are more aware of democracy. The examples are the middle/urban working class who formed the mass uprisings against the military governments of Field Marshall Thanom Kittikachorn (the 14 Tula Uprising) in 1973 and of General Suchinda Kraprayoon in 1992.¹⁰⁵⁸

Prior to the 1991 Coup which overthrew General Chatichai Choonhavan, Thailand experienced a very long period of parliamentary rule in its history, with many observers believing that the coup had become obsolete.¹⁰⁵⁹ This was contributed by the predecessor - General Prem Tinsulanonda. Prem's reputation is that of an incorruptible soldier fiercely loyal to his soldiers and to

¹⁰⁵⁴ Chai-Anan Samudavanija, “Old Soldiers Never Die, They Are Just Bypassed” in Kevin Hewison (ed), *Political Change in Thailand*, Routledge, New York, 1997, at 56-57.

¹⁰⁵⁵ Paul M Handley, “More of the Same?” in Kevin Hewison (ed), *Political Change in Thailand*, Routledge, New York, 1997, at 94-113.

¹⁰⁵⁶ “Where Power Lies: Coups are Such an Old-Fashioned Way of Running Things”, *The Economist*, 17 September 2009.

¹⁰⁵⁷ Kobkua Suwannathat-Pian, *Thailand's Durable Premier*, Oxford University Press, Kuala Lumpur, 1995, at 167.

¹⁰⁵⁸ Ji Ungpakorn, “The Struggle against the Military for Thai Democracy”, a working paper for the *Asian Research Centre of Murdoch University*, National Library of Australia, 1996, at 22.

¹⁰⁵⁹ James Ockey, *Business Leaders, Gangsters, and the Middle Class: Societal Groups and Civilian Rule in Thailand*, a Doctor of Philosophy dissertation, Cornell University, 1992, at 1.

the monarchy.¹⁰⁶⁰ He ruled Thailand from 1980-1988 under the military parliamentary regime.¹⁰⁶¹ It was not only the time of peace but ironically it was also the time when the economy expanded rapidly.¹⁰⁶² The pessimistic side was that military leaders restricted the freedom of elected politicians on the grounds of protecting national security. When General Chatichai, a soldier turned politician, was elected, the budget for the military was reduced drastically.¹⁰⁶³ The intension between the military and Chatichai's government finally led to the 1991 Coup.

The budget cut was not the only tactic the civilian government used to curb the military power. The attempt also included a civilian Prime Minister occupying the powerful position of Minister of Defence, usually reserved for former generals.¹⁰⁶⁴ This was a plan of Prime Minister Chuan Leekpai, a predecessor of Thaksin. Concurrently, the period of 1993-2002 was classified as the professional military era of Thailand. The plan to modernise the Royal Thai Army was introduced with the new military system - the C4I system (Command, Control, Communication, Computers, and Intelligence System).¹⁰⁶⁵ Welfare of lower rank soldiers was increased. There were joint military trainings between the foreign and Thai armies such as the US Cobra Gold.¹⁰⁶⁶ Yet, these activities did not impede the military moves in influencing politics *behind the scenes*.

¹⁰⁶⁰ "Disorder in Thailand; Thai Enemies Agree at Urging of King to Cease Violence", *The New York Times*, 21 May 1992.

¹⁰⁶¹ Michael Kelly Connors, *Democracy and National Identity in Thailand*, Routledge Curzon, Oxford, 2003, at 95-96.

¹⁰⁶² Priyambudi Sulistiyanto, *Thailand, Indonesia and Burma in Comparative Perspective*, Ashgate, Burlington, 2002, at 47-48.

¹⁰⁶³ Pasuk Phongpaichit and Chris Baker, *Thailand, Economy and Politics*, Oxford University Press, Singapore, 1997, at 351.

¹⁰⁶⁴ Priyambudi Sulistiyanto, *Thailand, Indonesia and Burma in Comparative Perspective*, Ashgate, Burlington, 2002, at 65.

¹⁰⁶⁵ Surapan Poomkaew, *The Decision of the Commander-in-Chief of the Royal Thai Army* (in Thai), Offset, Bangkok, 2007, at 153.

¹⁰⁶⁶ Donald E Weatherbee, et al, *International Relations in Southeast Asia: The Struggle for Autonomy*, Rowman & Little Field Publishers, Lanham, 2005, at 38.

Chai-Anan Samudavanija, a political scientist raised an important example of the military influence in disguise. He expressed his concern with regard to General Prem's influence. Since Prem was Commander-in-Chief and a Prime Minister for eight years and now a chief advisor of the present King, his role in Thailand both in the military and in politics cannot be underestimated. Chai-Anan believed that Prem's influence could be tactically employed to portray the situation in the way the military desires. This phenomenon was evident by the termination of a television program "Different Perspectives" which was known for not agreeing with the decisions and influence of the military elite. Chai-Anan wrote that:

"According to Dr Chirmsak Pinthong, the show's host, it was General Prem who told the secretary-general of the foundation which had been supporting the program to withdraw its support".¹⁰⁶⁷

The 2006 Coup was also believed to be under Prem's management.¹⁰⁶⁸ During the speech Thaksin gave to his supporters via the video link in March 2009, Thaksin accused Prem of being the influential person outside the Constitution.¹⁰⁶⁹ Thaksin also called on other military leaders to stop their involvement in politics. In fact, Thaksin had learned earlier that Prem and other military leaders could be influential to his premiership.¹⁰⁷⁰ To avoid any negative response from the military, Thaksin quickly re-politicised the army in order to form a major political base to directly support him. This included appointing his cousin Commander-in-Chief as well as appointing high-ranking military officers in his government. Some of these officers were closely linked

¹⁰⁶⁷ Chai-Anan Samudavanija, "Old Soldiers Never Die, They Are Just Bypassed" in Kevin Hewison (ed), *Political Change in Thailand*, Routledge, New York, 1997, at 56-57.

¹⁰⁶⁸ Michael H Nelson, "Thaksin Overthrown: Thailand's Well Intentioned Coup of September 19, 2006" (2007) 6(1) *Eastasia*.at <http://www.eastasia.at/vol6_1/article01.pdf> (2 September 2009), at 9.

¹⁰⁶⁹ "Thaksin's Bombshell: Gen Prem the invisible hand", *The Nation*, 28 March 2009.

¹⁰⁷⁰ Duncan McCargo and Ukrist Pathmanand, *The Thaksinisation of Thailand*, Nordic Institute of Asian Studies, 2005, at 130.

with Prem and were reported to meet up with Prem for an advice on a regular basis.¹⁰⁷¹

In fact, Prem was a focus of the relationship between the military and Thai politics during Thaksin's administration. Ukrist Pathmanand pointed out that such relationship represented the patron-client network with Prem who was seen as the link between the military, parties, high-ranking civil servants, powerful newspapers and large business conglomerates.¹⁰⁷² The view was also shared by Chai-Anan Samudavanija even though he noted that Prem as a privy council, was not supposed to be involved in politics.¹⁰⁷³ This supports the argument that politics can still be manipulated by the military although they are "going behind the scenes". One of contemporary examples of "military in disguise" is a control of a substantial part of the media.¹⁰⁷⁴

Channel 5 and Channel 7 - the two main television channels in Thailand are owned by the Royal Thai Army. While Channel 5 is also operated by the Royal Thai Army, Channel 7 is operated by the Bangkok Broadcasting and Television Company under contract. Both channels are "free to air" channels. On the one hand, this may not raise a problem in relation to freedom of expression. The Thai people especially in the rural area can have free access to news and other information. On the other hand, an average household in Thailand could not afford "cable TV". The limit access to the "cable TV"

¹⁰⁷¹ "Chavalit wants end to division" *The Nation*, 26 April 2006.

¹⁰⁷² Ukrist Pathmanand, "Thaksin and the Re-politicisation of the Military", a proceeding of the Japan Society for the Promotion of Science and National Research Council of Thailand, Core University Program Workshop on *Middle Classes in East Asia*, Centre for Southeast Asian Studies, Kyoto University, 6-8 October 2004, at 48.

¹⁰⁷³ Chai-Anan Samudavanija, "Old Soldiers Never Die, They Are Just Bypassed" in Kevin Hewison (ed), *Political Change in Thailand*, Routledge, New York, 1997, at 56.

¹⁰⁷⁴ Duncan McCargo and Ukrit Pathmanand, *The Thaksinisation of Thailand*, NiAS Press, Copenhagen, 2005, at 127.

means that the available information for the Thai people depends largely on the production of the military.¹⁰⁷⁵

4.4.3.3 The exploitation of the professional soldier

There are many soldiers who do not believe that military should interfere with political issues.¹⁰⁷⁶ They believe that their professionalism should focus on the national security and development.¹⁰⁷⁷ For these soldiers, it is in their profession to perform relief and development work that will bring prosperity and happiness to the country and the people.¹⁰⁷⁸ In the recent years, there are many projects initiated or supported by Ministry of Defence in every region of Thailand.¹⁰⁷⁹ However, these professional soldiers have still been drawn into politics through the operation of certain government policies. This is especially true where such policies seem to create further problems rather than solving the current ones in the region such as the policy to control the insurgency in the south.¹⁰⁸⁰

A wave of attacks in southern Thailand forced the government to stop blaming bandits and to acknowledge that separatist militants were operating in the country.¹⁰⁸¹ In January 2004, Thaksin's government placed three provinces in the south under martial law and later replaced it with an emergency decree

¹⁰⁷⁵ See also, "Thailand: Military-Backed Government Censors Internet", *Human Rights Watch Press Release*, 24 May 2007 <<http://www.hrea.org/lists/huridocs-tech/markup/msg01372.html>> (2 June 2009).

¹⁰⁷⁶ Kevin Hewison, "Thai Politics in the 1990s: Back to the Future?", a paper presented at the *First Thailand Update Conference*, The Australian National University, November 1991, at 1.

¹⁰⁷⁷ Surachart Bamrungsuk, "Thailand: Military Professionalism at the Crossroads" in Muthiah Alagappa (ed), *Military Professionalism in Asia: Conceptual and Empirical Perspectives*, East-West Centre, Honolulu, 2002, at 81.

¹⁰⁷⁸ Ministry of Defence, *The Defence of Thailand 1996*, Strategic Research Institute, Bangkok, 1996, at 33.

¹⁰⁷⁹ Royal Thai Army, *The Army in Forty Years* (in Thai), O.S. Printing, Bangkok, 1995, at 192-194.

¹⁰⁸⁰ Michael K Connors, "War on Error and the Southern Fire: How Terrorism Analysts Get It Wrong" in Duncan McCargo (ed), *Rethinking Thailand's Southern Violence*, National University Press, Singapore, 2007, at 147.

¹⁰⁸¹ Luke Hunt, "Thailand Rethinks Approach to Southern Insurgency", *World Politics Review*, 29 January 2009 <<http://worldfocus.org/blog/2009/01/30/thailands-muslim-insurgency-solidifies-in-south/3841/>> (18 June 2009); "Thailand Islamic Insurgency", *Global Security* <<http://www.globalsecurity.org/military/world/war/thailand2.htm>> (21 June 2009).

in July 2005. The military was assigned to take full responsibility for tackling the violent insurgency in the Muslim-dominated provinces.¹⁰⁸² However, outbreaks of violence, including bombings and arson continued. Thaksin's administration faced criticism for taking a heavy-handed approach in dealing with the insurgency.¹⁰⁸³ The critiques also automatically tarnished the military which had already struggled with their professional image.¹⁰⁸⁴

This is to affirm that although the military performed its professionalism in keeping the peace, its role can still impact the rule of law. Two operations in the south were classic examples of how professional military operations may place some government officers above the law. The first incident is a standoff at the Krue Se Mosque in 2004. It occurred when thirty-two suspected Muslim militants sought refuge in the mosque. The siege lasted for six hours until the military using grenades and rifles killed all men inside.¹⁰⁸⁵ An Independent Commission of Enquiry into Facts was later appointed. The Commission recommended compensation to victims' families and named the responsible military and police officials who were found over-reacted.¹⁰⁸⁶ However, no official has been disciplined or prosecuted.¹⁰⁸⁷

In the same year, six Muslim men were arrested for having supplied weapons to insurgents. More than one thousand and five hundred people demonstrated

¹⁰⁸² See Peter Chalk, "The Malay-Muslim Insurgency in Southern Thailand: Understanding the Conflict's Evolving Dynamic", *RAND Counterinsurgency Study Paper* No. 5, RAND National Defence Research Institute, Office of Secretary of Defence, Santa Monica, 2008.

¹⁰⁸³ The Economist Intelligence Unit Views Wire, "Thai Insurgency", *The Economist*, 11 June 2009.

¹⁰⁸⁴ For example see, Surachart Bamrungsuk, "Thailand: Military Professionalism at the Crossroads" in Muthiah Alagappa (ed), *Military Professionalism in Asia: Conceptual and Empirical Perspectives*, East-West Centre, Honolulu, 2002, at 77-92.

¹⁰⁸⁵ Sara Jones, "Framing the Violence in Southern Thailand: Three Waves of Malay-Muslim Separatism", a Master of Arts thesis for the Faculty of the Centre for International Studies of Ohio University, June 2007, at 61.

¹⁰⁸⁶ Asian Human Rights Commission, "Compensation without criminal liability is no solution to the killings in Southern Thailand", 4 August 2004

<<http://www.ahrchk.net/statements/mainfile.php/2004statement/187/>> (13 June 2009).

¹⁰⁸⁷ "Thailand: Investigate Krue Se Mosque Raid", *Human Rights Watch*, 27 April 2006

<<http://www.hrw.org/en/news/2006/04/27/thailand-investigate-krue-se-mosque-raid>> (18 June 2009).

in front of the Tak Bai police station demanding the release of them. The army was called in to resolve the unrest. The arrested demonstrators were sent to the army camp by trucks. With the heat and the distance, seventy-eight men died from suffocation. Thaksin however, gave the army his full support. The two-member panel in the post-mortem inquest concluded that the army had acted according to the law, used sound judgment and done their best given the circumstance.¹⁰⁸⁸ While this was only the inquest ruling on the cause of death which did not prejudice the guilt or innocence of the officials, the result of the inquest tremendously disappointed the victims and their families.¹⁰⁸⁹

The Krue Se Mosque and the Tak Bai incidents were only two of many examples illustrating how the military (albeit following the government policy) can be drawn into politics. It cannot be denied that while carrying out the government policy, the military can impact the rule of law principle.¹⁰⁹⁰ The military during Thaksin's administration was seen only as a tool which was used to strengthen the government policy. It is important for the military to move beyond this position (in being the government tool). Only then, the military can be a professional military which is independent from the government. And until then, the military can devote their profession to enhance the concept of the rule of law.

4.4.4 Conclusion: The future of military role and the rule of law

In the international community, it is believed that the military can perform its role in globalising the rule of law.¹⁰⁹¹ In a democratic country, the military embedded thoroughly in their ethos the fact that they exist to defend the

¹⁰⁸⁸ "Court Clears Military in Tak Bai Case", *The Bangkok Post*, 30 May 2009.

¹⁰⁸⁹ Section 150 of the Criminal Procedure Code.

¹⁰⁹⁰ May Tan-Mullins, "Voices from Pattani: Fears, Suspicion, and Confusion" in Duncan McCargo (ed), *Rethinking Thailand's Southern Violence*, National University of Singapore Press, Singapore, 2007, at 140.

¹⁰⁹¹ Gilbert Nelson, *The US Military Role in Supporting the Rule of Law in Peace Operations and Other Complex Contingencies*, USAWC Strategy Research Project, US Army War College, Pennsylvania, 2001.

democratic order and way of life. These forces are typically well aware that they may be called upon to defend and advance the ideals of liberty, democracy and the rule of law.¹⁰⁹² This is not unfamiliar ideals for the role of the army in Thailand.¹⁰⁹³ Indeed, it was the reason the recent coup based upon – to uphold democracy and the rule of law. But in which way, the Thai military can defend those ideals of democracy and the rule of law without resorting the coup? The answer lies in the attitude of the Thai people and the way the society has been structured.¹⁰⁹⁴

It is true that the military intervention creates the erratic political process and illuminates the rather unpredictable interaction of “the four contradictions” in which John Girling identified: civil society, money politics, military assertion, and business power.¹⁰⁹⁵ Until the Thai people realise the importance of their vote in building civil society, there remains military involvement in politics whether in the name of coup or “going behind the scene”.¹⁰⁹⁶ It is inevitable to conclude at this point that the military will still play a significant role in administering the country in the near future. This does not mean that there is no rule of law in Thailand. Rather it means that it will need a longer period for the Thai people to learn how to uphold the rule of law without military influence.

4.5 CLASS, CULTURE AND ITS INFLUENCE ON THE RULE OF LAW

4.5.1 Introduction: Class and cultural influences

¹⁰⁹² Michael Kelly, “The Role of the Military in Globalising the Rule of Law” in Spencer Zifcak (ed), *Globalisation and the Rule of Law*, Routledge Curzon, Oxford, 2005, at 184-197.

¹⁰⁹³ Piti Kumpoopong, *New Roles of the Thai Military: Readjusting for the 21st Century*, National Defence College <http://www.nids.go.jp/english/exchange/arf/pdf/thailand_paper.pdf> (22 June 2009), at 7.

¹⁰⁹⁴ See also, Thak Chaloemtiarana, *Thailand: The Politics of Despotism*, Cornell University, New York, 2007.

¹⁰⁹⁵ John Girling, *Interpreting Development: Capitalism, Democracy, and the Middle Class in Thailand*, Cornell Southeast Asian Program, New York, 1996, at 20-21.

¹⁰⁹⁶ Sonthi Boonyaratglin, “Two Leaders Three Former Prime Ministers” (in Thai), *Matichon Daily*, 26 May 2007, at 2.

Thailand is a country which has its long history. The country was formally founded in 1238 A.D. and has never been colonised by any Western country. The country is therefore rich for its old traditions and cultures. While these traditions and cultures underlie the fundamental social norm of the Thai people, their deep root could work against any influence from foreign culture especially any legal ideology from foreign countries. This is a basic argument of “Asian values”. When a legal concept from a foreign society was imported into an Asian country, the concept might not be able to perform as very well as it does in its original society. For the “Asian values” debate, the reason for this is because different countries do have their particular backgrounds such as the social structure or the social norms.

Similar to the debate of Asian values, both Thai and Western scholars have showed their concern about the Thai social structure and its social values which may not be compatible with the concept of “no one can be above the law”. While the first part of this sub-chapter demonstrates how the social class operates, the second part identifies certain social values that might impact the rule of law in Thailand. Like the other sections of this chapter, “the class and cultural influence on the rule of law” is another endeavour in exploring the concept of the rule of law through the sociological approach. As such, the social context of law such as culture, tradition, and attitude is taken into account in analysing how the legal principle is formed and functioned in a particular society.

4.5.2 Social classification

4.5.2.1 Background

Dating back to the period of Ayutthaya, the second era of Thailand, individuals were grouped within social categories.¹⁰⁹⁷ The upper class consisted of the royalties and the noble officials while the lower class was made of the commoners and the slaves.¹⁰⁹⁸ The ranking of each class depended upon “*sakdina*” - a system of land allocation.¹⁰⁹⁹ Within the *sakdina* system, different social ranks were given to individuals depending on their position or nature of work, how people were to behave towards one another as well as how much society considered their worth which relied upon their allocation of land.¹¹⁰⁰ Such system was no longer existed but, what *sakdina* left behind is the character which the contemporary Thai society possesses – a very class-oriented culture.¹¹⁰¹ Monks and members of the royal family are most respected of all individuals. Politicians and leading executives are also highly respected. The family names certainly help people establish their relative social positions when they first meet.

In its most simplified form, the traditional Thai society was characterised by a two class system: the estate of the rulers and the estate of the peasantry.¹¹⁰² Everyone had a numerical status rank, a *sakdina* that specified their place and

¹⁰⁹⁷ The history of Thailand is often categorised into four main epochs: (i) Sukhothai 1238-1350; (ii) Ayutthaya 1350-1767; (iii) Thonburi 1767-1782; and (iv) Rattanakosin or Bangkok 1782-present. See also, Swaeng Boonchalermpipas, “The Thai Legal History”, a paper presented in a conference *Development of Legal Systems in Asia: Experiences of Japan and Thailand*, Faculty of Law, Thammasat University, Bangkok, 6-7 November 1997, at 3-4.

¹⁰⁹⁸ Akin Rabibhadana, “The Organisation of Thai Society in the Early Bangkok Period, 1782-1873” in Clark D Neher (ed), *Modern Thai Politics: From Village to Nation*, Schenkman, Massachusetts, 1979, at 28.

¹⁰⁹⁹ Peter A Jackson, “Autonomy and Subordination in Thai History: The Case for Semicolonial Analysis” (2007) 8(3) *Inter-Asia Cultural Studies* 329, at 343.

¹¹⁰⁰ Mark Tamthai, “Thailand: Sakdina System and Promotion of Human Rights and Democracy” (1999) 9(6) *Human Rights Solidarity*, 8 August 2001
<<http://www.hrsolidarity.net/mainfile.php/1999vol09no06/>> (10 September 2009).

¹¹⁰¹ Victor King, *The Sociology of Southeast Asia: Transformations in a Developing Region*, NIAS Press, Denmark, 2008, at 120-127; Hans-Dieter Evers, “The Formation of a Social Class Structure: Urbanisation, Bureaucratisation and Social Mobility in Thailand” (1966) 7(2) *Journal of Southeast Asian History* 100, 100-115.

¹¹⁰² Niels Mulder, *Java-Thailand: A Comparative Perspective*, Gadjah Mada University Press, Indonesia, 1983, at 8.

privileges in the social hierarchy.¹¹⁰³ Having inferior status and less resource, the peasantry left politics in the hand of the ruling elite. The traditional Thai society thus did not prepare for the idea that all members of society can be equally deserving of respect and dignity, and that all members of society have equal ability in making political choices. With the long history of the social hierarchy, it explains to some extent the reason as to why the concept of “equality before the law” has found a peculiar place in the contemporary Thai society.¹¹⁰⁴

4.5.2.2 The rise of middle class

Historically, the ruling class was a driving force for Thai politics. Writing in 1973, Michael Williams observed that when general elections were held, the peasantry voted largely because they were told to by village headmen and district officers. Thus, Thai political parties did not actually represent substantial political forces.¹¹⁰⁵ The result of low peasant participation led to the ruling class fleeing away from appropriate social control. When the public did not satisfy with the ruling class, the protest or the coup was a simple exit. In the same year of Williams’ observation, the authoritarian regime of Field Marshall Thanom Kittikachorn was overthrown by the middle class. Ironically, this rising middle class was arguably the product of the previous military government’s policy (in increasing its number for economic purposes) since 1960.¹¹⁰⁶

In fact, this new middle class was a growing class of peasant origins which was part of the coup of 1932. The new middle class had emerged out of the

¹¹⁰³ Richard A O’Connor, “Law as Indigenous Social Theory: A Siamese Thai Case” (1981) 8(2) *American Ethnologist* 223, at 228.

¹¹⁰⁴ See, Craig J Reynolds, *Thai Radical Discourse: The Real Face of Thai Feudalism Today*, Cornell University, Southeast Asia Program, Ithaca, 1987.

¹¹⁰⁵ Michael C Williams, “Thailand: The Demise of a Traditional Society” (1973) 3(4) *Journal of Contemporary Asia* 427, at 427.

¹¹⁰⁶ Makawan Suwannaruang, “Thai Middle Class and Civil Society” (2006) 4(2) *Journal of Public Health and Development* (in Thai) 101, at 101-103.

bureaucracy and military, and had in common an opposition to the monarchy, land-based nobility and to the dominant Chinese merchant class which controlled internal and external trade.¹¹⁰⁷ By 1950s, there was a discourse on radical change being conducted by a small but articulate and vocal group of urban intellectuals, who began to speak of politics of Thai society past and present.¹¹⁰⁸ Since the middle class originally targeted its movements to protest authoritarian government and claim for rights and liberty, the rise of the middle class appeared to be a positive direction towards the rule of law.

4.5.2.3 Different social classes and the rule of law

By its origin, members of the middle class were qualified people and powerful to change society since they were called guilds or bourgeoisie in the history of Europe.¹¹⁰⁹ In Thailand after the World War II, its members were diverse with respect to their control over wealth, their social status, and their access to power.¹¹¹⁰ The middle class is so defined by wages and education. The Thai middle class has clearly grown as the economy has expanded. It is now larger, better educated, and more influential, as modernisation theory would predict.¹¹¹¹ Most analyses of “middle class” political activism refer to the urban white-collar workers, professionals and business owners.¹¹¹² It is the middle class who advocates for their civil society by pressuring authoritarian for change.¹¹¹³ The landmark of such testimony was their participation in the

¹¹⁰⁷ Peter F Bell, “Cycles of Class Struggle in Thailand” (1978) 8(1) *Journal of Contemporary Asia* 51, at 56.

¹¹⁰⁸ Craig J Reynolds and Hong Lysa, “Marxism in Thai Historical Studies” (1983) 43(1) *Journal of Asian Studies* 77, at 95.

¹¹⁰⁹ Jürgen Kocka, “The Middle Classes in Europe” in Hartmut Kaelble (ed), *The European Way: European Societies During the Nineteenth and Twentieth*, Berghahn Books, New York, 2004, at 26-27.

¹¹¹⁰ Barbara Leitch Le Poer, *Thailand National and Urban Structures: Class and Status*, CIA World Factbook, Washington, 1987.

¹¹¹¹ Neil A Englehart, “Democracy and the Thai Middle Class: Globalisation, Modernisation, and Constitutional Change” (2003) 43(2) *Asian Survey* 253, at 256.

¹¹¹² Jim Ockey, “Creating the Thai Middle Class” in Michael Pinches (ed), *Culture and Privilege in Capitalist Asia*, Routledge, London, 1999, at 238.

¹¹¹³ Michael W Foley and Bob Edwards, “The Paradox of Civil Society” (1996) 7(3) *Journal of Democracy* 38, at 38.

1932 coup, the 1973 October Uprising, the 1992 Black May and the 2006 rally against Thaksin.

On the other hand, the fact that the contemporary Thai society remains operative through the social hierarchy (of the ruling class, the middle class and the ruled class) poses certain difficulty for the rule of law development. For the Thai middle class, Robert Albritton and Thawilwadee Bureekul viewed that they might not be able to change society like their European counterpart did:

“Contrary to many nations in which the middle class is the engine of democracy, the middle class of Thailand represents two fundamentally divergent interests: 1) an emerging class of entrepreneurs who have difficulty responding to rapid social and economic change in Thai society consistent with a hierarchical social order, and 2) an aristocracy associated with the traditional social hierarchy from which they benefit.”¹¹¹⁴

Even though Albritton and Bureekul analysed the drawback of the middle class as a weak force for *democracy*, the shortcomings towards the *rule of law* development can be drawn. It is evident that the wealth of the emerging class of entrepreneurs especially from the telecommunication business creates more opportunity for businesspeople to enter into politics. The growth of telecommunication businesspeople in Thai politics during 1988-1992 was four times higher than that of the 1984-1987 period.¹¹¹⁵ Once politics and business are vested in the same person, conflicts of interest are hardly avoided. This was proved when Thaksin’s government changed laws and rules to favour his

¹¹¹⁴ Robert Albritton and Thawilwadee Bureekul, “The State of Democracy in Thailand”, a paper presented at the Asian Barometer Conference on *the State of Democratic Governance in Asia*, Taipei, 20-21 June 2008, at 12.

¹¹¹⁵ Montri Kanokwaree, “Thai Elites and Democratization to Democratic Consolidate” (in Thai), *Constitutional Court and the Implementation to Its Mission According to the Rule of Law*, Office of the Constitutional Court, Bangkok, 2008, at 374.

family business empire.¹¹¹⁶ The intension of this emerging class to become involved in politics put at risk the underlying principle of the rule of law in curbing the abuse of political power.

As identified by Albritton and Bureekul, some middle class being associated with the traditional social hierarchy, find themselves at odds with rural masses. Dissimilarities in their education and their interests result in the sharp differences in political cultures between urban and rural population.¹¹¹⁷ As Daniel Arghiros simply noted that the urban middle class elected candidates on the basis of policy while provincial voters voted on the basis of political patronage and money.¹¹¹⁸ However, the rural masses always determine which party would form the government.¹¹¹⁹ Not surprisingly, the urban middle class seems to be sceptical to any populist schemes for the rural mass, fearing that the proceeds are flowing upwards as corrupt subsidies in patronage system.¹¹²⁰ For this reason, the urban middle class with the traditional bureaucratic elite might not be ready to let the ruled class or their representatives dominate or manipulate the national policy.

The great divide among urban and rural Thais undoubtedly raises the question of the future of the development of democracy in Thailand.¹¹²¹ Yet the greater concern is the question of the rule of law development. The attitude of the urban middle class consequently allows the right of place (being educated,

¹¹¹⁶ Pasuk Phongpaichit and Chris Baker, "Thailand: Fighting over Democracy" (2008) 43(50) *Economic & Political Weekly* 18, at 18.

¹¹¹⁷ Anek Laothamatas, "A Tale of Two Democracies: Conflicting Perception of Elections and Democracy in Thailand" in R H Taylor (ed), *The Politics of Elections in Southeast Asia*, Cambridge University Press, New York, at 201-223.

¹¹¹⁸ Daniel Arghiros, *Democracy, Development and Decentralisation in Provincial Thailand*, Curzon Press, Surrey, 2001, at 212.

¹¹¹⁹ Jim LoGerfo, "Attitudes Toward Democracy among Bangkok and Rural Northern Thais" (1996) 36(9) *Asian Survey* 904, at 923.

¹¹²⁰ Pasuk Phongpaichit and Chris Baker, "Thailand: Fighting over Democracy" (2008) 43(50) *Economic & Political Weekly* 18, at 19.

¹¹²¹ David Murray, "The 1995 National Elections in Thailand: A Step Backward for Democracy?" (1996) 36(4) *Asian Survey* 361, at 361.

financially strong and cosmopolitan) to guide them through politics.¹¹²² This means the contemporary Thai society adheres to the social status. The danger of such adherence is that the urban middle class and the traditional ruling class are prepared to do whatever it takes to bring down the government which they see as incompetent even though this means that they have to rely on unconstitutional and undemocratic act like a coup.¹¹²³

As a result, the concept of “no one can be above the law” is in danger. The recent coup in 2006 is a classic example. Despite the enormous popularity of Thaksin and his party, academics, journalists and middle class Bangkokians had become concerned over transparency and accountability of his government.¹¹²⁴ Together with the traditional ruling class, they were willing to sacrifice their Constitution when they found control of government slipping from their grasp.¹¹²⁵ Since the ruling class and the middle class cannot win the lower class through an election, they jointly venture outside the legal framework. Akin to Pitch Pongsawat’s view, the coup seemed to be the peculiar relationship between the middle class and electoral democracy in Thailand.¹¹²⁶

In summary, the modern Thai society is not divorced from the concept of the social hierarchy. In the context of politics, there are the ruling class, the middle class and the lower class. While the last group can bring out the majority vote, their government could be brought down by the first two

¹¹²² Pipop Thongchai, “The Development of NGO in the New Decade” (in Thai), in *Talking with Khun Anan*, Matichon, Bangkok, 2004, at 207.

¹¹²³ Micheal K Connors and Kewin Hewison, “Introduction: Thailand and the Good Coup” (2008) 38(1) *Journal of Contemporary Asia* 1, at 4.

¹¹²⁴ James Ockey, “Thailand in 2006: Retreat to Military Rule” (2007) 47(1) *Asian Survey* 133, at 133-134.

¹¹²⁵ Robert Albritton and Thawilwadee Bureekul, “The State of Democracy in Thailand”, a paper presented at the Asian Barometer Conference on *the State of Democratic Governance in Asia*, Taipei, 20-21 June 2008, at 1.

¹¹²⁶ Pitch Pongsawat, “Middle Class Ironic Electoral Cultural Practices in Thailand: Observing the 2005 National Assembly Election and Its Aftermath” in Chua Beng Huat (ed), *Elections as Popular Culture in Asia*, Routledge, New York, 2007, at 108.

groups through an unconventional act for supposedly “the better governance”.¹¹²⁷ The question remains as to whether having different class with different backgrounds is good for the rule of law development. If abuse of power is conducted by such government, is it justifiable for the middle class to resort to instruments of military power?¹¹²⁸ If the answer is “yes”, is it perceived that the urban middle class and its supporters are above the law? Perhaps the link to such perception lies in Thai social norms and values.

4.5.3 Social norm and value

Thai people do possess distinctive social norm and traditional value. In political arena, the perception of the ways to power is primarily located in hierarchical, that is vertical relationships that crosscut class lines.¹¹²⁹ The Thai way to power and resources is to seek patronage, to attach oneself to superior power, to join a *khana* (faction, clique, group), and to become *look nong* (subordinate) of somebody who has more resources.¹¹³⁰ As previously discussed, it is the way *sakdina* operated. Everyone was both a patron to someone and at the same time having someone else as a patron.¹¹³¹ Inherited from such perspective, there are at least three key social values which could influence the way the rule of law evolves in Thai society: *patronage relationship*; *high respect for those who are superior*; and *social harmony*. These norms do apply for the Thai people, regardless of their class.

4.5.3.1 Patronage relationship

¹¹²⁷ Mark R Thompson, “Pacific Asia after Asian Values: Authoritarianism, Democracy, and Good Governance” (2004) 25(6) *Third World Quarterly* 1079, at 1088.

¹¹²⁸ See also, Juan Linz and Alfred Stepan, “Toward Consolidated Democracies” in Larry Diamond and Marc F Plattner (eds), *The Global Divergence of Democracies*, The Johns Hopkins University Press, Baltimore, 2001, at 93-112.

¹¹²⁹ Jon S T Quah, “Causes and Consequences of Corruption in Southeast Asia: A Comparative Analysis of Indonesia, the Philippines and Thailand” (2003) 25(2) *Asian Journal of Public Administration* 235, at 240.

¹¹³⁰ Niels Mulder, *Java-Thailand: A Comparative Perspective*, Gadjah Mada University Press, Indonesia, 1983, at 9.

¹¹³¹ David K Wyatt, “Laws and Social Order in Early Thailand: An Introduction to the Mangraisat” (1984) 15(2) *Journal of Southeast Asian Studies* 245, at 250.

Having *sakdina* forming the characteristic of the traditional Thai society, the nature of patron-client ties is also tied to contemporary society.¹¹³² In the formal organisation of society, the ruling class in the *sakdina* structure must provide food and shelter for the lower class who was assigned to serve a particular ruling elite. The lower class, having so little social and economic power, would give their patrons their labour in exchange.¹¹³³ The most fundamental value that has emerged out of such hierarchical nature is the concept of *bunkhun*.¹¹³⁴ Niels Mulder explained *bunkhun* as “benefit received, giving rise to moral obligation”.¹¹³⁵ The lower class in the *sakdina* system received the basic needs from their patrons and thus they were morally obliged to offer their labour to express their gratitude.

While *sakdina* may no longer be present, the modern Thai society is underpinned by the concept of *bunkhun*. Thai people generally follow the concept of *bunkhun* with another set of moral value, called *katanyu*. This means when a person receives any benefit from another person, gratefulness and reciprocity are expected to be delivered. In other words, the first person, being *katanyu*, or constantly aware and conscious of the benefit or favour another person has bestowed, should reciprocate.¹¹³⁶ As a general rule, a Thai person would do anything in his or her ability to repay their indebtedness. The concept of *katanyu* is used primarily in the relationship between parents and children while *bunkhun* extends to many realms of life.¹¹³⁷

¹¹³² James C Scott, “Patron-Client Politics and Political Change in Southeast Asia” (1972) 66(1) *The American Political Science Review* 91, at 103, 111.

¹¹³³ John H Bodley, *The Power of Scale: A Global History Approach*, M E Sharpe Inc, New York, 2003, at 41.

¹¹³⁴ Komin, Suntaree, *Psychology of the Thai People – Values and Behavioral Patterns*, Research Centre, National Institute of Development Administration, Bangkok, 1990, at 168.

¹¹³⁵ Niels Mulder, *Java-Thailand: A Comparative Perspective*, Gadjah Mada University Press, Indonesia, 1983, at 9.

¹¹³⁶ William Klausner, *Reflections on Thai Culture*, Siam Society, Bangkok, 1993, at 275.

¹¹³⁷ John Knodel, et al, “Ageing in Thailand: An Overview of Formal and Informal Support” in David R Phillips (ed), *Ageing in the Asia-Pacific Region: Issues, Policies, and Future Trends*, Routledge, London, 2000, at 255.

When the overall ideology of *sakdina*, *bunkhun* and *katanyu* is politically implicated, law itself is not a priority to control society. Ruth McVey viewed that the idea of rule of law is not natural to Thai society; laws are seen merely as descriptive decrees, and to activate them one must have a specific arrangement, effectively a contract between an individual and an officer or official.¹¹³⁸ This perhaps explains the reason as to why corruption is very much embedded. When an officer is given some “benefit”, that officer, being *katanyu*, has to give “something back” to a benefactor. For “benefit”, it does not have to be monetary. It could be anything in disguise. The officer may be guaranteed from a politician that he will not be rotated to rural areas. Or a place at a famous school could be reserved for his child through an arrangement by a local businessman.

For “something back”, it could range from an ordinary businessman getting his business licence to a politician operating in an illegal casino in his house without being detected.¹¹³⁹ Since *katanyu* is a highly valued character trait, politicians take advantage of it especially during an election. Rural voters, being paid to vote for a particular candidate, would vote for such candidate. The voters have to give something back for a person giving them some money or other kinds of benefit. In examining the characteristics of Thai people, a number of foreign scholars agreed that vote buying is a problem rooted in the traditional culture based on patronage.¹¹⁴⁰ The social value of

¹¹³⁸ Ruth T McVey, “Change and Consciousness in Southern Thailand” in Han ten Brummelhuis and Jeremy H Kemp (eds), *Strategies and Structures in Thai Society*, Anthropological-Sociological Centre, Amsterdam, 1984, at 116.

¹¹³⁹ Pasuk Phongpaichit and Chris Baker, *Thailand’s Boom and Bust*, Silkworm Books, Chiang Mai, 1998, at 255.

¹¹⁴⁰ For example, Katherine A Bowie, “Vote Buying and Village Outrage in an Election in Northern Thailand: Recent Legal Reforms in Historical Context” (2008) 67(2) *Journal of Asian Studies* 469, at 469; Michael H Nelson, *Central Authority and Local Democratisation in Thailand: A Case Study from Chachoengsao Province*, White Lotus Press, Bangkok, 1998, at 86-99; James Ockey, *Making Democracy: Leadership, class, gender, and political participation in Thailand*, University of Hawaii Press, Honolulu, 2004, at 166-170.

bunkhun and *katanyu* appears to warrant the nature of patron-client and, thus makes the deviation of law more acceptable.¹¹⁴¹

4.5.3.2 Respect for those who are superior

A very important part of Thai culture is the *wai*. It is a gesture used to show respect to those older or in positions of power. To *wai*, a person does a slight bow of the head accompanied by pressing the palms of the hands together and raising them in front of the chin.¹¹⁴² Different levels of bow and palms also represent the different degrees of respect.¹¹⁴³ Its use demonstrates much about Thai values and attitudes. It does so by publicly demonstrating “the superiority rule”. Such demonstration is simple and clear. In any social meeting, the socially inferior person assumes a physically inferior posture and the socially superior one takes a position that is physical superior. For this, the person in the higher position is dominant both physically and socially.¹¹⁴⁴

Generally, the superiority rule means that young people do listen to old people’s advice. It is extremely rude and socially unacceptable for young people to question old people’s authority even though the old and the young are not related. A research on collective Thai culture found that young people are quiet in the presence of older people and seldom disagree with older people.¹¹⁴⁵ When the superiority rule is applied in the work environment,

¹¹⁴¹ James Ockey, “Change and Continuity in the Thai Political Party System” (2003) 43(4) *Asian Survey* 663, at 675.

¹¹⁴² Penporn Pagram and Jeremy Pagram, “Issues in E-Learning: A Thai Case Study” (2006) 26 *The Electronic Journal on Information Systems in Developing Countries* 1, at 4.

¹¹⁴³ Kampol Suwanarat, “Deaf Thai Culture in Siam: The Land of Smiles” in Carol Erting (ed), *The Deaf Way: Perspectives from the International Conference on Deaf Culture*, Gallaudet University Press, Washington D.C., 1994, at 62.

¹¹⁴⁴ “The Wai” <<http://www.kingdom-of-thailand.com/wai.htm>> (4 October 2009).

¹¹⁴⁵ Thomas J Knutson, et al, “A Comparison of Communication Apprehension between Thailand and USA Samples: The Identification of Different Cultural Norms Governing Interpersonal Communication” (1995) 27 *Journal of the National Research Council of Thailand* 21.

senior officers are highly regarded.¹¹⁴⁶ Another research conducted by both Thai and American scholars showed that the junior staff looked up to the senior staff which created trust among colleagues.¹¹⁴⁷ Having trust built by seniority also means that senior officers are hardly questioned by junior officers.

Without the subordinates assertively challenge the authority of their bosses, the one in authority is free to exercise power.¹¹⁴⁸ Undoubtedly, Thai organisational characteristics open the door for the superior authority to abuse their position.¹¹⁴⁹ Much of this applies to public organisations throughout the country. It is awkward for junior officers who work for a high rank officer to question the decision of their superior.¹¹⁵⁰ For a corruption case to be exposed, there must be an independent third party to investigate the matter. A study which established an external authority showed that corruption in a public organisation is hardly to be detected partly because of the superior-subordinate relationships in the workplace.¹¹⁵¹

In the political sphere, the superiority rule is also used as a strategy to win the national, provincial and municipal elections. In a rural area, villagers look up to their head of the village. The head of the village, being old or more educated receives enormous respect from the members. The head of the village's decision is hardly questioned. Ordinary villagers simply followed the

¹¹⁴⁶ Richard Basham, "Ethnicity and World View in Bangkok" in Chee Kiong Tong and Kwok B Chan (eds), *Alternate Identities: The Chinese of Contemporary Thailand*, Times Academic Press, Singapore, 2001, at 132.

¹¹⁴⁷ Philip Hallinger and Pornkasem Kantamara, "Educational Change in Thailand: Opening a Window onto Leadership as a Cultural Process" (2000) 20(2) *School Leadership and Management* 189, at 196.

¹¹⁴⁸ Nongluck Sriussadaporn-Charoenngam, "An Exploratory Study of Communication Competence in Thai Organisations" (1999) 36(4) *The Journal of Business Communication* 382.

¹¹⁴⁹ Jon S T Quah, "Curbing Asian Corruption: An Impossible Dream?" (2006) 105(690) *Current History* 176, at 177.

¹¹⁵⁰ See also, John Paul Fieg and Elizabeth Mortlock, *A Common Core: Thais and Americans*, Intercultural Press, Yarmouth, 1989.

¹¹⁵¹ Pongpat Reangkreu, "The Establishment of National Counter Corruption Commission" (in Thai), a paper presented in the Third National Symposium of Justice Administration on *Roles of Justice Administration in Combating Corruption* (in Thai), Nonthaburi, 22-23 August 2005.

advice of their leader.¹¹⁵² To gain support from villagers, a candidate only needs to make a connection with the village leader.¹¹⁵³ By the leader agreeing to vote for such candidate, other villagers will simply follow suit. Although respect for those older is a good attitude, it can pose a threat to the rule of law development when it is politically misused for example, as a strategy to abuse the process of elections.

4.5.3.3 Social harmony

Perhaps the saying that Thailand is the “Land of Smiles” can sum up that the country strives for social harmony.¹¹⁵⁴ One foreign scholar observed that even when quite worried or upset, Thai people remain calm. Thai people also consider confrontation or expression of anger as adversely affecting social harmony.¹¹⁵⁵ Based on such characteristics, Thailand was selected by an American university to serve as a unique laboratory for the search of behaviours associated with interpersonal relationships.¹¹⁵⁶ “No confrontation” also means that Thais, by nature, are not litigious.¹¹⁵⁷ They are willing to compromise and thus develop a greater tolerance towards any conflict. Outwardly, Thais live in harmony, but what is not revealed may give unpleasant outcome to the rule of law concept.¹¹⁵⁸

Social harmony is best maintained by avoiding any unnecessary friction in their contacts with others. This makes the individualistic behaviour of the

¹¹⁵² Daniel Arghiros, *Democracy, Development and Decentralisation in Provincial Thailand*, Curzon Press, Surrey, 2001, at 78.

¹¹⁵³ Philip S Robertson Jr, “The Rise of the Rural Network Politician; Will Thailand’s New Elite Endure?” (1996) 36(9) *Asian Survey* 924, at 929.

¹¹⁵⁴ Timothy D Hoare, *Thailand: A Global Studies Handbook*, ABC-CLIO, California, 2004, at 241.

¹¹⁵⁵ Alexandra R Karpur-Fic, *Thailand: Buddhism, Society, and Women*, Shakti Malik, New Delhi, 1998, at 77.

¹¹⁵⁶ Thomas J Knutson, et al, “A Cross-Culture Comparison of Thai and US American Rhetorical Sensitivity: Implications for Intercultural Communication Effectiveness” (2003) 27 *International Journal of Intercultural Relations* 63, at 66.

¹¹⁵⁷ Tilleke & Gibbins International, “Thailand Legal Basics”, June-July 2007 <http://www.tillekeandgibbins.com/Publications/thailand_legal_basics/> (9 September 2009).

¹¹⁵⁸ Yuthasak Dee-aram, “Chose to Tell” (in Thai) (2008) 4(2) *Journal of Alternative Dispute Resolution Office* 1, at 2.

Thai people so distinctive. An American anthropologist considered that such individualism was a very first characteristic of Thai culture that struck an observer from the West.¹¹⁵⁹ The characteristic of individualism also explains the high possibility of any unlawful act being ignored or disregarded. The use of social control to expose any illegal act especially one that is committed by a person in power appears to be at a low level.¹¹⁶⁰ Recently, there are a number of measurements to encourage the people to commit and participate in combating against any form of abuse of power.¹¹⁶¹

To avoid any confrontation between the accused and the informant, a call centre for corruption case is established. The hotline may not be an innovative way to protect the identity of the informant. The strategy is used around the world to encourage a whistleblower in giving details of any wrongdoing. However, with the country where smooth interpersonal relationship is the main value orientation, establishing the call centre is a big step towards transparency and accountability of the authority.¹¹⁶² The culture of *bunkhun* and the superiority rule also contribute to the small number of the wrongdoing being reported. This is especially so where the accused is a family member or a friend or a colleague of the informant.

Another implication of social harmony which can relatively impact the rule of law development bases on the fact that social harmony leads to a compromise.¹¹⁶³ As a result, the alternative dispute resolution program in the

¹¹⁵⁹ John F Embree, "Thailand – A Loosely Structured Social System" (1950) 52(2) *American Anthropologist* 181, at 182.

¹¹⁶⁰ Rosana Tositrakul, "Public Lesson and the Protest against Corruption" (in Thai), *Talking with Khun Anan*, Matichon, Bangkok, 2004, at 232-233.

¹¹⁶¹ Pasuk Phongpaichit, "Is There Any Hope in Preventing Corruption?", a paper presented at King Prajadhipok's Institute Congress I on *Politics, Administration, and Change in Thai Society at the Outset of Next Century*, Bangkok, 10-12 December 1999.

¹¹⁶² Suntaree Komin, "Culture and Work-Related Values in Thai Organisations" (1990) 25 *International Journal of Psychology* 681.

¹¹⁶³ See, P Iamsudha and Claudia Hale, "The Implications of Thai Cultural Values for Self-Reported Conflict Tactics, Family Satisfaction and Communication Competence of Young Adults", a paper

Courts of Justice is very successful.¹¹⁶⁴ Having two parties solving their personal dispute is a perfect scenario to avoid the costly and time-consuming trial. However, when the dispute involves in public benefit or at least one party is acting on behalf of the public, a compromise might be seen as a way to avoid the operation of the rule of law.¹¹⁶⁵ Where one party is a politician or a government officer and the other party is only a commoner, the dispute is less common.¹¹⁶⁶ To challenge authority and power would only create interpersonal conflicts with the authority.

4.5.4 Conclusion: Negative influence by class and culture

Patronage relationship, high respect for those who are superior and social harmony are a few of many distinctive Thai social values which may impact on the rule of law. These values themselves are not harmful and generally have positive influences on peoples way of living. However, when they are misguided and used as a political strategy, those social values could be used as tools to abuse the power. This is especially so when the analysis of Thai psychology identifying the highest Thai cultural values as those associated with interpersonal relationships.¹¹⁶⁷ By relying upon the interpersonal relationships, some politicians manipulate the patronage relationship as a way to gain the votes from their supporters. In doing so, it was common that these politicians would offer financial as well as non-financial benefit to the locals.

presented at the annual meeting of the *International Communication Association*, San Diego, 27 May 2003.

¹¹⁶⁴ Alternative Dispute Resolution Office, "Statistics of the Successful Cases for ADR" (in Thai), (2009) 5(1) *Journal of Alternative Dispute Resolution Office* 1, at 30-32.

¹¹⁶⁵ Carolyn A McCarthy, et al, "Culture, Coping, and Context: Primary and Secondary Control among Thai and American Youth" (1999) 40(5) *Journal of Child Psychology and Psychiatry and Allied Disciplines* 809, at 811.

¹¹⁶⁶ Janpen Pheungwong, et al, "Recommendation in Developing the Public Network of the National Anti-Corruption Commission" (in Thai), a paper submitted as part of the NACC Workshop on *The Strategic Executives*, July 2009, at 13.

¹¹⁶⁷ Suntaree Komin, *Psychology of the Thai People: Values and Behavioural Patterns*, National Institute of Development Administration, Bangkok, 1991, at 144.

With the superiority rule, it is also difficult to question someone with authority. Smooth interpersonal relationship orientation could also mean that no one would bother to investigate or litigate corrupt government officials. These social values could offer the clearer picture as to what extent Thai society can comply with the concept of the rule of law. The Thai social system is first and foremost a hierarchically structured society where individualism and interpersonal relationships are of utmost importance. Solving any problem through interpersonal relationships is much preferred to the reliance of rule or law. Even though the rule of law is not rejected by Thai people, particular social values and social hierarchy could hinder the way the rule of law operates.

4.6 KING'S INFLUENCE ON THE RULE OF LAW

4.6.1 Introduction: The King's influence

The institution of the Thai monarchy is in many ways unique and often difficult for outsiders to fully comprehend. The extraordinary high level of respect given by the Thai people to their King is one way of explaining an exceptional relationship between the monarchy and the people. Such unique characteristic allows the King to be the most powerful institution in Thailand. A particular aspect of the King's influence is his ability to be involved in government and politics. This is even so Thailand is constitutional monarchy where the King's ability to influence government and politics should be minimal. For the Thai people, the King's involvement does not seem to be much of a problem. Without the King, Thailand would have been ended by civil wars.

The following analysis illustrates how the Thai King as a modern constitutional monarch, uniquely interacts with the three branches of government: the legislature, the executive and the judiciary. Each branch of

government is discussed individually with the objective to demonstrate the extent of the King's influence on the rule of law. The rule of law as argued throughout the thesis is limited to the principle which guards against abuse of power by government and state agencies. The analysis does not aim to justify the King's action or inaction in any particular incident. Rather, it focuses on a sociological approach which offers an in-depth understanding of how the rule of law is developed in a country which has a long history of monarchy.

4.6.2 Background of the traditional Thai King and the link to a modern kingship

The role of the King of Thailand has evolved considerably over the last eight hundred years of reign. At the birth of the nation, the King was regarded as a “father” of the “children”.¹¹⁶⁸ The paternal relationship conveniently allowed the Thai people in the Sukhothai period (1238-1350: the first era of Thai history) the “right to access” the King.¹¹⁶⁹ The people sought personal help from the King by ringing a large bell which was placed outside the palace.¹¹⁷⁰ This fatherly relationship remains well-established in modern Thai society.¹¹⁷¹ Today, people in remote areas still write their letters asking the King to help improve their living condition.¹¹⁷² This is a result from a unique relationship between the King and the people. Such relationship elevates the status of the King from a symbolic head of state to the most powerful and respectful institution in Thailand.

During Ayutthaya (1350-1767: the second era of Thai history) and Thonburi (1767-1782: the third era of Thai history), the perception towards the King

¹¹⁶⁸ Sawaeng Boonchalermwipas, *The Thai Legal History* (in Thai), Winyuchon Publication, Thailand, 2000, at 78; Preedee Kasemsup, *Legal Philosophy* (in Thai), Thammasat University Press, Thailand, 1996, at 69.

¹¹⁶⁹ Damrongrachanuparb, *The Legend of Buddhist Pagoda* (in Thai), Praepittaya, Bangkok, 1971, at 35.

¹¹⁷⁰ Dhani Nivat, *A History of Buddhism in Siam*, The Siam Society, Bangkok, 1965, at 162.

¹¹⁷¹ Pramol Rootjanaseri, *King's Power* (in Thai), Bangkok, 2005, at 108-113; Chaw Chang Hua Nah, “Under the King's Power” (in Thai) (2006) 6(4) *Journal of the Courts of Justice* 15, at 17-18.

¹¹⁷² “The King's Speech – the Petition for Royal Pardon” (in Thai), *Chaopraya News*, 16 August 2009.

had changed due to the influence of Khmer Buddhism as well as Indian Hinduism.¹¹⁷³ The mixed religious influences enabled the King to claim for supernatural powers. These powers were used to re-enforce the King's position. The King was no longer a "father" but a "demigod" where all justice was sprung from.¹¹⁷⁴ With the religious support, the King could enact and enforce his own rules called Raj-sastra for the administration of the country. In modern days, some Thai people still believe that their King is sent from the heaven and thus warranting the concept of "the King is the fountain of justice". For them, it is also the reason as to why the King has a prerogative to pardon the convicted.¹¹⁷⁵

In the present era of Rattanakosin (from 1782 onwards), the long line of the Thai Kings was confronted with the Western influence, especially its legal and political ideologies.¹¹⁷⁶ Among those ideologies were the concepts of liberal democracy, separation of powers and the rule of law. To avoid the outright imposition of Western colonial powers, the King adopted Western systems of laws, courts and legal education.¹¹⁷⁷ The King employed his advisers from France, Germany, Belgium and the United Kingdom to supervise the transformation of the country.¹¹⁷⁸ The idea of liberal democracy finally led to the abolition of absolute monarchy. Despite these "radical changes", the

¹¹⁷³ Kittisak Prokati and Saweang Boonchalermwipas, "Role of the King as Ruler and Source of Law" (in Thai), a paper discussed in an academic seminar hosted by Thammasat University for the 60th Anniversary Celebrations of His Majesty the King's Accession to the Throne, Bangkok, 30 November 2006, at 13; Preedee Kasemsup, *Legal Philosophy* (in Thai), Thammasat University Press, Thailand, 1996, at 49.

¹¹⁷⁴ Jesada Bhornchaiya, *Power of the King: the Comparison between Thailand & England* (in Thai), Chulalongkorn University Press, Bangkok, 2003, at 42-50.

¹¹⁷⁵ Section 191 of the 2007 Constitution; Tanin Kraivixien, *The King on His Majesty the King & His Genius on Law* (in Thai), a speech given at the Faculty of Law, Thammasat University, Bangkok, 5 January 2000.

¹¹⁷⁶ Ukrit Mongkolnawin, *The History of International Law* (in Thai), Bopit, Bangkok, 1970, at 122-129.

¹¹⁷⁷ Saweang Boonchalermwipas, "The Legal History" in Prachoom Chomchai (ed), *Development of Legal Systems in Asia: Experiences of Japan and Thailand*, Thammasat University, 1997, at 118.

¹¹⁷⁸ Office of the Council of State, *Factbook: Council of State (Kritsadika) and Office of the State*, 2008 <<http://www.lawreform.go.th/>> (21 August 2009), at 3.

monarch institution has survived and remains the highest-regarded institution of Thailand.

4.6.3 Why is the King so influential in Thai politics?

The rule of law in Thailand would not have developed to where it is today without the influence of the line of Kings who reigned in the Rattanakosin period. Most changes of legal and political matters occurred during the reign of King Rama V (1868-1910). His intension was clear in reforming the Thai government and its legal system to avoid being colonised.¹¹⁷⁹ In pursuing his intention, many law reforms took place. To be more specific to the rule of law development, he enacted the law to abolish slavery, the law to restrict the government officials' power, and the law to introduce a Cabinet system.¹¹⁸⁰ Specific crimes of official corruption were listed in the newly codified law in 1908. To a lesser extent, human rights, such as freedom of speech were also reviewed, which were of great significance for future development.¹¹⁸¹

Royal advocacy for the rule of law as well as democracy was continued by King Rama V's successors. King Rama VI (1910-1925) established and administered a miniature city called Dusit Thani as an experimental city governed by democracy.¹¹⁸² In the model city, people were educated how to exercise their right in a democratic state. King Rama VI also allowed the publication of the writing which criticised the absolute power of the monarchy.¹¹⁸³ King Rama VII (1925-1935) continued to contribute to the rule of law development and his contribution perhaps is considered the most

¹¹⁷⁹ Wuttichai Moolsilpa, *History of Thailand* (in Thai), Amarin Printing, Bangkok, 2004, at 137.

¹¹⁸⁰ Kittisak Prokati, *The European Influence on the Legal Reform of Thailand* (in Thai), 2nd ed, Winyuchon, Bangkok, 2006, at 61-62.

¹¹⁸¹ David Engel, *Law and Kingship in Thailand During the Reign of King Chulalongkorn*, Centre for Southeast Asian Studies, Michigan, 1975, at 95.

¹¹⁸² Penny van Esterik, *Materialising Thailand*, Berg Publishers, Oxford, 2000, at 113.

¹¹⁸³ Sulak Sivaraksa, "Thailand" in Philip Altbach and Edith Hoshino (eds), *International Book Publishing: An Encyclopedia*, Garland Publication, New York, 1995, at 526-527; Boonrat Boonyaketmala, *Thailand in Newspaper in Asia: Contemporary Trends and Problems*, Wing King Tong, Hong Kong, 1982, at 339.

important incident of Thailand. Such contribution was the King's acceptance to relinquish his absolute power turning Thailand into constitutional monarchy in 1932. It would not have been difficult for King Rama VII if he had wanted to resist demand for constitutional monarchy by using his royal troops to fight back.¹¹⁸⁴

For this, King Rama VII was widely praised for his decision in giving up his absolute power, which spared the country a civil war and facilitated the transition to constitutional monarchy.¹¹⁸⁵ The change of the regime might have suggested a separation between two concepts: law and kingship, but it was not a case for Thailand. The influence the royal institution has on Thai politics continued. After a short reign of King Rama VIII (1935-1946), his younger brother, King Rama IX was crowned in 1946. For King Rama IX or King Bhumibol, his pursuit of a royal political idea has created stability and satisfaction among his subjects. Whenever political conflicts erupted, he intervened openly to restore unity and direction.¹¹⁸⁶

What is seen in this brief section helps support the reason as to why the King has become so powerful.¹¹⁸⁷ What the line of Thai Kings has contributed to the country earns the royal institution a special place in Thai politics. It is the place where the King in constitutional monarchy has tremendous influence on the decision of government. It is observed that the Thai King's popularity allows for the exercise of discretion to a somewhat greater extent than in

¹¹⁸⁴ Saitip Sukatipan, "Thailand: The Evolution of Legitimacy" in Muthiah Alagappa (ed), *Political Legitimacy in Southeast Asia*, Stanford University Press, California, 1995, at 196.

¹¹⁸⁵ Sukhumbhand Paribatra, "Some Reflections on the Thai Monarchy" in Dljit Singh and Chin Kin Wah (eds), *Southeast Asian Affairs 2003*, Institute of Southeast Asian Studies, Singapore, 2003, at 297.

¹¹⁸⁶ Paul M Handley, *The King Never Smiles: A Biography of Thailand's Bhumibol Adulyadej*, Yale University Press, New Haven, 2006, at 8.

¹¹⁸⁷ See also, Charles F Keyes, *Thailand: Buddhist Kingdom as Modern Nation-State*, Westview Press, London, 1987; William Stevenson, *The Revolutionary King: The True-Life Sequel to the King and I*, Constable, London, 1999.

European constitutional monarchies.¹¹⁸⁸ When the country is in political crisis, the King is expected to be an intermediary. His action has somehow altered the course of each incident considerably.¹¹⁸⁹ Undoubtedly, and in a similar fashion, the King's ability to be politically involved has also influenced the operation of rule of law.

It is also the law itself which allows the King have a special position – “the King shall be enthroned in a position of revered worship”.¹¹⁹⁰ No person shall expose the King to any sort of accusation or action.¹¹⁹¹ It is unlawful to criticise the King's action or inaction. Anyone can file a police complaint of *lèse majesté* on the King's behalf and the penalty is up to fifteen years in jail.¹¹⁹² For this, probably nothing in Thailand can be as a sensitive subject as the monarch.¹¹⁹³ This is especially so when *lèse majesté* appears to be the most popular trick in Thai politics. Those who criticise an incident which the King is involved may be accused of disloyalty to the King.¹¹⁹⁴ It is common that those who disagree with the King's involvement may not directly express their own view and thus, the extended power of the King becomes stronger.¹¹⁹⁵

Although some perceive that the King's involvement is not constitutional,¹¹⁹⁶ most Thai people still believe that the King is indispensable for the survival of

¹¹⁸⁸ Andrew Harding, “May There be Virtue: New Asian Constitutionalism in Thailand” (2001) 3 *Asian Law* 236, at 240-241.

¹¹⁸⁹ Kevin Hewison, “The Monarchy and Democratisation” in Kevin Hewison (ed), *Political Change in Thailand*, Routledge, New York, 1997, at 58.

¹¹⁹⁰ Section 8 of the 2007 Constitution.

¹¹⁹¹ Section 8 paragraph 2 of the 2007 Constitution.

¹¹⁹² Section 112 of the Criminal Code.

¹¹⁹³ Kevin Hewison, “A Book, the King and the 2006 Coup” (2008) 38(4) *Journal of Contemporary Asia* 190, at 191.

¹¹⁹⁴ “Thailand's Lèse Majesté Law”, *The Economist*, 14 August 2008.

¹¹⁹⁵ D Grey, *The King of Thailand in World Focus*, Foreign Correspondent's Club of Thailand, Bangkok, 1988, at 6.

¹¹⁹⁶ Giles Ji Ungpakorn, “Thailand's Battle for Democracy”, *The Guardian*, 18 February 2009 <<http://www.guardian.co.uk/commentisfree/libertycentral/2009/feb/17/thailand-democracy>> (2 March 2010).

the country.¹¹⁹⁷ The endurance of the Thai monarchy almost eight hundred years unquestionably proves the royal institution as a fundamental and powerful institution. What follows is a detailed analysis of how and to what extent the King of Thailand does influence the rule of law. The emphasis is placed on the King during the present Rattanakosin period, especially King Bhumibol Adulyadej the Great or more commonly known as King Rama IX, who is the world's longest-serving current head of state and the longest-serving monarch in Thai history.

4.6.4 The King and his role in constitutional monarchy

The name “constitutional monarchy” already suggests that the power of the King is limited by the Constitution. Under the regime, the King is portrayed as a symbolic head of the state. Indeed, since Thailand became constitutional monarchy, the Constitution always states that sovereign power belongs to the Thai people with the King as head of the state.¹¹⁹⁸ Thailand adopts a democratic regime of government and the King shall exercise such power through the National assembly (the Parliament), the Council of Ministers and the Courts.¹¹⁹⁹ To uphold the concept of the rule of law, the present 2007 Constitution also requires all state organs to perform duties “in compliance to the legal justice principle”¹²⁰⁰ and “the rule of law”.¹²⁰¹

Where the administration is not democratically carried out and the rule of law has been violated, would it be a duty of the King as head of the state to intervene? As a symbolic head of the state with non-executive power, it appears that the King has no authority to intervene. However, unlike a traditional European style of constitutional monarchy, the opposite is true in

¹¹⁹⁷ “The Hill People Wish the King to Recover Soon” (in Thai), *Matichon Daily*, 25 October 2009, at 13.

¹¹⁹⁸ Section 3 of the 2007 Constitution.

¹¹⁹⁹ Sections 2 and 3 of the 2007 Constitution.

¹²⁰⁰ Section 3 paragraph 2 of the 2007 Constitution.

¹²⁰¹ Section 78 (6) of the 2007 Constitution.

Thailand. The Thai people are more than willing to consult or rely upon the King's decision when a crisis occurs.¹²⁰² When there is a political unrest, it is always the case where the Thai people seek to listen to the King's advice.¹²⁰³ For this aspect, the Thai King holds a peculiar status where his people require him to be more than just a symbolic monarch.

In general, the boundary of a constitutional monarchy can be defined as a state which is headed by a sovereign who reigns but does not rule.¹²⁰⁴ For this, the real powers of European monarchs are negligible. But for Thailand, monarchy acts as a guardian of a nation's heritage. As such it is a powerful focus for loyalty and a source of strength in times of crisis.¹²⁰⁵ This peculiar status may have raised an eye brow of some constitutional law scholars in Western countries. Why should the opinion of one person, in office by accident of birth, be able to influence the political decision making? Of course, if such exceptional status cannot be controlled by the law, the rule of law concept will be undermined. Yet, the following analysis proves such presumption otherwise.

4.6.4.1 King's influence on the legislative power

Constitutional monarchy does not forbid the King to be involved with the legislative power. However, his role is largely passive and mostly symbolic. Some comparison can be made with the reference to the United Kingdom. It is noted that the role of the Thai King has been explicitly written in the Thai Constitution while that of the English counterpart is largely determined by constitutional conventions. Despite different forms of Constitution, both the

¹²⁰² "The Royal Institution and Thai Democracy" (in Thai), *Matichon Daily*, 23 March 2009, at 7.

¹²⁰³ Andrew Harding, "May there be Virtue: New Asian Constitutionalism in Thailand" (2001) 3 *Asian Law* 236, at 240.

¹²⁰⁴ Vernon Bogdanor, "The Monarchy and the Constitution" (1996) 49(3) *Parliamentary Affairs* 407, at 407.

¹²⁰⁵ International Debate Education Association, *The Database Book*, Idea Press Books, New York, 2004, at 155.

Thai King and the English Queen are required to give the royal assent to legislation, dissolve the Parliament, and call for an election on the request of the Prime Minister.¹²⁰⁶ However, the people's perception towards the Thai King places him slightly beyond the English model of constitutional monarchy.¹²⁰⁷

A classic example is the Thai King's prerogative to veto legislation. After a bill is approved by the National Assembly, the Prime Minister must submit it to the King for his signature.¹²⁰⁸ If the King does not agree with the bill, he can refuse to give his assent to the bill.¹²⁰⁹ However, his rejection is not absolute. The King could object to the bill, but it entirely depends upon the decision of Parliament whether to take the royal advice. If Parliament reaffirms the bill with the required votes, the bill can be enforced as law as if the King had signed it. This is in line with the rule of law theory and international practice. The Thai Constitution assures that the power to veto confines to the symbolic status. Nevertheless, the King's influence is beyond the boundary of being a symbol.

In 1992, King Bhumibol did not sign his signature on the *Amendment of the Civil Code Bill*.¹²¹⁰ The *Bill* would allow the much higher damages for defamation committed by the press and publishers. The King was concerned that the *Bill* would be the obstruction of the freedom of speech and the right to information.¹²¹¹ According to the constitutional provision, it is the duty of Parliament to review whether there should be any amendment to the *Bill* and

¹²⁰⁶ Sections 124 and 108 of the 2007 Constitution.

¹²⁰⁷ Andrew Harding, "May there be Virtue: New Asian Constitutionalism in Thailand" (2001) 3 *Asian Law* 236, at 240.

¹²⁰⁸ Section 150 of the 2007 Constitution.

¹²⁰⁹ Section 151 of the 2007 Constitution.

¹²¹⁰ The Bill was passed by the national assembly on 24 January 1992.

¹²¹¹ *Matichon Daily*, 27 January 1992.

re-submit it to the King.¹²¹² However, Parliament agreed not to proceed with such procedure. It was decided among the Members of Parliament that the King's opposition must be respected.¹²¹³ Although the King and Parliament in this case did not act outside the constitutional provision, the example illustrated how willing for Parliament to accept the King's decision.¹²¹⁴

While the King did not agree with the *Amendment of the Civil Code Bill*, his decision not to sign such *Bill* was not unlawful. According to the Constitution, the Parliament could have confirmed their legislation by ignoring the King's opposition. Indeed, it is a peculiar status of the King which prevented any other institution from overlooking the King's opinion. Since the King's opposition followed the provision of the Constitution, but his image of the "wise old King" places him outside conventional norm, there is always a question as to whether his incomparable position could damage the principle of the rule of law. This is especially so where the British monarch, in theory, can veto an act of Parliament, but none has done so since the eighteenth century.¹²¹⁵

4.6.4.2 King's influence on the executive power

When King Rama VII relinquished his absolute power, he specifically expressed that "sovereign power was now transferred to the Thai people not to the group of elites".¹²¹⁶ The question again arises if the government

¹²¹² Section 94 of the 1991 Constitution; Section 94 of the 1997 Constitution; Section 151 of the 2007 Constitution.

¹²¹³ Bowornsak Uwanno, *Public Law Volume III* (in Thai), Nititham, Bangkok, 1995, at 228-229.

¹²¹⁴ Pramol Rootjanaseri, *King's Power* (in Thai), Bangkok, 2005, at 79.

¹²¹⁵ While the English monarch can *theoretically* withhold, no monarch has refused it *in practice* since Queen Anne vetoed a *Scottish Militia Bill* in 1708. See also Alan James Mayne, *From Politics Past to Politics Future*, Greenwood Publishing, Westport, 1999, at 25; David Hayton, Eveline Cruickshanks, and Stuart Handley, *The House of Commons 1690-1715*, Cambridge University Press, Cambridge, 2002, at 383. For an opposite view see, Vernon Bogdanor, *The Monarchy and the Constitution*, Clarendon Press, Oxford, 1995, at 126; R Brazier, "The Monarchy" in Vernon Bogdanor (ed), *The British Constitution in the Twentieth Century*, Oxford University Press, Oxford, 2003, at 81.

¹²¹⁶ King Rama VII stated in his abdication letter on 2 March 1934 that "I am fully willing to relinquish the powers which previously belonged to me, to the people in general, but I refuse to hand these powers

becomes a tyranny, would the King as head of the state exercise his power to re-establish the rule of law? When the government entertained arbitrary power, rumours about military intervention usually appear. Would it be then justifiable for the King to intervene before a coup occurs? Would there have been more people killed if for example, the King had not intervened in the violent unrest like the 1992 Black May? For the rule of law ideology, it should not be either the King or the coup to restore the functional and legitimate government. It is again the issue of how the rule of law is translated into a distinctive society.

The two following incidents are to demonstrate how the rule of law interacts in Thai society where the King is seen as the most reliable source of power. Both incidents reiterate the King's influence in terms of executive power. They involved the royal appointment of the Prime Minister.¹²¹⁷ Under normal circumstances, the Thai King, like the British Queen will appoint the person who can command a majority in the House of Representatives.¹²¹⁸ This is even so although in constitutional theory, the Queen under the royal prerogative may appoint whomsoever she pleases to the Office of Prime Minister.¹²¹⁹ Similar to the prerogative to veto an act of Parliament, the prerogative to appoint the Prime Minister is perceived as symbolic.

Interestingly, both following examples raise the same question if the royal appointment of the Prime Minister is really as symbolic as it is perceived in the Thai context. The former occurred in 1973 which was normally referred to as the "14 Tu La Uprising" (the 14 October Uprising). It started with massive student demonstrations which protested against the then Prime

to any specific person or group to exercise them in an absolute way and without listening to the real voice of the people".

¹²¹⁷ Section 171 of the 2007 Constitution.

¹²¹⁸ Section 172 of the 2007 Constitution.

¹²¹⁹ Hilaire Barnett, *Constitutional and Administrative Law*, 4th ed, Carvendish Publishing, London, 2002, at 155.

Minister and his military-dominated government.¹²²⁰ The latter was the King's speech before the coup in September 2006. The speech responded to the call to obtain a new Prime Minister to replace the elected Prime Minister Thaksin Shinawatra who was found guilty of having conflicts of interest between his personal financial affairs and his premiership¹²²¹ and of fraudulent conduct at the general election.¹²²²

4.6.4.2.1 Prerogative to appoint the Prime Minister (14 October 1973)

In 1973, after extensive protests against Prime Minister Field Marshal Thanom Kittikachorn and the deaths of pro-democracy demonstrators, King Bhumibol appointed Sanya Dharmasakti as the new Prime Minister.¹²²³ It was argued that by making such appointment, the King ventured beyond his symbolic position.¹²²⁴ Those who opposed to the King's decision also argued that Sanya was not an appropriate person as a Prime Minister. He was not a Member of Parliament. Instead, he was the King's counsel and a member of the Privy Council at that time.¹²²⁵ The decision of the King in this matter is historically contestable. It is always subject to a debate if the King's political role is beyond the limit of constitutional monarchy.¹²²⁶

¹²²⁰ Elinor Bartak, *The Student Movement in Thailand: 1970-1976*, Centre of Southeast Asian Studies, Monash University, Australia, 1993, at 8-20.

¹²²¹ Pasuk Phongpaichit and Chris Baker, *Thaksin: The Business of Politics in Thailand*, Silkworm Books, Chiang Mai, 2004, at 197.

¹²²² The Constitutional Court handed down the decision on 8 May 2006 ruled eight to six to invalidate the election in April 2006.

¹²²³ Sanya Dharmasakti was also the Rector of Thammasat University at that time. He was highly regarded as the legal expert of the country.

¹²²⁴ Nakarin Mektrirat, *The King Who Supports Democracy* (in Thai), Thammasat University Press, Bangkok, 2006, at 121.

¹²²⁵ "The Historic Record – King Advises on the Political Crisis of the Nation" (in Thai), *Matichon Weekly*, 28 April 2006, at 26.

¹²²⁶ Anek Laothamatas, *Two Democracies in Thailand* (in Thai), 7th ed, Kobfai Publishing Project, Bangkok, 2009, at 103-114.

Those who believe in a political monarch argued on a number of grounds.¹²²⁷ Firstly, there was no proper Prime Minister in office because Thanom lost his control of his government. Thanom resigned and fled the country. Secondly, there was no requirement that the Prime Minister must be a Member of Parliament.¹²²⁸ Thirdly and most importantly, Thailand was on the verge of commencing a civil war.¹²²⁹ Prior to the King's intervention, the administration under Thanom was extremely confused and in disrepute. Thanom commanded that anyone disagreeing with his military-dominated government would be jailed.¹²³⁰ While Thanom ordered the military to suppress the demonstrators,¹²³¹ it was certain that the rule of law did not take place in Thailand.

Supporting the above arguments is a provision in the Thai Constitution. It is stated that wherever no provision under the Constitution is applicable to any case, it shall be decided in accordance with “the *constitutional practice* in the democratic regime of government with the King as head of the state”.¹²³² Prior to Thanom's administration, there had not been any case where the Prime Minister fled the country and left the Cabinet unattended. Resorting to *constitutional practice* as a guideline seemed to be a viable and legitimate option. When *constitutional practice* was applied to find the solution for the country, it was interpreted as a warrant for King Bhumibol to appoint the new Prime Minister.

¹²²⁷ Jan McGirk, “Thailand's King and That Democracy Jazz”, 11 June 2006 <http://www.opendemocracy.net/democracy-protest/thailand_king_3633.jsp> (2 October 2009).

¹²²⁸ Thongtong Chantarangsu, *The King's Power in the Constitutional Law* (in Thai), Chulalongkorn University Press, Bangkok, 2005, at 95-96.

¹²²⁹ It was a period of social and political conflicts since Thanom declared martial law and abrogated the constitution.

¹²³⁰ Prajak Kongkeerati, *Finally the Movement Can Be Seen* (in Thai), Thammasat University, Bangkok, 2005, at 513-518.

¹²³¹ James Ockey, “Thailand: The Struggle to Redefine Civil-Military Relations” in Muthiah Alagappa (ed), *Coercion and Governance: The Declining Political Role of the Military in Asia*, Stanford University Press, California, 2001, at 194-195.

¹²³² Section 7 of the 1997 Constitution; section 7 of the 2007 Constitution.

Leading to the “14 October Uprising”, Thanom ran his administration through the National Executive Council where he as a Premier, also held the position of Commander-in-Chief. It was clear that there was no separation of powers. It was also clear that the rule of law which guards against arbitrary power did not exist. The national legislative assembly was wholly appointed. Two-third of the members was soldiers or policemen who were friends of the Prime Minister.¹²³³ After the appointment of Sanya, a large number of the members in the unicameral assembly were pressurised and thus resigned from their positions.¹²³⁴ It appeared that the royal appointment of the new Prime Minister provided the country with a stable and functional government.

However, the King’s decision has been enormously criticised. He was blamed for venturing outside the Constitution. Perhaps it is because the provision was so generalised in giving no further direction as to what it was meant by the term *constitutional practice*. To clarify the term, the comparative approach is explored to analyse whether King Bhumibol’s prerogative departed from that of other constitutional monarchy such as the United Kingdom.¹²³⁵ As previously discussed, under normal circumstance, the British Queen must appoint the Prime Minister who is the leader of the party which won the election.¹²³⁶ Yet, in the past, under special circumstances such as wars or financial crisis, prerogative in appointing the Prime Minister may not follow the constitutional convention.¹²³⁷

¹²³³ See also Suchit Bunbongkarn, “Thailand: Democracy under Siege” in James Morley (ed), *Driven by Growth: Political Change in the Asia-Pacific Region*, An East Gate Book, New York, 1999, at 164-165.

¹²³⁴ The pressure was from the Thammasat Graduate Committee as well as the Law Society in November 1973. The fact that these groups were largely consisted of lawyers made the pressure become more intense.

¹²³⁵ Vernon Bogdanor, *The Monarchy and the Constitution*, Clarendon Press, Oxford, 1995, at 84-111.

¹²³⁶ The Office of Prime Minister is governed not by codified laws, but by unwritten and, to some extent, fluid customs known as constitutional conventions, which have developed over years of British history. See also, Jesada Bhornchaiya, *Power of the King: the Comparison between Thailand & England* (in Thai), Chulalongkorn University Press, Bangkok, 2003, at 226.

¹²³⁷ These incidents include the 1916 appointment of Prime Minister Lloyd George and the appointment of the temporary government during the monetary crisis in 1931 by King George V.

During World War I, Prime Minister Asquith, the leader of the Liberal Party had resigned because he could not gain support from Parliament. However, his competitor – Bonar Law, the leader of the Conservatives Party, being minority was not able to form the new government either. The question then arose as to how the United Kingdom would have a legitimate Prime Minister especially in the time of war. King George V was concerned for the stability of the country if there was no Prime Minister in office. He therefore initiated the meeting by calling over leaders from different parties. King George V intended to find an appropriate person who could avoid conflicts in government by coalition.¹²³⁸ It appeared that the King’s involvement in the process was substantial and was not predicted under constitutional monarchy.

At the end of World War I, the United Kingdom suffered from the Great Depression. The then Ramsay Macdonald’s government was having a problem in gaining support for its financial policy. Fearing for the government’s resignation during the financial crisis, King George V was prepared to engage in any necessary inventive measure. This included King George V’s arrangement to support the minority government. He asked the leaders of the Conservatives Party and the Liberal Party to form a “National Government” – a coalition which was designed to be a caretaker of the country.¹²³⁹ There are much more recent examples of the British royal intervention. These included Sir Anthony Eden’s resignation after the Suez Crisis in 1957 and MacMillan’s resignation because of his illness in 1963.¹²⁴⁰

Considering the fact that King Bhumibol appointed a new Prime Minister during the turmoil in Thailand, the roles of the Thai King and the British

¹²³⁸ Jesada Bhornchaiya, *Power of the King: the Comparison between Thailand & England* (in Thai), Chulalongkorn University Press, Bangkok, 2003, at 230.

¹²³⁹ Jesada Bhornchaiya, *Power of the King: the Comparison between Thailand & England* (in Thai), Chulalongkorn University Press, Bangkok, 2003, at 231.

¹²⁴⁰ Peter Leyland, *The Constitution of the United Kingdom: A Contextual Analysis*, Hart Publishing, Oxford, 2007, at 71.

counterpart appear to be not so different. The British history has shown that there have been occasions where constitutional monarchs involved in politics even though in modern times, such involvement becomes a rarer occasion. With this comparative analysis, the disputed term of *constitutional practice* should be able to include the King's prerogative in appointing the Prime Minister during a crisis. While the term is unsettled, political scholars suggest the term be interpreted on a case by case basis.¹²⁴¹ Unavoidably, the debate over the King's prerogative in appointing a Prime Minister continues.

4.6.4.2.2 Asking for a royal government (April 2006)

More recently, the debate over the King's role in politics was re-visited. It is a repetitive question as to how the Thai people perceive the political duty of their King. When referring to King Bhumibol, the Thai people generally replace the word "king" with "father" bringing a Sukhothai paternal relationship into a present time. As a "father", the King is expected to take control of any problems Thailand encounters.¹²⁴² This is especially true for any political turmoil which is a serious setback of the country. It is noted however, that the expectation of the people could be their false impression. By this, it means that such expectation may not be found under normal circumstances in constitutional monarchy. The false impression could ask for an extended power which the King cannot constitutionally exercise. This second example represents such circumstance during the administration of the ex-Prime Minister Thaksin Shinawatra.

Since Thailand became democratic, political stability was rare. Some scholars start to wonder whether democracy is actually the right form of constitutional

¹²⁴¹ Anek Laothamatas, *Two Democracies in Thailand* (in Thai), 7th ed, Kobfai Publishing Project, Bangkok, 2009, at 112.

¹²⁴² The speech by Crown Prince for the 60th Anniversary Celebrations of His Majesty the King's Accession to the Throne on 9 June 2006.

system for Thailand.¹²⁴³ Vote buying and election fraud are common activities among Thai politicians.¹²⁴⁴ Unfortunately, these corrupt politicians were elected and became very large majorities in Parliament. For example, Thaksin was elected with a landslide victory.¹²⁴⁵ However, he, in the end was prosecuted for many charges relating to corruption and conflicts of interest.¹²⁴⁶ The series of protests were held by a growing number of those who were against him. Thaksin refused to resign as he believed that he was legitimately elected. It was unfortunate for the King as he was once again demanded to end this political deadlock.

The demand was specific for King Bhumibol to appoint a new Prime Minister and a new government.¹²⁴⁷ The King was very careful in handling such request. It would be undesirable if he was accused of stepping outside the *constitutional practice* again. In responding to the demand, his Majesty was prompt to tell the country's judges to sort out the "mess".¹²⁴⁸ Within two weeks after the royal speech, the Constitutional Court ruled that the 2 April 2006 election in which Thaksin had just won was invalidated.¹²⁴⁹ Thaksin was no longer able to hold his office. It is noted that despite the court decision and the growing opposition, Thaksin undoubtedly retained strong support particularly in the north and northeast of Thailand.¹²⁵⁰

¹²⁴³ Pongsak Hoontrakul, "Legitimacy will mitigate the risk of tyranny in Thailand", *The Nation*, 23 October 2008.

¹²⁴⁴ Pasuk Phongpaichit, "Is There Any Hope in Preventing Corruption?", a paper presented at King Prajadhipok's Institute Congress I on *Politics, Administration, and Change in Thai Society at the Outset of Next Century*, Bangkok, 10-12 December 1999.

¹²⁴⁵ Thitinan Pongsudhirak, "Victory places Thaksin at crossroads", *Bangkok Post*, 9 February 2005.

¹²⁴⁶ "Profile: Thaksin Shinawatra", *BBC News* <<http://news.bbc.co.uk/2/hi/asia-pacific/1108114.stm>> (14 January 2009).

¹²⁴⁷ Chachapon Jayaphorn, *Precautionary Issues When Asking for the Royal Government* (in Thai) <<http://www.law.chula.ac.th/web/popnews.php?Id=75>> (25 August 2007).

¹²⁴⁸ King Bhumibol addressed the Administrative and Supreme Courts' judges during separate Royal audience at Klai Kangwol Palace in Prachuap Khiri Khan on 25 April 2006.

¹²⁴⁹ The Constitutional Court Ruling No. 9/2549 (2006).

¹²⁵⁰ James Hookway, "Thai Ex-Premier Rallies Support", *The Wall Street Journal*, 29 June 2009, at 8; Alan Klima, "Thai Love Thai: Financing Emotion in Post-crash Thailand" in Jonathan Xavier Inda and Renato Rosaldo (eds), *The Anthropology of Globalisation: A Reader*, 2nd ed, Blackwell, Malden, 2007, at 129.

King Bhumibol himself pointed out a significant difference between the student uprising in 1973 (14 October Uprising) and the protest against Thaksin in 2006.¹²⁵¹ While Thanom resigned during the uprising, Thaksin had never given up his position since his party won the election on 2 April 2006. However, those who were against Thaksin grew so fast and became so aggressive.¹²⁵² With these circumstances, Thaksin only promised that he would not take the official Prime Minister position but would continue his premier as a caretaker.¹²⁵³ Therefore, despite the massive demand asking the King to appoint a new Prime Minister, Thaksin was not replaced. Using the King's prerogative to overthrow an elected Prime Minister would undermine the principle of democratic rule of law. Although the King did not step in as he did in 1973, the 2006 incident illustrates that the King retains all his royal charisma and power.¹²⁵⁴

4.6.4.3 King's influence on the judicial power

The decision of the Constitutional Court in invalidating the April 2006 election produced three aspects of the rule of law in Thailand. Firstly, the campaign requesting the King to appoint a new Prime Minister was put to an end. This avoided any criticism that the King might misrepresent the concept of constitutional monarchy or the rule of law. Secondly, it was a beginning of what so-called "judicial revolution". By directly speaking to the judges at the King's palace, it was a clear message for them to start utilising their power in building "clean" government. Finally, it is a confirmation of how the King can influence the rule of law in Thailand through the judicial power.

¹²⁵¹ King Bhumibol addressed the Administrative and Supreme Courts' judges during separate Royal audience at Klai Kangwol Palace in Prachuap Khiri Khan on 25 April 2006.

¹²⁵² Frank Munger, "Culture, Power, and Law: Thinking about the Anthropology of Rights in Thailand in an Era of Globalisation" (2007) 51 *New York Law School Law Review* 817, at 821.

¹²⁵³ "Thai PM Thaksin Says He'll Step Down", *Channel NewsAsia*, 4 April 2006.

¹²⁵⁴ Nakarin Mektrirat, *The King Who Supports Democracy* (in Thai), Thammasat University Press, Bangkok, 2006, at 218.

After the Constitutional Court nullified the 2006 election, several rulings relating to political corruption from other courts were handed down. For example, the Criminal Court held that the Election Commissioners was guilty of illegal assistance to Thaksin's party in such election.¹²⁵⁵ The Supreme Court's Criminal Division for Holders of Political Positions found Thaksin guilty of a land deal since he violated the constitutional provision on conflicts of interest.¹²⁵⁶ Three of Thaksin's lawyers were found by the Supreme Court to be guilty of contempt of court after allegedly attempting to bribe court officials with two million baht stashed in a pastry package.¹²⁵⁷ These series of judgments portrayed the idea of political landscape being altered by the judiciary.¹²⁵⁸

The idea would probably have not occurred if the King had not directed political problems to the judicial branch. The King's approach to solve the political deadlock in April 2006 has paved the way for the courts to create their better image in performing their duty according to the rule of law. Undeniably, the King has sparked the idea of "judicial revolution". His speech also raised public awareness of how necessary the impartial institution is, for the rule of law to be determinedly developed.¹²⁵⁹ Prior to the King's speech, the Thai people seemed to neglect the idea that judicial power can provide the public with the system of checks and balances in eliminating any arbitrary act.¹²⁶⁰

¹²⁵⁵ The Criminal Court Decision No. Aor 2343/2549 (2006).

¹²⁵⁶ The Criminal Division of Holders of Political Positions Decision No. 1/2550 (2007).

¹²⁵⁷ Thanong Khanthong, "Would the Owner of the Pastry-box Bribe Please Step Forward?", *The Nation*, 27 June 2008.

¹²⁵⁸ Marwaan Macan-Markar, "Judicial Revolution Changing Political Landscape", *Inter Press Service News Agency*, 19 August 2008.

¹²⁵⁹ International Commission of Jurists, "The Dynamic Aspects of the Rule of Law in the Modern Age", a report on the proceedings of the *South-East Asian and Pacific Conference of Jurists*, Thailand, 15-16 February 1965, at 42.

¹²⁶⁰ Barry Weingast, "The Political Foundations of Democracy and the Rule of Law" (1997) 91(2) *American Political Science Review* 245, at 260-262.

It is noted that a judge may not be impartial just because the King says so. Rather, the King was making it much more difficult for any judge who might have wavered because of interference from corrupt politicians.¹²⁶¹ This strikes at the core element of the rule of law – to have an independent judiciary.¹²⁶² The King’s speech to the judge to solve the political problem in April 2006 is not the only example of how the King has created a positive correlation between the King and judicial independence. This was even so despite the fact that Thailand experienced the long period of absolute monarchy.¹²⁶³ A number of incidents can be traced to validate the royal respect for such doctrine.

Prior to the reign of King Rama V (1868-1910), courts in Thailand were scattered and unregulated. The jurisdiction among courts was not clear. In criminal cases, certain administrative offices had power to convict or punish the accused. Those who had power to arrest the criminals also acted as adjudicator in the case. Police were allowed to decide the case if the penalty of the charge was not more than six months of imprisonment.¹²⁶⁴ These rules were channels for polices to abuse their power. It was one of the main reasons why King Rama V decided to overhaul the court system. In issuing the law retracting the adjudicating power from the police, it is believed that the independence of the judiciary was initially built and promoted by the King during the time of absolute monarchy.¹²⁶⁵

¹²⁶¹ “Court Lay Bribery Complaint against Jailed Thaksin Lawyers”, *Bangkok Post*, 27 June 2008.

¹²⁶² Lung-chu Chen, “Human Rights Protection Needs Rule of Law and Independence of Judiciary to Succeed” in Uwe Johannsen & James Gomez (eds), *Democratic Transitions in Asia*, Select Publishing, Singapore, 2001, at 85.

¹²⁶³ See, Prasit Kovilaikool, *Legal System of Thailand*, Butterworths, Singapore, 1995; Institute of Developing Economics, *The Judicial System in Thailand: An Outlook for a New Century*, Institute of Developing Economics, Bangkok, 2001.

¹²⁶⁴ Trachuying, “Porisapa Court” (in Thai) (1997) 44 (4) *Journal of the Office of the Judiciary* 118, at 119.

¹²⁶⁵ Jarunee Tanrataporn, “The Influence of Three Seals Law on the Thai Courts and Society” (in Thai) (2009) 3(5) *Courts of Justice Review* 48, at 67.

Now that Thailand is a constitutional monarchy, the King can no longer issue his own law to support the judiciary. In spite of not having absolute power, King Bhumibol continues to be an advocate of judicial independence. This may raise a question as to how judges can be autonomous if they are influenced by the King. To answer the question, it needs more clarification of the term “influence”. King Bhumibol does not instruct judges how to decide their assigned cases. He is influential in the sense that he persists in asking judges to be impartial. Under normal circumstances, such a request might be easily ignored. However, as the sole source of unity and strength of the country, most judges would want to live up to the King’s expectation and often do so.

According to the Thai Constitution, judges are selected by the process according to the judicial law and the Constitution. The rules are varied depending upon the types of courts they belong to. However, before taking office, judges from every court must make a solemn declaration before the King.¹²⁶⁶ It is again a ceremonial role of the constitutional monarch to appoint the judges.¹²⁶⁷ Nevertheless, King Bhumibol has turned this symbolic ceremony to be a real opportunity to reiterate his request. Every time, judges were at his palace for their royal appointment, King Bhumibol would always articulate the ability of an individual judge in maintaining judicial impartiality and honesty.¹²⁶⁸ The seriousness of the King’s request may be underestimated when he is seen as a symbolic constitutional monarch.¹²⁶⁹ However, when

¹²⁶⁶ Section 201 of the 2007 Constitution.

¹²⁶⁷ Section 200 of the 2007 Constitution.

¹²⁶⁸ Chamrus Khaemajaru, “King Bhumibol and the Judiciary Power” (in Thai), *King Bhumibol: The Carer of Legal Profession (in Thai)*, Bangkok, 1987, at 61-74.

¹²⁶⁹ Thongtong Chantarangsu, *The King’s Power in the Constitutional Law* (in Thai), Chulalongkorn University Press, Bangkok, 2005, at 95-96.

seen as a beloved father and role model of the country, the King's word is enthusiastically adopted.¹²⁷⁰

4.6.5 Conclusion: Unprecedented royal institution

The rule of law is a legal concept which ensures that no one can be above the law. Clearly, it shows that Thai government may fall short in upholding such a concept. In the reign of King Bhumibol alone, there are a number of incidents which the government has clearly abused its power. When the rule of law is mixed with the powerful kingship, its performance in restraining abuse of power may not be the same way as the concept has performed in other countries. What has been discussed in the thesis is an example how the rule of law is transformed by the King's influence. At times, the King's influence is criticised as his involvement in politics is rather unconventional for a country with constitutional monarchy.

The concern is left as to how well the rule of law can perform when the royal institution becomes involved. More specifically, it is the concern of how rule of law can be applied in the country where the constitutional monarch is more than a symbolic power. Walter Bagehot once summarised three rights that a constitutional monarch should possess: the right to be consulted; the right to encourage; and the right to warn.¹²⁷¹ Clearly, King Bhumibol's influence went beyond what these rights can offer.¹²⁷² As the King is the fundamental institution of Thailand, it will be difficult to separate his role from the rule of law application. Even though he is named "political monarch", his involvement in politics does not appear to be negative on the rule of law in Thailand.

¹²⁷⁰ Kevin Hewison, "The Monarchy and Democratisation" in Kevin Hewison (ed), *Political Change in Thailand*, Routledge, New York, 1997, at 62.

¹²⁷¹ Miles Taylor, *Walter Bagehot: The English Constitution*, Oxford University Press, Oxford, 2001, at 64.

¹²⁷² Frank Munger, "Culture, Power, and Law: Thinking about the Anthropology of Rights in Thailand in an Era of Globalisation" (2007) 51 *New York Law School Law Review* 817, at 820.

4.7 RELIGIOUS INFLUENCE ON THE RULE OF LAW

4.7.1 Introduction: Religious influence

Religion is one of the only three institutions avowed in the Thai Constitution as the most sacred and supreme objects of respect. It is a duty of every Thai citizen to protect the *nation, religion and the King*.¹²⁷³ The three institutions are recognised as foundation of sovereignty and independence of the country. Religion in Thailand thus, extends far beyond the teaching of individual and social morals. It does not only influence the way of thinking and doing, but also plays a vital role in shaping the culture and core ideology of Thailand.¹²⁷⁴ At times, religion has united the Thai people as well as influenced its core institutions. Law and administration is also deeply rooted with religious characteristic.¹²⁷⁵ It is noted that such interrelationship is not always *straightforward*, but rather *universal* and to a greater extent *implicit*.

However, the interaction of religion with Thai politics was sometimes denied.¹²⁷⁶ This is understandable given the erratic history and nature of Thai politics with the high level of corruption. Politics in Thailand, and no doubt also in other nations, is considered by some as “the dirtiest business” in human affairs.¹²⁷⁷ It is to no surprise that religious institutions would deny any level of affiliation, influence or even a remote connection with politically secular matters¹²⁷⁸. However, as shown below, the extent of *unintentional* influence is quite astonishing. While religion may strive not to interfere with

¹²⁷³ Section 70 of the 2007 Constitution.

¹²⁷⁴ Sulak Sivaraksa, *Religion & Development*, Thai Inter-Religious Commission for Development, Bangkok, 1987, at 67; See generally, John Robilliard, “Religion, Conscience, and Law” (1981) 32(4) *Northern Ireland Legal Quarterly* 358.

¹²⁷⁵ Lakshman Marasinghe, “The Use of Customary Law in Development in Southeast Asia” in Bruce Matthews & Judith Nagata (eds), *Religion, Values and Development in Southeast Asia*, Institute of Southeast Asian Studies, Singapore, 1986, at 22.

¹²⁷⁶ Somboon Suksamran, *Buddhism and Politics in Thailand*, Institute of Southeast Asian Studies, Singapore, 1982, at 1.

¹²⁷⁷ David Ambuel, “Buddhist Democracy and the Rule of Law” (2001) 32(1) *Journal of Social Science* 275, at 291.

¹²⁷⁸ See also, Harold Berman, *The Interaction of Law and Religion*, Abingdon Press, Tennessee, 1974, at 11.

politics or the legal system, it undeniably has an *inadvertent* impact on the rule of law in Thailand.¹²⁷⁹

Such an impact is most welcomed. It is welcomed because many of the religious teachings are synopsis with the core principles of the rule of law. It is difficult to specify the exact level of impact that religion has had on the rule of law in Thailand. However, it may be estimated as *significant* in comparison to other nations, where religion is less prominent.¹²⁸⁰ The following analysis is an exploration of the relationship between some religions and the rule of law in Thailand.¹²⁸¹ The exploration is by no means complete. Indeed, the examination of the interaction between religion and law is something that may be written as an entire thesis by itself.¹²⁸² What follows is a brief overview and selection of religious influences on the rule of law in Thailand.

4.7.2 Buddhism and the rule of law

Strictly speaking, the term “religion” does not refer to Buddhism.¹²⁸³ Nevertheless, the term has been felt to refer primarily to Buddhism.¹²⁸⁴ This is because almost all Thais are Buddhist and this has been the case for as long as the historical records refer back into the past.¹²⁸⁵ In 2007, ninety-five percent of Thailand’s population is Buddhist.¹²⁸⁶ The remaining five percent of religion adheres to Islam, Hinduism, Christianity and other animist minorities.

¹²⁷⁹ Andrew Harding, “Thailand’s Reforms: Human Rights and the National Commission” (2006) 1(1) *Journal of Comparative Law* 88, at 91-92.

¹²⁸⁰ Frank Reynolds, “Dhamma in Dispute: The Interaction of Religion and Law in Thailand” (1994) 28 *Law and Society Review* 433, at 444-445.

¹²⁸¹ See also, Matthew Kramer, *Objectivity and the Rule of Law*, Cambridge University Press, New York, 2007, at 102.

¹²⁸² See also, Peter Radan, Denise Meyerson, and Rosalind Croucher (eds), *Law and Religion: God, the State, and the Common Law*, Routledge, New York, 2005.

¹²⁸³ Niels Mulder, *Java-Thailand: A Comparative Perspective*, Gadjah Mada University Press, Indonesia, 1983, at 38.

¹²⁸⁴ Sunthorn Na-Rangsi, “The Significance of Buddhism for Thai Studies” in B J Terwiel (ed), *Buddhism and Society in Thailand*, Centre for South East Asian Studies, India, 1984, at 4.

¹²⁸⁵ Wendell Blanchard, *Thailand: Its People, Its Society, Its Culture*, Hraf Press, Connecticut, 1970, at 87.

¹²⁸⁶ The Pluralism Project, *International Portrait: Thailand 2007*, <<http://www.pluralism.org/research/profiles/display.php?profile=74596>> (23 February 2009).

According to the statistics, Buddhism is often considered as the most important symbol of, and primary base for, national and cultural identification. The prosperity of Thailand is thought to be related to the prosperity of Buddhism and vice versa. As such, the stability and well-being of Thailand and Buddhism are inseparable.

Due to these important qualities of Buddhism, the Thai rulers have been deeply concerned with the prosperity and uprightness of Buddhism. The survival and meaningfulness of Buddhism largely depends on its sound and uncorrupted priest - the sangha (the community of the Buddhist monks). It is the sangha who preserves, studies, and disseminates the teachings of the Buddha. It is in turn a vital traditional function of the political rulers to promote and protect the sangha. It has always been argued that if this function is not successfully maintained, the Thai people would lose faith in the sangha, in Buddhism and ultimately in moral foundation of Thailand.¹²⁸⁷ In this sense, it appears that the sangha and Thai politics are unavoidably interfaced.¹²⁸⁸

As the base of the morality of Thai society, Buddhism plays an essential part in various aspects of the people's lives. Undoubtedly, this includes its influence on law and administration of the country.¹²⁸⁹ For example, a moral King should observe the ten royal virtues - the Buddhist ethical principles of leadership.¹²⁹⁰ The King, according to the Thai Constitution, must be

¹²⁸⁷ Sunthorn Na-Rangsi, "The Significance of Buddhism for Thai Studies" in B J Terwiel (ed), *Buddhism and Society in Thailand*, Centre for South East Asian Studies, India, 1984, at 3.

¹²⁸⁸ Carlo Caldarola, "Thailand: A Sacred Society in Modern Garb" in *Religions and Societies: Asia and the Middle East*, Mouton, Berlin, 1982, at 373.

¹²⁸⁹ Preedee Kasemsup, "Reception of Law in Thailand: A Buddhist Society" in Masaji Chiba (ed), *Asian Indigenous Law in Interaction with Received Law*, Dartmouth, UK, 1992, at 285.

¹²⁹⁰ Tavivat Puntarigvivat, "Good Governance: A Buddhist Perspective", a paper presented at the International Buddhist Conference on the United Nations Day of Vesak Celebrations 2007, Bangkok, 26-29 May 2007

<http://www.vesakday.net/vesak50/article/pdf_file/04_Good_Governance_Buddhist_Perspective-Thailand.pdf> at 3.

Buddhist.¹²⁹¹ A jurist act can become void if its objective is against public morality.¹²⁹² As shown below, further connections are evident in the judicial decisions, government policies and the Constitution. The relevant question is to what extent these connections influence the rule of law in Thailand. An insight to this answer lies in the following examination of the Buddha's teachings and the role of sangha.

4.7.2.1 The rule of law and the law of Buddhism

The fundamental principles of the Buddhist belief lie in the spiritual enlightenment of followers through spiritual cultivation, religious practices and meditation. The goal is liberation or freedom from suffering. Once the mind has been awakened or enlightened, they will be a Buddha, much like the founder of the religion, Gautama Buddha.¹²⁹³ Through the study of his words, the practice of a virtuous, moral life, and by purifying the mind, followers will achieve Nibbana or Nirvana which ends the repeated cycle of birth, sickness and death. One of the most important duties of Buddhists is therefore to learn Dharma or the Buddha's teachings which lead the way to Nirvana. Many of these teachings reveal that they are corresponding to the core concept of the rule of law.

4.7.2.1.1 General Buddhist teachings: The true nature of phenomena and the law of uncertainty (in supporting equality before the law)

Buddhism is a religion which focuses on personal spiritual development.¹²⁹⁴ The Buddha proclaimed that each individual is a master of his own destiny. This highlights the capacity that each person has the *same opportunity* to attain

¹²⁹¹ Section 9 of the 2007 Constitution.

¹²⁹² Section 150 of the Civil and Commercial Code.

¹²⁹³ Fundamental Buddhism, *Buddhist Teachings/ Buddhism/ Buddha* <<http://www.fundamentalbuddhism.com/>> (11 February 2009).

¹²⁹⁴ "Religion and Ethics: Buddhism", *BBC* <<http://www.bbc.co.uk/religion/religions/buddhism/>> (11 February 2009).

enlightenment and reach Nirvana.¹²⁹⁵ To attain enlightenment, one must understand the true nature of phenomena. For example, when one is unhappy, one should examine what causes such feeling. When the cause is found, it should be clear as to what should be done to overcome the problem. Greed, anger and delusion are believed to be the root of unhappiness and suffering.¹²⁹⁶ It is the *true nature of phenomena*. Human beings with or without power, fame and wealth equally experience the same phenomena and have an equal chance to develop their spirits to overcome their problems.¹²⁹⁷

The principle of equality and the principle of the true nature is also linked to the *law of uncertainty*.¹²⁹⁸ Buddhism believes that those who are not yet enlightened remain bound to the wearisome cycle of birth, aging, illness, death and rebirth.¹²⁹⁹ Those with wealth, power, or fame are not immune to such cycle. The cycle illustrates that there are nothing unchangeable in a human life.¹³⁰⁰ When there is birth, there is death. There is happiness but there is also unhappiness. Those with power can become powerless. It is unwise to attach or hold on to these uncertain factors which could only lure a human being into intertwined emotions, such as love, hatred, fear, or delusion.¹³⁰¹ Accepting change as a passage of life is part of the way to overcoming unhappiness.

¹²⁹⁵ P D Premasiri, "The Social Relevance of the Buddhist Nibbana Ideal" in David J Kalupahana (ed), *Buddhist Thought & Ritual*, International Religious Foundation, Delhi, 2001, at 46.

¹²⁹⁶ Ronald B Epstein, *Buddhist Text Translation Society's Buddhism A to Z*, Buddhist Text Translation Society, Burlingame, 2003, at 90.

¹²⁹⁷ Thai Khadi Research Institute, *Social Dimension of Buddhism in Contemporary Thailand*, Thammasat University Press, 1983, at 30.

¹²⁹⁸ Papassorn Tienpanya, "Dharma as a Principle for the Three Seals Law" (in Thai) (2009) 56(2) *Journal of the Office of the Judiciary* 148, at 160.

¹²⁹⁹ John Built, *What is Theravada Buddhism?* <<http://www.accesstoinsight.org/lib/authors/bullitt/theravada.html>> (12 February 2009).

¹³⁰⁰ David Burton, *Buddhism, Knowledge and Liberation: A Philosophy Study*, Ashgate, Hants, 2004, at 15.

¹³⁰¹ Sulak Sivaraksa, "Buddhist Concept of Law" (2007) 1 *Law* 12, at 14.

Similar ideas can be equated when comparing these Buddha's teachings with the rule of law concept. Buddhism recognises the fundamental sameness of all human beings.¹³⁰² This is a good platform for the rule of law to developed and in particular the idea of equality before the law. *Implicitly*, rulers are discouraged to abuse their power since they have no better chance in avoiding the same path of birth and rebirth.¹³⁰³ Being obsessed with their power would rather make their mind clouded by delusion.¹³⁰⁴ Under the Buddhist law of uncertainty, power is subject to change or impermanence. Those who rule can become defenseless. Abuses of power would only accelerate such possibility. Buddhism therefore *determinedly* opposes those who take advantage of their authority.

4.7.2.1.2 General Buddhist teachings: The law of karma (in encouraging the limit of power)¹³⁰⁵

Upon the dissolution of the body, Buddhists believe that rebirth will take place in a state consistent with the resultant of past actions or *karma* at the time of death.¹³⁰⁶ Karma explains the differences amongst living beings.¹³⁰⁷ Some are fortunate because they did good actions. Some experience hardship because they used to involve in bad behaviour. In other words, the pains and pleasures inflicted on each person are a consequence of his or her own actions and will inevitably result in the same being inflicted on themselves.¹³⁰⁸ This reactive infliction could be experienced at present, the future or even in the

¹³⁰² Dalai Lama, "Buddhism, Asian Values, and Democracy" (1997) 10(1) *Journal of Democracy* 3.

¹³⁰³ Ian Stevenson, *Twenty Cases Suggestive of Reincarnation*, The University Press of Virginia, Virginia, 2002, at 129.

¹³⁰⁴ Fred Eppsteiner, *The Path of Compassion: Writing on Socially Engaged Buddhism*, Parallax Press, Berkeley, 1988, at 141.

¹³⁰⁵ See, H Patrick Glenn, *Legal Traditions of the World*, Oxford University Press, Oxford, 2007.

¹³⁰⁶ See, Rudolf Steiner, *Reincarnation and Karma: Their Significance in Modern Culture*, Anthroposophical Publishing Co., London, 1960.

¹³⁰⁷ Vincanne Adams, "Suffering the Winds of Lhasa" in Jonathan Xavier Inda and Renato Rosaldo (eds), *The Anthropology of Globalisation: A Reader*, 2nd ed, Blackwell, Malden, 2007, at 397.

¹³⁰⁸ Peter Harvey, *An Introduction to Buddhist Ethics*, Cambridge University Press, Cambridge, 2003, at 17.

afterlife.¹³⁰⁹ It is noted however, that karma is not a reward or punishment for past actions but rather a natural result of them.

The rule of karma explains why Buddhism denies the concept of a creator god who sits in judgment on his creation. It is clarified that Buddhists are own creator by their past actions.¹³¹⁰ In the ethical realm, the law of karma is thus conceived as the law of cause and effect.¹³¹¹ By regarding the well-being as a fruit from the past good action, the teaching helps promote goodness and the abstention from evil at all levels of society.¹³¹² When applied to the rule of law, rulers misusing their power are *impliedly* warned in receiving bad effect caused by their misconduct. The rule of karma was referred by some Thais who agreed with the Constitutional Court's decision in disbanding ex Prime Minister Thaksin from politics.¹³¹³ For those Thais, the exclusion from politics was in fact the karma caused by Thaksin's misbehaviour.¹³¹⁴

Further element of the rule of karma also *obliquely* applies to the relationship between the ruler and his subjects. How much karma can impact an actor is modified by the conditions under which the actions are performed.¹³¹⁵ For example, those who possess extraordinary qualities are considered to be more advanced or fortunate than the others. When they misbehave, they attract more weight or strength of karma. The working of karma is tuned and balanced so as to match effect with cause. This element of karma has been

¹³⁰⁹ Lakshman Marasinghe, "The Use of Customary Law in Development in Southeast Asia" in Bruce Matthews & Judith Nagata (eds), *Religion, Values and Development in Southeast Asia*, Institute of Southeast Asian Studies, Singapore, 1986, at 26.

¹³¹⁰ Melford E Spiro, *Buddhism and Society*, University of California Press, Berkeley, 1982, at 7.

¹³¹¹ Mahasi Sayadaw, *The Theory of Karma* <<http://www.buddhanet.net/e-learning/karma.htm>> (13 February 2009).

¹³¹² See also Thai Khadi Research Institute, *Social Dimension of Buddhism in Contemporary Thailand*, Thammasat University Bangkok, 1983, at 35.

¹³¹³ Suchai Jogkaew, "The Rule of Law and the Rule of Karma" (in Thai), *Matichon Daily*, 7 June 2007, at 6-7; "Thai Court Orders Dissolution of Ex Prime Minister's Party", *International Herald Tribune*, 30 May 2007 <<http://www.ihf.com/articles/2007/05/30/asia/thai.php>> (12 March 2009).

¹³¹⁴ See also, "Rite Seeks to Absolve Thaksin of Past Life Bad Karma", *The Nation*, 18 February 2009.

¹³¹⁵ Papassorn Tienpanya, "Dharma as a Principle for the Three Seals Law" (in Thai) (2009) 56(2) *Journal of the Office of the Judiciary* 148, at 161.

recently construed by the Supreme Court's Criminal Division for Political Office Holders. In convicting Thaksin for his corruption charge over the sale of property in Bangkok, one presiding judge made a clear reference to Thaksin's extraordinary position as a premier.¹³¹⁶

In such Supreme Court case, it was articulated that Thaksin was a Prime Minister. He was supposed to be an ethical ruler and role model for the country. Rather Thaksin abused his power in benefiting the sale of property in Bangkok. Clearly, the sale prompted an issue of conflicts of interest. The allegation of conflicts of interest and corruption mostly do not result in the convict being jailed.¹³¹⁷ Either the penalty is reduced or a suspension is granted.¹³¹⁸ This is because those cases involve defendants who are or used to be government officials for a long time; it is generally presumed that he or she used to do a good deed for the country.¹³¹⁹ Therefore, it is most likely that lesser penalty or suspension is granted. However, either option was not granted to Thaksin.

It is clear in the judgment that corruption is not a small criminal matter. When committed by a Prime Minister, there was no room for less penalty or suspension. The judgment further described what a good leader should be and how Thaksin and his wife were opposite to such character. Thaksin's abuse of power was emphasised as unethical karma. During his premiership, he was always criticised for allowing his family business to gain benefit from the government projects or concession.¹³²⁰ By not granting a suspension to

¹³¹⁶ The Supreme Court Decision No. 1/2550 (2007).

¹³¹⁷ The Supreme Court Decision No. 2354/2531 (1988); The Supreme Court Decision No. 27/2531 (1988); The Supreme Court Decision No. 2078/2529 (1986); The Supreme Court Decision No. 271/2473 (1930).

¹³¹⁸ Section 56 of the Criminal Code.

¹³¹⁹ Section 78 of the Criminal Code.

¹³²⁰ "Big Gains for Families with Links to Thaksin", *The Nation*, 8 December 2006; "Deal of the Century", *The Nation*, 27 January 2006.

Thaksin, the judgment *directly* affirms that the operation of karma in matching effect and cause corresponds to the concept of the rule of law.¹³²¹

A concern however, was raised when using court decisions as evidence of how Buddhism can influence the rule of law. It is a concern of what Robert Bork called “room for personal moral”. Bork believed that there is only little room for judges to allow any of their personal moral to influence their judicial decision-making.¹³²² The concern might be sound if personal moral forms the main part of a judgment.¹³²³ However, when discussing this matter in the country where civil law system operates, the concern is minimal.¹³²⁴ In Thailand, judges are required to adhere to the code of law. When making a reference to Buddhist teachings, it appears to only illustrate the positive correlation between the Buddhist teachings and the principle of law.¹³²⁵ *Indirectly*, judicial decisions exemplify the connection as to how Buddhism can influence the rule of law in Thailand.

4.7.2.1.3 A specific teaching for Buddhist rulers: The Buddhist political theory

It is not only the *general* Buddha’s teachings which can be applied to limit arbitrary power. In advancing Buddha’s teachings into the world of politics, certain teachings are *specifically tailored* for those who are rulers.¹³²⁶ This is generally understood as Dharma for the King or the ruler.¹³²⁷ The

¹³²¹ Frank Munger, “Constitutional Reform, Legal Consciousness, and Citizen Participation in Thailand” (2007) 40 *Cornell International Law Journal* 455, at 470.

¹³²² Robert Bork, *The Tempting of America: The Political Seduction of the Law*, Free Press, New York, 1997, at 66.

¹³²³ See also, John Robilliard, “Religion, Conscience and Law” (1981) 32(4) *Northern Ireland Legal Quarterly* 358.

¹³²⁴ Samuel Gregg, *Morality, Law and Public Policy*, The St Thomas More Society, Sydney, 2001, at 34.

¹³²⁵ Keith Mason, “Law and Religion in Australia”, a speech at *National Forum on Australia’s Christian Heritage*, Canberra, 7 August 2006.

¹³²⁶ Papassorn Tienpanya, “Dharma as a Principle for the Three Seals Law” (in Thai) (2009) 56(2) *Journal of the Office of the Judiciary* 148, at 159.

¹³²⁷ Sulak Sivaraksa, “Thailand: A Return to the Ideal?”, *Open Democracy News Analysis*, 20 May 2002 <http://www.opendemocracy.net/democracy-world_monarchy/article_525.jsp> (31 August 2009).

fundamental principle of this Dharma lies in the concept of righteousness. The explanation of the concept is as followed:

“To maintain his political authority and to regulate state affairs for the benefit of the kingdom and hence reaffirm and enhance his authority, the king had to be a righteous ruler, the Dharma Raja. The ethics of Dharma are of universal relevance, applicable as much to individual conduct as to the principles of government. Thus, the king existed to uphold the righteous order, and should not act arbitrarily. He was also advised to shun four wrong courses of judgment and decision either through favouritism, malice, delusion or fear...”¹³²⁸

According to the Buddhist political theory, ultimate sovereignty does not reside in any ruler or a government. The people are made responsible for the quality of the rulers they have chosen.¹³²⁹ In this sense, Buddhism does not only help shape the rule of law but also democracy. Indeed, David Ambuel used the term “Buddhist democracy” when describing the modern political process in Thailand.¹³³⁰ The idea that a ruler can do no wrong is also alien to the Buddhist political theory. This is because the rule of karma operates within the theory; every individual is as equal and personally responsible for all the volitional acts which he commits.¹³³¹ Low or middle or high, the rule of karma cares for nothing. A ruler thus cannot claim special immunity to laws to which other people are subject.¹³³²

Rulers of Buddhist kingdoms in South-East Asia absorbed the concept of ideal ruler as part of their own traditions.¹³³³ In fact, the early Thai King partly

¹³²⁸ Somboon Suksamran, “Buddhism and Political Authority: A Symbiotic Relationship” in B J Terwiel (ed), *Buddhism and Society in Thailand*, Centre for South East Asian Studies, India, 1984, at 26.

¹³²⁹ Sulak Sivaraksa, “Buddhist Concept of Law” (2007) 1 *Law* 12, at 91.

¹³³⁰ David Ambuel, “Buddhist Democracy and the Rule of Law” (2001) 32(1) *Journal of Social Science* 275, at 276.

¹³³¹ Karl D Jackson, “The Ideology of Total Revolution” in Karl D Jackson (ed), *Cambodia, 1975-1978: Rendezvous with Death*, Princeton University Press, Princeton, 1989, at 70.

¹³³² Sulak Sivaraksa, “Buddhist Concept of Law” (2007) 1 *Law* 12, at 91.

¹³³³ Somboon Suksamran, “Buddhism and Political Authority: A Symbiotic Relationship” in B J Terwiel (ed), *Buddhism and Society in Thailand*, Centre for South East Asian Studies, India, 1984, at 27.

relied on Buddhism as source of his power.¹³³⁴ When absolute monarchy was replaced by constitutional monarchy, the concept of righteousness continues to apply to those who represent the sovereign power.¹³³⁵ For this, those who are political office holders or government officials cannot be above the law.¹³³⁶ *Impliedly*, they are obliged to follow the core principle of the rule of law. The evidence of Buddhist political theory in influencing the rule of law can be found in the 2007 Constitution¹³³⁷ as well as the Code of Conduct for the Judiciary.¹³³⁸

Prior to 2007, the concept of righteousness was mostly written in religio/political rather than religio/legal context. Most literatures were written to admire the way the Thai King has maintained the concept of righteousness. These literatures offer ample examples of how the Thai King strictly and successfully follows the Buddhist political theory.¹³³⁹ However, it is rare to find any literature establishing the link between the concept and the duty of politicians.¹³⁴⁰ To encourage the practice of the theory among the ruler elite (after a series of corruption and conflicts of interest among politicians), the concept of righteousness now forms a code of ethics, a new chapter in the 2007 Constitution. The chapter contains the ethical standard and a penal procedure in case of a breach by any politicians or other state officials. The new code of ethics is a verification of how Buddhism can be *indirectly* supportive to the rule of law.

¹³³⁴ Yoneo Ishii, *Sangha, State, and Society: Thai Buddhism in History*, University of Hawaii Press, Honolulu, 1986, at 42.

¹³³⁵ See also, Sompong Sucharitkul, "Thai Law and Buddhist Law" (1998) 46 *American Journal of Comparative Law* 69.

¹³³⁶ Sulak Sivaraksa, "Buddhist Concept of Law" (2007) 1 *Law* 12, at 91.

¹³³⁷ Sections 279 and 280 of the 2007 Constitution.

¹³³⁸ Office of Judicial Support, *Code of Judicial Conduct*, Ministry of Justice, Bangkok, 1986.

¹³³⁹ For example, Pornpan Tharanumas, *Much of the King's Power* (in Thai), Kittiwan, Bangkok, 1987.

¹³⁴⁰ Jon S T Quah, "Causes and Consequences of Corruption in Southeast Asia: A Comparative Analysis of Indonesia, the Philippines and Thailand" (2003) 25(2) *Asian Journal of Public Administration* 235, at 254.

While the code of ethics for politicians is recently inserted in the 2007 Constitution, the Code of Conduct for the Judiciary which mostly discusses the Buddhist political theory was published since 1986.¹³⁴¹ There are forty-four rules that judges in the Court of Justice are strictly required to follow. The Code is *heavily* relied upon both general Buddhist teachings and the specific Buddhist political theory. Rule No. 1 clearly states that “a judge must be independent and must decide a case without prejudice”. Using more religious term in Rule No. 2, “a judge must not be greedy since it will lead to personal suffering”. Rule No. 21 *expressly* requires “a judge to follow the Buddha’s teaching. A judge who fails to comply with the Code will be reported and disciplined.” It is *clear* that the Buddhist teachings form a major component for the judicial disciplinary rules.

4.7.2.1.4 The Buddhist political theory and folklore

The Buddhist political theory does not only appear in the formal document like the Constitution or the Code of Judicial Conduct. The theory is also *informally* conveyed to the public through folktales. In Thailand, folklores are not only the source of entertainment, but they are very much recognised as one of the main sources of moral principles.¹³⁴² The Thai folklore principally was created through the Buddha’s teachings and the Buddhist political theory is *indirectly* articulated in a lively connotation.¹³⁴³ In this way, the folklores assist people to understand fundamental characteristics of the rule of law by simplifying them in stories to an enjoyable read. The result of this is a *direct* influence on the Thai way of life and its unique means in portraying the rule of law.¹³⁴⁴

¹³⁴¹ Office of Judicial Support, *Code of Judicial Conduct*, Ministry of Justice, Bangkok, 1986.

¹³⁴² Supaporn Vathanaprida, *Thai Tales: Folktales of Thailand*, Greenwood Publishing Group, Englewood, 1994, at 123.

¹³⁴³ Alexander Shytov, “The Rule of Law: Thai Law and Folk Wisdom” (in Thai) (2004) 23(2) *Chulalongkorn Law Journal* 159, at 164.

¹³⁴⁴ Alexander Shytov, *Thai Folktales & Law*, ACTS Co.Ltd, Thailand, 2004, at 253-267.

A classic example of a tale containing the rule of law concept is the story of Ong-wiset or Magical Jar. The story emphasises a good character of a judge.¹³⁴⁵ The local judge in this story was called to decide which party should have right to possess the jar. But because it is a magical jar which can multiply money put into the jar, the judge would like to keep the jar for himself. The story ends where the father of the judge fell into the jar and it continues cloning his father instead of money. His father remains in the jar forever because of the judge's greed. It is only one of hundreds of tales which tries to teach the Thai people, from an early age, to understand a basic component of the rule of law. It is a testimony how the Buddha's teachings *intend* to cultivate the idea of rule of law in Thailand.

4.7.2.2 The rule of law and the role of sangha

The primary role of the sangha (the Buddhist priest or monk) is to preserve and promote Buddhism.¹³⁴⁶ When the sangha involves in politics, it always raises an unresolved long-standing issue about the role of the monk in Thailand.¹³⁴⁷ Unlike Burma or Sri Lanka, a Thai monk is not supposed to affiliate to any level of politics.¹³⁴⁸ Monks who are more conservative with their preaching role believe that the sangha is omnipotent in holy status and should only retain their role in teachings the Dharma.¹³⁴⁹ On the other side, more liberal monks believe that their prominence could be beneficial to society if they are involved in Thai politics. The Northern Development Monks Network is a good example of monks who work to prevent illegal

¹³⁴⁵ See also, Wichian Getpratum, *Nithaanphynbaan*, Pattanaasygsaa, Thailand, 2000, at 129.

¹³⁴⁶ Section 15 of the *Sangha Act* (No. 2) (1992).

¹³⁴⁷ Jerrold Schecter, *The New Face of Buddha: Buddhism and Political Power in Southeast Asia*, Gollancz, London, 1967, at 89-90.

¹³⁴⁸ Duncan McCargo, "Buddhism, Democracy, and Identity in Thailand" in John Anderson (ed), *Religion, Democracy, and Democratisation*, Routledge, New York, 2005, at 158.

¹³⁴⁹ Somboon Suksamran, *Buddhism and Politics in Thailand*, Institute of Southeast Asian Studies, Singapore, 1982, at 101.

logging and land encroachment by some politicians.¹³⁵⁰ Today, the unresolved issue about the monk's role has led to the assorted role of the Thai monk which includes to a certain extent, a political role.¹³⁵¹

At present, there are more occasions when politics and the sangha cannot be separable. The sangha sought to secure the adherence of the political rules to Buddhist values. This assists them in maintaining a virtual monopoly as religious professionals of the state. In turn, the political leaders need to secure the cooperation of the sangha, for this would provide the state with moral legitimisation. While some may not approve the mixture of religion and politics, it has nonetheless helped the democratic progression and political stability of Thailand.¹³⁵² The following examples illustrate that the sangha does contribute to the preservation and development of the Thai rule of law. Whether the monks are conservative or liberal, their contribution appears to *ultimately uplift* the quality of “equality before the law”.

4.7.2.2.1 The direct role of the sangha in influencing the rule of law

Unlike Sri Lanka, a monk in Thailand cannot be a Member of Parliament.¹³⁵³ Unlike Burma, a Thai monk has not led a violent protest against the military dictator.¹³⁵⁴ So, how could the Thai sangha play a direct role in influencing the rule of law? The answer lies in other types of activities the monks have engaged. By the beginning of the 1970s, monks travelled with the electoral

¹³⁵⁰ Asian Human Rights Commission, “Thailand: Murder of Thai Monk Following an Environmental and Land Dispute with Local Influential Business Figures”, 30 June 2005
<<http://www.ahrchk.net/ua/mainfile.php/2005/1145/?print=yes>> (27 August 2009).

¹³⁵¹ Peter A Jackson, “Withering Centre, Flourishing Margins: Buddhism’s Changing Political Roles” in Kevin Hewison (ed), *Political Change in Thailand*, Routledge, New York, 1997, at 77.

¹³⁵² Pholak Jirakraisiri, “Political Beliefs of the Thai Sangha”, a research report of the doctoral thesis, *Buddhist Beliefs, Status within the Sangha and Political Beliefs of the Thai Sangha*, Chulalongkorn University, Bangkok, 1984.

¹³⁵³ This issue was discussed in the International Buddhism Conference on the United Nations Day of Vesak Celebrations 2007, Bangkok, 26-29 May 2007.

¹³⁵⁴ “Burmese Monks’ Protest Escalate”, *BBC News*, 19 September 2007.

candidate in the constituency and occasionally made speeches supporting him.¹³⁵⁵ Monks' criticism of the government appeared in the press, journals, and leaflets. The overthrown of the 1973 military government was also profoundly supported by the sangha. No doubt, the mobilisation of monks to participate in these activities *directly* established the connection between the sangha and the Thai rule of law.

While the sangha's activities firstly appear to produce a positive correlation in limiting the abuse of power of the military regime, some are concerned where the boundary line should be drawn. The concern is shared by both the conservative monk and the government.¹³⁵⁶ Part of the concern is warded off by law. For example, a monk cannot be either a councillor in a local government or a Member of Parliament.¹³⁵⁷ However, when the line is unclear, liberal-minded monks believe that their political role can help bringing an end to suffering according to the Buddha's teachings.¹³⁵⁸ For the liberal monks, their participation in the political protest can eliminate the chance of the people being disadvantaged or suffered by the abuse of their corrupt government.¹³⁵⁹

4.7.2.2.2 The indirect role of the sangha in influencing the rule of law

To be diplomatic about the sangha's political role, political activities like the protests have now been less directly pursued even by the liberal monks. Rather they increasingly opt for other alternatives. They use their teaching

¹³⁵⁵ Somboon Suksamran, *Buddhism and Politics in Thailand*, Institute of Southeast Asian Studies, Singapore, 1982, at 105.

¹³⁵⁶ Preedee Kasemsup, "Reception of Law in Thailand: A Buddhist Society" in Masaji Chiba (ed), *Asian Indigenous Law in Interaction with Received Law*, Dartmouth, UK, 1992, at 285.

¹³⁵⁷ The Supreme Court Decision No. 1231/2545 (2002).

¹³⁵⁸ Somboon Suksamran, *Buddhism and Politics in Thailand*, Institute of Southeast Asian Studies, Singapore, 1982, at 111.

¹³⁵⁹ See, Tavivat Puntarigivat, "Toward a Buddhist Social Ethics: The Case of Thailand" (1998) 48(3) *Cross Currents* 347, 347-365.

duty to educate Thai people what a good government is. Law and politics are among famous topics that modern monks choose to preach.¹³⁶⁰ Every year, a senior monk is invited to convene the Buddhist lesson for the judiciary as part of the training program for the judge trainees.¹³⁶¹ Monks also host the radio talk or even invite state officials to participate in the discussion.¹³⁶² The sangha appears to “join” or “weld” the government to the people.¹³⁶³ It is another strategy in expanding the understanding of the rule of law concept.

The role of sangha in teaching people how to apply Buddhism to politics is rapidly developed and is not only limited to the form of verbal teaching.¹³⁶⁴ The expression of the monk is also daily or monthly published in various newspapers and magazines. Instead of indicating whom the sangha supports to be a ruler, the religious writing focuses more on the characteristics of a good politician. In doing so, abuse of power is usually labelled as a characteristic of greedy ruling elite.¹³⁶⁵ The sangha’s role in political education is not solely operated by the Buddhist monks in Thailand. Such role attracts also an international corporation from the Buddhist monks around the world. Tibetan Dalai Lama and Vietnamese Thich Nhat Hanh are among the Buddhist monks which advocate for the rule of law.¹³⁶⁶ Their teachings are extensively published in Thailand.¹³⁶⁷

The sangha’s role in supporting the rule of law with the inspiration of the Buddhist teachings may not be successful if there is no faith in the sangha. In

¹³⁶⁰ Somboon Suksamran, *Buddhism and Political & Social Changes in Thailand* (in Thai), Chulalongkorn University Press, Bangkok, 1984, at 130.

¹³⁶¹ Buddhadasa Bhikkhu, *The Explanation of the Buddha’s Teachings for the Judge Trainee* (in Thai), Dharmatan Chaiya Association, Bangkok, 1968, at 250-252.

¹³⁶² Somboon Suksamran, *Buddhism and Political & Social Changes in Thailand* (in Thai), Chulalongkorn University Press, Bangkok, 1984, at 145.

¹³⁶³ Craig J Reynolds, *The Buddhist Monkhood in Nineteenth Century Thailand*, Cornell University, New York, 1973, at 270.

¹³⁶⁴ “What is the Sangha’s Role?” (in Thai), *Matichon Daily*, 31 May 2007, at 7.

¹³⁶⁵ “Thich Nhat Hanh Teaches Politicians”(in Thai), *Matichon Daily*, 29 May 2007, at 13.

¹³⁶⁶ The Dalai Lama, “Buddhism, Asian Values, and Democracy” (1999) 10(1) *Journal of Democracy* 3.

¹³⁶⁷ “Thich Nhat Hanh: The Power of Consciousness” (in Thai), *Matichon Daily*, 29 May 2007, at 33.

2004, a survey illustrated that the sangha enjoys the highest levels of trust among Thais comparing with other governmental agencies.¹³⁶⁸ This factor is beneficial to the teaching role of the monk. *Unintentionally*, when the monk vouches for the good government, the knowledge for the rule of law is expanded. This is especially so at the local level where the temple is still the centre of the village.¹³⁶⁹ Furthermore, in maintaining the faith in the sangha, a monk must adhere strictly to the sangha disciplines.¹³⁷⁰ These rules represent the maintenance of sufficient being and the way to live without causing any pain to others.¹³⁷¹ *Inadvertently*, a monk is a role model for the basic principle of the rule of law.

4.7.3 Hinduism and the rule of law

Hinduism or Brahmanism is a religion which originally came to Thailand through Khmer (Cambodia) during the Ayutthaya period (the second period of Thailand). Hindus recognise three principle gods and engage in a number of religious rituals on a daily basis. During the Ayutthaya period, Thailand decided to reform the structure of the administration according to the Khmer system. For this reason, the Thai King during the Ayutthaya period was considered as a receptacle of divine essence.¹³⁷² While the concept of divine kingship is no longer popular at the present time, Hindu rituals are still formally performed.¹³⁷³ It is this ceremonial aspect of Hindu tradition in which some elements of the rule of law are conveyed.

¹³⁶⁸ The Asia Foundation, *Public Opinion Surveys on Judicial Independence and Accountability*, Asian Development Bank, Manila, 2004, at 14.

¹³⁶⁹ Paul Rutledge, *Central Thai Buddhism & Modernisation: An Academic Study*, Dhammapradipa Association, Bangkok, 1992, at 68.

¹³⁷⁰ Sulak Sivaraksa, *Religion & Development*, Thai Inter-Religious Commission for Development, Bangkok, 1987, at 76.

¹³⁷¹ See generally, Paul Rutledge, *Central Thai Buddhism & Modernisation: An Academic Study*, Dhammapradipa Association, Bangkok, 1992.

¹³⁷² Somboon Suksamran, "Buddhism and Political Authority: A Symbiotic Relationship" in B J Terwiel (ed), *Buddhism and Society in Thailand*, Centre for South East Asian Studies, India, 1984, at 33.

¹³⁷³ Preedee Kasemsup, "Reception of Law in Thailand: A Buddhist Society" in Masaji Chiba (ed), *Asian Indigenous Law in Interaction with Received Law*, Dartmouth, UK, 1992, at 275.

Hindu tradition manifested itself in the form of royal ceremonies.¹³⁷⁴ Rituals associated with oath of allegiance are performed every time when the new Cabinet is appointed.¹³⁷⁵ The oath-taking ceremony must also be carried out by other senior state officers. In the judicial law, prior to taking the office, judges must also make a solemn declaration before the King.¹³⁷⁶ The oath is an expression how the ruling body promises to do right to all manner of people after the laws and usage without fear or favour, affection or ill-will. The ceremony exists as a mental mechanism to remind the ruling elite of what could constitute abuse of their power. Unfortunately, the effectiveness of the ritual cannot be exactly measured. However, the law of karma and the reincarnation are shared by Hinduism and Buddhism.¹³⁷⁷ Thais strongly believe that those who breach their oath will suffer from their wrongdoing.

When Hindu administrative culture was exported by Khmer, Thailand also imported its legal tradition. While the Hindu legal influence may not reflect in the modern legal procedure, it appears that the Hindu concept of the judiciary is still profoundly preserved in Thailand. For example, the Hindu belief in trial by ordeal is no longer part of the criminal procedural law.¹³⁷⁸ Yet, the judicial ethics especially judicial independence much relies on the Hindu judicial code.¹³⁷⁹ Apart from taking an oath at the judicial appointment ceremony, a judge trainee is required to study the Hindu principle of judicial independence. It is interesting to note that when breach of judicial independence occurs,

¹³⁷⁴ Santosh N Desai, *Hinduism in Thai Life*, Popular Prakashan Private, Bombay, 1980, at 34-41.

¹³⁷⁵ Manish Jumsai, *History of Thai Literature*, Chalermnit, Bangkok, 1992, at 151; "Thai King Urges New Cabinet to Bring Peace", *Asia Pacific News*, 22 December 2008 <http://www.channelnewsasia.com/stories/afp_asiapacific/view/397973/1/.html> (22 August 2009).

¹³⁷⁶ Section 16 of the *Act on Judicial Service of the Courts of Justice* (2000).

¹³⁷⁷ Graeme Lyall, *Buddhism: An Introduction* <<http://www.buddhismaustralia.org/buddh.htm>> (13 February 2009).

¹³⁷⁸ Marlene Guelden, *Thailand into the Spirit World*, Times Editions, Singapore, 1995, at 37,96.

¹³⁷⁹ Srisak Walipodom, *Three Seals Law and the Thai Beliefs* (in Thai), Muang Boran, Bangkok, 2002, at 35.

Hinduism believes that a corrupt judge will receive severe punishment in hell rather than the court of law.¹³⁸⁰

Even though Hinduism constitutes a small amount of population, these political and legal aspects of Hinduism are clearly entrenched in Thai society.¹³⁸¹ Such aspects allow Hinduism to become another source of religious influence on the rule of law. It is believed that this Hindu influence will play a role in shaping the rule of law as long as Buddhism is still a national religion of Thailand.¹³⁸² The main reason of this lies within the similarity between the Buddhist and the Hindu core teachings such as the rule of karma.¹³⁸³ Both religions do co-exist. Many Thais accept and follow other religious practices, particularly those associated with Hinduism and local folk beliefs, which they believe complement Buddhism.¹³⁸⁴ Undoubtedly, both religions concomitantly form the distinctive contribution to the rule of law in Thailand.

4.7.4 Islam and the rule of law

Islam also constitutes another religious influence on the rule of law in Thailand. Muslims are the largest of the religious minority groups in the country.¹³⁸⁵ Almost eighty percent of the Muslim followers reside in the four most southern provinces of Thailand.¹³⁸⁶ These provinces are governed by

¹³⁸⁰ Preecha Changkhanyuean, *The System of Political Philosophy in Manawa Dharmasastra* (in Thai), Chulalongkorn University Press, Thailand, 1991, at 66-67; Winai Pongsripien, *Three Seals Law: The Glasses that Mirrors Thai Society* (in Thai), Chulalongkorn University Press, Bangkok, 2004, at 13-14.

¹³⁸¹ "Hinduism-Thailand" <<http://www.bookrags.com/history/hinduismthailand-ema-02/>> (4 March 2009).

¹³⁸² Wilfrido Villacorta, *Theravada Buddhism as a Value Standard of Attitudes towards International Law: Ceylon and Thailand*, The Catholic University of America, Washington, 1972, at 84.

¹³⁸³ Jan-Erik Lane and Svante Ersson, *Culture and Politics: A Comparative Approach*, Ashgate, Hants, 2005, at 149.

¹³⁸⁴ Arne Kislenko, *Culture and Customs of Thailand*, Greenwood Press, Westport, 2004, at 23, 34-35.

¹³⁸⁵ Omar Farouk, "The Muslims of Thailand" in Lutfi Ibrahim (ed), *Islamika*, Sarjana Enterprise, Kuala Lumpur, 1981, at 97-121.

¹³⁸⁶ Adul Wichiencharoen and Chamroon Netisastr, "Some Main Features of Modernisation of Ancient Family Law in Thailand" in David Buxbaum (ed), *Family Law and Customary Law in Asia: A Contemporary Legal Perspective*, Martinus Nijhoff, the Hague, 1968, at 105.

their own separate law in civil matters - The *Application of Islamic Law in the Territorial Jurisdictions of Pattani, Narathiwat, Yala and Satun Provinces Act* (1946) (the “Act”). The *Act* applies in replacement of the Thai Civil and Commercial Code to only Thais of Muslim decent who resides in one of the four most southern provinces. The use of the *Act* for a particular group of people constitutes a debate whether such Thais of Muslim descent are exempted from the law which applies to the rest of Thais.

On one view, it may be argued that the separate use of legislation for a minority religion is detrimental to the idea of equality before the law. On another, it is argued that the *Act* does not make Muslims above the Thai law, as the legislation is highly restricted. For example, the *Act* only applies to family and succession matters. All other civil and criminal matter is still enforced under the national Thai law. This is not so different from the legal system in other countries such as Canada which allows the minority group, the Inuit (the Eskimos) to apply their own legal source and authority.¹³⁸⁷ For this, Islam appears to have minimal influence on the rule of law in Thailand. However, the existence of it can be a testimony as to how the minority is recognised by the Thai government.

4.7.5 Conclusion: Religion as a base of the Thai rule of law

Those who believe that the rule of law is a matter of law and law only may oversee the importance of religion. In Thailand where religion is more than a spiritual faith, religion seeps into the way the people think and the way people are supposed to behave. Buddhism as a main religion has offered its teachings for common people and has tailored its Buddhist political theory for its ideal rulers. Whether it is general Buddhist teachings or a specific one like its political theory for the ruling elite, limit of arbitrary power appears to be a

¹³⁸⁷ See Patrick Fitzgerald and Gretchen Kewley, *This Law is Ours*, Prentice-Hall, Melbourne, 1978, at 160-165.

basic element. Other religious beliefs that root in Thailand also contribute to the concept of the rule of law including the Hindu oath of allegiance and the use of Muslim law for Muslim minority. In this way, religions are part of how the rule of law distinctively develops in Thailand.

From the sociological perspective, it is believed that religion produces positive correlation to the Thai rule of law. This is even though the correlation between religion and law in Thailand may not always be seen as straightforward. Rather religious contribution to the rule of law is implicit. Some even disguise in the form of rituals or folklores. By taking into account the implied contribution of the religion, one could achieve the true understanding of the rule of law in Thailand. Through the religio-legal approach, the thesis projects to contribute to a wider debate how the rule of law might be perceived and functioned in a particular country.

4.8 CONCLUSION

This chapter has adopted the sociological approach in reviewing the operation of the rule of law in Thailand. It has been demonstrated above that the rule of law is not only influenced by the provisions in its written Constitution. There are also and perhaps more important social aspects which deeply influence the concept of “no one can be above the law”. Each key influence has, *to different extents*, enhanced or disrupted the proper function of the rule of law in Thailand. The important point to note is that none of the key influences, when examined individually or as a whole, has substantially impaired or totally eroded Thailand’s rule and law. They have nonetheless clearly affected its appearance both in a positive and in a negative way

Perhaps it is fair to say that when these key influences are combined (with the exceptions to the King and the religion influences), they have caused

considerable damage to the appearance of the rule of law in Thailand. A military coup in the press always provides a justification for the presumption that Thailand has no rule of law. However, by disregarding the cause of coup and how the coup is formed, the Thai military would always be painted as a negative influence on Thai rule of law. Appearances are therefore sometimes quite misleading. Without proper evaluation of the key influences, it would be difficult, if not impossible, and unfair, to arrive at an accurate conclusion on the validity of the rule of law in Thailand especially when that conclusion is based on appearance.

CHAPTER FIVE

ASIAN VALUES, GLOBALISATION AND THE RULE OF LAW

5.1 INTRODUCTION

Globalisation is created from the interaction between local and international communities. Globalisation entails not only the integration of markets, but also the emergence of global civil society. The emergence of such society makes the Western ideologies such as human rights, democracy and the rule of law circulate from where they originate to different parts of the world, including Asia. Yet, Asian nations do have their own traditions which those Western ideologies may not easily fit in with. As a consequence, the debate of Asian values arose out of this disharmony. This chapter describes what the debate is about and how it can be misused by political leaders to reject the flow of human rights, democracy and ultimately the rule of law in Thailand.

More specifically, this chapter endeavours to establish to what extent, if any, Asian values can influence the concept of “limit government” in Thailand. Considering the benefit the public would receive from such concept, Asian values might not appear to be a valid argument in explaining the reason as to why the government may not follow the mainstream of law. Asian values debates are also weakened by various dimensions of globalisation. Through economic globalisation, law reform in Thailand was made compulsory by the World Bank and the International Monetary Fund. Through political globalisation, Thai law is to apply to protect human rights and thereby set the limits of state power. While challenges of globalisation are recognised, globalisation is proved to be a good platform for further developing Thailand’s rule of law.

5.2 THE FICTION IS REALLY A FACT

This chapter is divided into two main sections. The first section begins with a brief examination of what Asian values is. This is followed by a more in-depth analysis of the *thrust* and *use* of Asian values in the political arena. The *thrust* aspect of Asian values pays particular attention to the long-standing debate between universalism and relativism. The *use* aspect, on the other hand, examines how the concept itself has been manipulated with regard to issues concerning human rights, democracy and economic development. The focus of the analysis then shifts towards exploring the relationship between Asian values, Thai values and the rule of law. This leads into the examination of evidence of Asian values in Thailand. It is noted that “Asian values” is not a stable and unquestioned category. The Asian values concept has been profoundly criticised and certain critiques are raised later in this chapter.

The second section of the chapter examines the concept of globalisation and its encounter in Asia. The aim of the examination is to explore what relationship, if any, globalisation has with the rule of law. In particular, two dimensions of globalisation and the rule of law are explored. The first dimension is focused on economic globalisation. This analysis refers to specific events where the International Monetary Fund and the World Bank have attempted to influence Asian nations with conditional loans. The second dimension examines the relationship between the rule of law and political globalisation. While globalisation creates a positive correlation with the concept of limit government, a concluding analysis recognises the challenges that Thailand may face in using globalisation to promote the rule of law.

5.3 ASIAN VALUES AND THE RULE OF LAW

5.3.1 What is Asian values?

Traditionally, Asian values was a debate confined to the rejection of globalisation of human rights and the claim that Asia has a unique set of values.¹³⁸⁸ Based on the incommensurable differences from the Western countries, the debate was manipulated to provide the basis for Asia's dissimilar understanding of human rights and to justify the exceptional handling of rights by Asian governments.¹³⁸⁹ The debate was later used by cultural relativists as fresh evidence for their various positions against a political liberalism that defends universal human rights and democracy.¹³⁹⁰ While some may question if the debate has withstood the test of time, it remains as a fundamental explanation as to why Asian people might have different political views from those found in Western countries.¹³⁹¹

The discussion surrounding an Asian versus a Western set of values can be, at the very least, traced back to Meiji the nineteenth Century.¹³⁹² Although Meiji Japan was catching up with the West, Michael Barr argued that Japanese intellectuals at that time were urging Asian nations to look into their common traditions to produce a cultural alternative to the Western culture of war and conflict.¹³⁹³ By the 1920s, Chinese Dr Sun Yat-Sen was convinced of the superiority of pan Asian values over Western values since he saw the

¹³⁸⁸ Alexej Behnisch, "What Was the Asian Values Debate? And Who Won It?", a paper presented at the *Annual Meeting of the International Studies Association*, Hawaii, 5 March 2005.

¹³⁸⁹ Xiaorong Li, "Asian Values and the Universality of Human Rights" in Martha Meijer (ed), *Dealing with Human Rights: Asian and Western Views on the Value of Human Rights*, World View Publishing, Oxford, 2001, at 37.

¹³⁹⁰ Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed, Cornell University Press, Ithaca, 2003, at 89-106.

¹³⁹¹ Gerd Langguth, "Asian Values Revisited" (2003) 1 *Asia Europe Journal* 25, at 38.

¹³⁹² Georg Wiessala, *Re-Orienting the Fundamentals: Human Rights and New Connections in EU-Asia Relations*, Ashgate, Hampshire, 2006, at 40.

¹³⁹³ Michael D Barr, *Cultural Politics and Asian Values: the Tepid War*, Routledge Curzon, London, 2002, at 12.

destruction of Western countries through the Great War in Europe.¹³⁹⁴ It was the same period where King Rama VI (1910-1925) glorified Thai culture to promote the Thai national identity and nationalism.¹³⁹⁵ Yet the King did so, for the West to recognise and allow Thailand to play a more significant role in the world.¹³⁹⁶

Asian values is invariably discussed in the context of an East-West dichotomy. From this context, the debate over Asian values has been associated with political, economic, international policies of Asian countries. Asian values argued that human rights are an imposition of Western liberalism and threatened the stability and cohesion of Asian nations.¹³⁹⁷ Asian cultural particularity justified the rejection of democracy.¹³⁹⁸ Before the 1997 Asian economic crisis, Asian values was hailed as a model for the future by market-oriented neo-conservatives in the West.¹³⁹⁹ For this, Asian values is not a single debate. Rather, it is a series of debates which require careful investigation because of its interdisciplinary backgrounds.¹⁴⁰⁰

With so many claims relying upon the same concept of “Asian values”, it is difficult to identify the universally accepted content of Asian values. The concept itself is not static and never has been.¹⁴⁰¹ It has evolved erratically since its inception and continues to evolve inconsistently as the world

¹³⁹⁴ Prasenjit Duara, “Culture and Consciousness: Civilisation Discourse and the Nation-State in the 20th Century” in Kwok Kian-Woon, et al (eds), *We Asians: Between Past and Future*, Singapore Heritage Society and National Archives of Singapore, Singapore, 2000, at 185-186.

¹³⁹⁵ King Rama VI’s speech on 30 June 1925, quoted in Walter F Vella, *Chaiyo!, King Vajiravudh and the Development of Thai Nationalism*, University Press of Hawaii, Honolulu, 1978, at 179.

¹³⁹⁶ Clark D Neher, *Modern Thai Politics*, Schenkman, Massachusetts, 1979, at 10.

¹³⁹⁷ Richard Pearshouse, “Asian Values and Universal Human Rights” (2000) 10(1) *Polemic* 23, at 23.

¹³⁹⁸ Mark R Thompson, “Whatever Happened to Asian Values?” (2001) 12(4) *Journal of Democracy* 154, at 154.

¹³⁹⁹ Richard Robinson, “The Politics of Asian Values” (1996) 9(3) *The Pacific Review* 309, at 321.

¹⁴⁰⁰ Leena Avonius and Damien Kingsbury, “Introduction” in Leena Avonius and Damien Kingsbury (eds), *Human Rights in Asia: A Reassessment of the Asian Values Debate*, Palgrave Macmillan, New York, 2008, at 6.

¹⁴⁰¹ Jau-hwa Chen, “Asia Values? Why Not, But How?” in Leena Avonius and Damien Kingsbury (eds), *Human Rights in Asia: A Reassessment of the Asian Values Debate*, Palgrave Macmillan, New York, 2008, at 41.

struggles to agree on its true meaning. The problem with the definition appears to lie in its purpose for existence. Often Asian leaders use and misuse the definition for different political purposes, which have created a divergent array of meanings of Asian values.¹⁴⁰² Some of these meanings have swayed far away from the original definition, which has sparked strong criticism of its application, thereby causing a conceptual undermining of the concept itself.

This is evident not only in academic writings from the Western countries, but also from publications in Asia. Scholars, such as William Theodore de Bary, have struggled to find a modern-day definition that captures the original reason for why the definition should exist and for what purpose is it to be used for.¹⁴⁰³ Some scholars, such as Takeshi Inoguchi and Edward Newman agree and add that the lack of the accepted definition is partly because the question itself is so politicised, contested and methodologically dubious that it makes the concept illusory.¹⁴⁰⁴ Perhaps there never will be a complete consensus on what exactly Asian values is, but there appears to be a sufficient number of accepted characteristics that assist in providing the definition with some level of practical meaning.¹⁴⁰⁵

The content of what constitutes Asian values would include a distinctively Asian approach towards: (i) strong and stable leadership rather than political pluralism; (ii) respect for social harmony and an inclination towards consensus as opposed to a tendency towards dissent or confrontation; (iii) acceptance of broad and penetrating state and bureaucratic intervention in social and

¹⁴⁰² Vitit Muntarbhorn, *Dimensions of Human Rights in the Asia – Pacific Region*, Office of the National Human Rights Commission of Thailand, Bangkok, 2002, at 8.

¹⁴⁰³ William Theodore de Bary, *Asian Values and Human Rights*, Harvard University Press, Massachusetts, 1998, at 1.

¹⁴⁰⁴ Takashi Inoguchi & Edward Newman, “Introduction: Asian Values and Democracy in Asia”, a conference proceeding on *The Future of the Asia – Pacific Region* organised by the Shizuoka Prefectural Government and the Organising Committee of the Asia – Pacific Forum, Japan, 28 March 1997.

¹⁴⁰⁵ Mark R Thompson, “Whatever Happened to Asian Values?” (2001) 12(4) *Journal of Democracy* 154, at 156.

economic affairs; (iv) concern with socio-economic well-being instead of civil liberties and human rights; (v) and preference for the welfare and collective well-being of the community over individual rights.¹⁴⁰⁶ It appears that these characteristics are accepted by most as a general “playing field” for giving a practical meaning to Asian values.¹⁴⁰⁷

5.3.2 The politics of Asian values

The debate over Asian values has been visited and revisited for different purposes.¹⁴⁰⁸ For political incentives, the concept is used to play a somewhat reactionary role in rejecting the imposition of Western ideas of society and government in Eastern nations.¹⁴⁰⁹ Resting on cultural relativism, Asian values has denied the universality of human rights, vowing for economic development instead of civil and political rights.¹⁴¹⁰ Using the claim between universalism and relativism, proponents of Asian values also argue that Western democracy is culturally inappropriate.¹⁴¹¹ In order to clarify to what extent, if any, Asian values influences the concept of rule of law in Asia, it is only appropriate to first investigate the *thrust*, and then the *use* of Asian values which have been swirling in a political arena for quite some time.

5.3.2.1 The thrust of Asian values: Cultural relativism

¹⁴⁰⁶ Randall Peerenboom, “Beyond Universalism and Relativism: the Evolving Debates about Values in Asia” (2003) 14 *Indiana International and Comparative Law Review* 1, at 74; Aihwa Ong, *Flexible Citizenship: the Cultural Logics of Transnationality*, Duke University Press, Durham, 1999, at 74; Same Varayudej, “A Right to Democracy in International Law: Its Implications for Asia” (2006) 12 *Annual Survey of International and Comparative Law* 1, at 13.

¹⁴⁰⁷ Philip J Eldridge, *The Politics of Human Rights in Southeast Asia*, Routledge Curzon, New York, 2002, at 33.

¹⁴⁰⁸ Han Sung-Joo, “Asian Values: An Asset or a Liability?” in Han Sung-Joo (ed), *Changing Values in Asia: Their Impact on Governance and Development*, Japan Centre for International Exchange, Japan, 1999, at 3.

¹⁴⁰⁹ Fareed Zakaria, “Culture Is Destiny: A Conversation with Lee Kuan Yew” (1994) 73(2) *Foreign Affairs* 109, at 113.

¹⁴¹⁰ Hossain MD Shanawez, “Human Security in Asia: By Universal Human Right or Cultural Relativism?”, a paper presented at the conference on *Mainstreaming Human Security: The Asian Contribution*, Chulalongkorn University, Bangkok, 4-5 October 2007.

¹⁴¹¹ Kuan Yew Lee, “Discipline vs. Democracy”, *Far Eastern Economic Review*, 10 December 1992, at 29.

Asian values is the debate which is based on the concept of cultural relativism. The cultural relativity theory argues that social actions must be evaluated according to standard which underline a particular culture, and that no standard of a society can be implanted successfully beyond cross-cultural boundaries.¹⁴¹² Cultural relativism therefore takes the opposite side against universalists. Universalism, influenced by the ideas of natural law and liberal individualism, rests on the proposition that all human beings possess certain inalienable rights.¹⁴¹³ Supporters for the theory of universalism include Jürgen Habermas's universal justifiability of human rights¹⁴¹⁴ and Jack Donnelly's interpretation of "human rights" as the idea of universalism.¹⁴¹⁵

For cultural relativists, human rights are far from being universal. Human rights vary a great deal according to different cultural perspectives and application of human rights could be interpreted differently within different cultural, ethnic and religious traditions.¹⁴¹⁶ By embracing cultural relativism, Asian values asserts claims of culturally-based differences that justified substantial deviations from standard international interpretations of human rights norms.¹⁴¹⁷ Cultural relativism also raises the question if democracy is a system so alien to Asian cultures.¹⁴¹⁸ Banking on cultural relativism is also scholars who promote multiculturalism such as Adda Bozeman's illustration

¹⁴¹² Same Varayudej, "A Right to Democracy in International Law: Its Implications for Asia" (2006) 12 *Annual Survey of International and Comparative Law* 1, at 13.

¹⁴¹³ Nancy Kim, "Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism" (1993) 25 *Columbia Human Rights Law Review* 49, at 49.

¹⁴¹⁴ Jürgen Habermas, "Remarks on Legitimation through Human Rights" in Max Pensky (ed), *The Postnational Constellation*, MIT Press, Cambridge, 2001, at 113-129.

¹⁴¹⁵ Jack Donnelly, *Universal Human Rights in Theory and Practice*, Cornell University Press, Ithaca, 1989, at 10.

¹⁴¹⁶ See, Ayton-Shenker Diana, *The Challenge of Human Rights and Cultural Diversity*, United Nations Department of Public Information, New York, 1995.

¹⁴¹⁷ Jack Donnelly, *Universal Human Rights in Theory and Practice*, Cornell University Press, Ithaca, 1989, at 107.

¹⁴¹⁸ Kim Dae Jung, "Is Culture Destiny? The Myth of Asia's Anti-Democratic Values" (1994) 73(6) *Foreign Affairs* 189, at 191.

of differences between Western legal theories and those of Africa and Asia¹⁴¹⁹, and Heiner Bielefeldt's plurality of Muslim perspectives of human rights.¹⁴²⁰

The debate between universalism and relativism has not yielded any concrete outcome.¹⁴²¹ Flaws can be found in both concepts.¹⁴²² With no consensus among scholars that there are any such things as universal human rights, the aura of universalism and relativism appears to be too philosophical and there is a call to move beyond universalism and relativism.¹⁴²³ Practice in human rights goes much further than theory and that there is a need to explore what cultural relativism could affect Asian people whose their leaders ruled the countries with the belief of Asian values.¹⁴²⁴ For example, certain Asian leaders believe that there is a need to limit personal freedom for the sake of political stability and economic prosperity.¹⁴²⁵

5.3.2.2 The use of Asian values: Human rights, democracy and economic development

5.3.2.2.1 Asian values and human rights

There is a core of common claims which are a result of the contrast between the universality of human rights and the virtues of Asian values. These are that the interests of the community or the group take precedence over the vested interests of individuals. Hence, individual obligations to the community

¹⁴¹⁹ See, Adda Bozeman, *The Future of Law in A Multicultural World*, Princeton University Press, Princeton, 1971.

¹⁴²⁰ See, Heiner Bielefeldt, "Muslim Voices in the Human Rights Debate" (1995) 17(4) *Human Rights Quarterly* 587.

¹⁴²¹ Fred Dallmayr, "Asian Values and Global Human Rights" (2002) 52(2) *Philosophy East & West* 173, at 176.

¹⁴²² Elizabeth M Zechenter, "In the Name of Culture: Cultural Relativism and the Abuse of the Individual" (1997) 53 *Journal of Anthropological Research* 319, at 323.

¹⁴²³ Randall Peerenboom, "Beyond Universalism and Relativism: the Evolving Debates about Values in Asia" (2003) 14 *Indiana International and Comparative Law Review* 1.

¹⁴²⁴ Farid Abdel-Nour, "Farewell to Justification: Habermas, Human Rights, and Universalist Morality" (2004) 30(1) *Philosophy & Social Criticism* 73, at 74.

¹⁴²⁵ Mahatir Mohamad, "No Freedom without Responsibility", *New Straits Times*, 20 May 1995, at 1-2.

are emphasised over individual rights and freedoms.¹⁴²⁶ For a while, Asian values has been passively used to defend different positions on human rights in Asia. However, for Randall Peerenboom, the most serious threat of the debate occurred when assertive Asian governments, buoyed by years of economic growth, issued the 1993 Bangkok Declaration criticising the international human rights movement for being Western-biased.¹⁴²⁷

In a similar manner, a former economic advisor to the Malaysian Government, Mr Tun Daim Zainuddin, challenged the Universal Declaration of Human Rights by stating that when the Declaration was proclaimed “there were only about forty members of the United Nations, whereas today there are more than one hundred and eighty members”.¹⁴²⁸ In saying this, at the thirtieth Meeting of ASEAN Ministers of Foreign Affairs in Kuala Lumpur, it was pointed out that the Declaration did not accommodate Asian values or the interests of each United Nations member. It was claimed that underlying the Declaration was the reflection of corrosive, hedonistic individualism where Asian values’ notion of group or community takes an opposite stand.¹⁴²⁹

By collapsing “community” into the “state” and the state into the “regime”, any criticisms of the regime become crimes against the nation-state, the community and the people.¹⁴³⁰ According to Asian values’ advocates, such

¹⁴²⁶ Richard Robinson, “The Politics of Asian Values” (1996) 9(3) *The Pacific Review* 309, at 310-311.

¹⁴²⁷ Randall Peerenboom, “Beyond Universalism and Relativism: the Evolving Debates about Values in Asia” (2003) 14 *Indiana International and Comparative Law Review* 1, at 1.

¹⁴²⁸ Daniel Helle and Maarit Kohonen, “Publicity for the Universal Declaration of Human Rights: General Assembly Resolution 217D (III)” in Gudmundur Alfredsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, Martinus Nijhoff Publishers, Boston, 1999, at 730.

¹⁴²⁹ Mohd Azizuddin Mohd Sani, “Mahathir Mohamad as a Cultural Relativist: Mahathirism on Human Rights”, a paper presented at the 17th *Biennial Conference of Asian Studies Association of Australia*, Melbourne, 1-3 July 2008, at 3.

¹⁴³⁰ Hossain MD Shanawez, “Human Security in Asia: By Universal Human Right or Cultural Relativism?”, a paper presented at the conference on *Mainstreaming Human Security: The Asian Contribution*, Chulalongkorn University, Bangkok, 4-5 October 2007.

equation means that individual right and freedom may be strictly curtailed if the result of the curtailment makes the state stronger and thus the better condition of the community and the nation. It is not uncommon in Asia where the use of state power is the constant deployment and justification of executive power in the name of public order and national unity.¹⁴³¹ Many examples of this can be found in the countries like Singapore, Malaysia, Indonesia and China where their leaders speak highly of Asian values.¹⁴³²

Two classic examples in the neighbouring countries of Thailand are worthy of noting. In Singapore, reporters have been long socialised into self-censorship.¹⁴³³ There is the continuing use of restrictive law and civil defamation suits to penalise peaceful critics of the Singaporean government.¹⁴³⁴ The same applies for the Malaysian government in using repressive law to silence its critics. Among those who questioned Dr Mahathir Muhammed's government was Deputy Prime Minister Anwar Ibrahim.¹⁴³⁵ In what was widely viewed as a politically motivated attempt to discredit Anwar Ibrahim, police charged him with consensual sexual relations with a male aide in August 2008.¹⁴³⁶ Many more incidents promoting "strong government" are continually found and criticised by Asian Human Rights Commission.¹⁴³⁷

¹⁴³¹ Kanishka Jayasuriya, "The Rule of Law and Regimes of Exception in East-Asia" in Uwe Johannsen & James Gomez (eds), *Democratic Transitions in Asia*, Select Publishing, Singapore, 2001, at 93.

¹⁴³² For example, see Carolina López, "Globalisation, State, and G/Local Human Rights Actors: Contestations between Institutions and Civil Society" in Edmund Terence Gomez (ed), *Politics in Malaysia: The Malay Dimension*, Routledge, New York, 2007, at 70.

¹⁴³³ Laurence Wai-Teng Leong, "From Asian Values to Singapore Exceptionalism" in Leena Avonius and Damien Kingsbury (eds), *Human Rights in Asia: A Reassessment of the Asian Values Debate*, Palgrave Macmillan, New York, 2008, at 123; James Gomez, *Self-Censorship: Singapore's Shame*, Think Centre, Singapore, 2000.

¹⁴³⁴ Amnesty International, "Singapore: Government Misusing the Law to Muzzle Critics", 14 December 2006 <<http://www.amnestyusa.org/document.php?lang=e&id=ENGASA360052006>> (2 October 2009).

¹⁴³⁵ Craig Lockard, *Southeast Asia in World History*, Oxford University Press, New York, 2009, at 187.

¹⁴³⁶ Human Rights Watch, "Malaysia: Events of 2008", January 2009 <<http://www.hrw.org/en/node/79333>> (3 October 2009).

¹⁴³⁷ Asian Human Rights Commission, "Urgent Appeals" <<http://www.ahrchk.net/ua/>> (21 November 2009).

As the examples illustrate, the equation of “community” as “state” presents another angle of the political discourse of Asian values and human rights. When closely analysed, human rights which have been denied under the cloak of Asian values appear to be part of civil and political rights. From the debate of Asian values, freedom of expression and right to information could be sacrificed if public order and national security is in danger. For this, it is convenient for Asian leaders to refer to Asian values to ward off scrutiny into alleged human rights violations and political turmoil.¹⁴³⁸ The result of the political use of Asian values in the contexts of human rights soon leads to the denial of democracy and the minimal rule of law development in the region.

5.3.2.2.2 Asian values and democracy

Democracy, according to Samuel Huntington, is delineated by the twin dimensions of liberal participation and electoral contestation.¹⁴³⁹ Both dimensions require freedoms of political communication which create a vibrant civil society and enable people to vote freely and fairly.¹⁴⁴⁰ Originated in ancient Greece and strongly promoted in the Western countries, democracy is generally labelled to be another product imported to Asia.¹⁴⁴¹ While democracy is not yet universally practiced, it is very much believed that democracy can guarantee basic human rights and offer equal opportunity to all people.¹⁴⁴² As Amartya Sen pointed out, the “ball is very much in the court

¹⁴³⁸ Marina Svensson, “The Chinese Debate on Asian Values and Human Rights” in Ole Bruun and Michael Jacobsen (eds), *Human Rights and Asian Values: Contesting National Identities and Cultural Representations in Asia*, Curzon Press, London, 2003, at 207.

¹⁴³⁹ Samuel Huntington, *The Third Wave: Democratisation in the Late Twentieth Century*, University of Oklahoma Press, Norman, 1991, at 5-13.

¹⁴⁴⁰ William Case, “Democracy in Southeast Asia: How to Get It and What Does It Matter?” in Mark Beeson (ed), *Contemporary Southeast Asia: Regional Dynamics, National Differences*, Palgrave Macmillan, Hampshire, 2004, at 76-77.

¹⁴⁴¹ Kurt A Raaflaub, “Introduction” in Kurt A Raaflaub, Josiah Ober and Robert W Wallace (eds), *Origins of Democracy in Ancient Greece*, University of California Press, Berkeley, 2007, at 3.

¹⁴⁴² Yu Keping, *Democracy is a Good Thing*, The Brookings Institution, Washington, 2009, at 3-5.

of those who want to rubbish democracy to provide justification for that rejection”.¹⁴⁴³

To begin with, the former Prime Ministers of China and Japan, Li Peng and Hosokawa, respectively, made a joint statement in 1994 in which they warned the West against forcing their type of democracy upon others.¹⁴⁴⁴ The former Prime Minister of Singapore, Lee Kuan Yew articulated that what developing countries need was discipline but not democracy.¹⁴⁴⁵ Even though Asian political systems mixed many combinations of democratic and non-democratic elements, Asian values seems to be a common pill to justify the deviation from Western-style democracy.¹⁴⁴⁶ Based on cultural particularity in Asia, the departure of liberal democracy at the same time created the discourse for “Asian-style democracy”.¹⁴⁴⁷

Asian values, once again, is matched to the value of community and its equation with a strong state. Such equation avoids any weakening of leadership or governance. This reflects in Asian models of democracy. Singapore is a state with one dominant political party with dominant leader of such party.¹⁴⁴⁸ The dominant political party is also a character of democracy in Japan, Malaysia, India and Indonesia.¹⁴⁴⁹ Asian values nurturing for this particular type of democracy is further tied down to Confucian values where consensus and stability are more important than competition and

¹⁴⁴³ Amartya Sen, “Democracy as a Universal Value” (1999) 10(3) *Journal of Democracy* 3, at 5.

¹⁴⁴⁴ Bob Beatty, *Democracy, Asian Values, and Hong Kong: Evaluating Political Elite Beliefs*, Praeger, Westport, 2003, at 42.

¹⁴⁴⁵ Kuan Yew Lee, “Discipline vs. Democracy”, *Far Eastern Economic Review*, 10 December 1992, at 29.

¹⁴⁴⁶ Philip J Eldridge, *The Politics of Human Rights in Southeast Asia*, Routledge Curzon, New York, 2002, at 37.

¹⁴⁴⁷ Takashi Inoguchi, “Asian-Style Democracy?” in Takashi Inoguchi, Edward Newman, and John Keane (eds), *The Changing Nature of Democracy*, United Nations University Press, New York, 1998, at 173-183.

¹⁴⁴⁸ Christopher Lingle, *Singapore’s Authoritarian Capitalism: Asian Values, Free Market Illusions, and Political Dependency*, Locke Institute, Fairfax, 1996.

¹⁴⁴⁹ Clark D Neher, “Asian-Style Democracy” (1994) 34(11) *Asian Survey* 949, at 954-956.

disagreement.¹⁴⁵⁰ As a result of the link between Asian values and Confucianism in the context of democracy, the term “Asian values” is often referred to “Confucian values”.¹⁴⁵¹

In the *Quest for the World Order*, Tommy Koh has made the sense of the society’s stability more affirmative in the name of Asian values. For his Asian values, freedom is not an absolute right.¹⁴⁵² Certain human rights such as freedom of expression, association and political participation which are necessary to democracy could be sacrificed for communal interests and the need for order.¹⁴⁵³ It was an affirmation that Asian values (which Lee Kuan Yew frequently invoked as Confucianism) did not in a strict sense follow the principle of liberal democracy.¹⁴⁵⁴ With high growth of economy in many Asian states where liberal democracy was not endorsed, it was Confucianism which formed a powerful current for Asian values.¹⁴⁵⁵

5.3.2.2.3 Asian values and economic development

For some, the interest in Asian values has been motivated by a genuine desire to discover the source of Asia’s rapid economic development.¹⁴⁵⁶ Indeed, the remarkable economic success of a number of Asian countries since the mid 1960s has urged the World Bank to conduct the research for economic

¹⁴⁵⁰ Sor-hoon Tan, *Confucian Democracy: A Deweyan Reconstruction*, State University of New York Press, New York, 2003, at 6.

¹⁴⁵¹ Fred Dallmayr, “Asian Values and Global Human Rights” (2002) 52(2) *Philosophy East & West* 173, at 178.

¹⁴⁵² Tommy Koh, *The Quest for World Order: Perspectives of a Pragmatic Idealist*, Times Academic Press, Singapore, 1998, at 5.

¹⁴⁵³ Michael Freeman, “Human Rights, Democracy and Asian Values” (1996) 9(3) *The Pacific Review* 363, at 358.

¹⁴⁵⁴ Surya Subedi, “Are the Principles of Human Rights Western Ideas? An Analysis of the Claim of the Asian Concept of Human Rights from the Perspectives of Hinduism” (1999) 30 *California Western International Law Journal* 45, at 48.

¹⁴⁵⁵ Dajin Peng, “Does Confucianism Matter?: The Role of the Oriental Tradition in Economic Development of East Asia” in Aiko Ikeo (ed), *Economic Development in Twentieth Century East Asia: The International Context*, Routledge, London, 1997, at 170-171.

¹⁴⁵⁶ Han Sung-Joo, “Asian Values: An Asset or a Liability” in Han Sung-Joo (ed), *Changing Values in Asia: Their Impact on Governance and Development*, Japan Centre for International Exchange, Japan, 1999, at 3.

growth and public policy in East Asia.¹⁴⁵⁷ In searching for the answer, Asian political leaders and academics offered Asian values as an answer to their success.¹⁴⁵⁸ As Asian values was often synonymous with Confucian values, it was then Confucianism which brought prosperity to Asian countries. This was very much a position of Asian values in the context of economic development prior to 1997.

Before 1997, Asian economic success was widely claimed to be tempered by the fact that Asian values brought together economic goals with traditional family values and traditional networks.¹⁴⁵⁹ These values, found in Confucianism, replicated economic goals as Confucian goals.¹⁴⁶⁰ By using general features of Confucianism such as strong bureaucracy and close government-business relations, it was also easy for certain Asian leaders to maintain authoritarian governance and the suppression of political and civil rights in the name of economic development.¹⁴⁶¹ However, this position was later heavily challenged. A number of studies cannot provide concrete connection between political rights and economic performance.¹⁴⁶²

When the 1997 Asian economic crisis occurred, Asian values was worldwide discredited. The financial crisis exposed the hollowness of these values that

¹⁴⁵⁷ World Bank, *The East Asian Miracle: Economic Growth and Public Policy*, Oxford University Press, New York, 1993.

¹⁴⁵⁸ Fareed Zakaria, "Culture Is Destiny: A Conversation with Lee Kuan Yew" (1994) 73(2) *Foreign Affairs* 109, at 152.

¹⁴⁵⁹ Alastair Bonnett, *The Idea of the West: Culture, Politics and History*, Palgrave Macmillan, Hampshire, 2004, at 116-117.

¹⁴⁶⁰ Wei-ming Tu, "Cultural China: The Periphery as the Centre" in Wei-Ming Tu (ed), *The Living Tree: The Changing Meaning of Being Chinese Today*, Stanford University Press, California, 1994, at 7.

¹⁴⁶¹ Alice Erh-Soon Tay, *Asian Values and the Rule of Law* <<http://www.juragendum.unifi.it/en/surveys/rol/tay.htm>> (18 March 2009).

¹⁴⁶² For example see, John Helliwell, "Empirical Linkages Between Democracy and Economic Growth", Working Paper No. 4066, National Bureau of Economic Research, Cambridge, 1994; Adam Przeworski, et al, *Sustainable Democracy*, Cambridge University Press, New York 1995; Robert Barro, *Getting It Right: Markets and Choices in a Free Society*, MIT Press, Cambridge, 1996.

were supposed to account for the Asian development miracle.¹⁴⁶³ Yet, in March 1998, rather backing away from his advocacy of Asian values, Lee Kuan Yew vowed that Singapore was escaping the financial crisis because of Asian values and its policy for having a strong government.¹⁴⁶⁴ With the desire to be economically relieved from the financial crisis, Asian leaders were tempted to follow Singaporean model of government. This raises a further concern of the use of the Asian values concept. For the idea of strong government, would an Asian country need to ignore the rule of law principle?

5.3.2.3 Asian values and the rule of law

After examining the *thrust* and the *use* of Asian values in a political sphere, it is clear that there is a correlation between Asian values and the rule of law. It may be difficult, and perhaps impossible, to accurately carve out the *exact* relationship between Asian values and the rule of law. Yet, it is not difficult to recognise that the correlation between the two ideologies does exist in a negative form. The fundamentals of Asian values do not *generally* follow the fundamentals of the rule of law. The emphasis of strong government and the collective good highlights the tension between the elemental principle of Asian values and the concept of limit government which is the core of the rule of law.¹⁴⁶⁵

Asian values does not believe that the government interventions in personal liberties and the economy should be limited by law. As pointed out by Clark Neher, in Japan, Taiwan, China and South Korea, the state has intervened in the economic affairs of the society to a far greater degree than have Western

¹⁴⁶³ Walter Mead, "The Real Asian Miracle: Asia Devalued", *New York Times Magazine*, 31 May 1998 <<http://www.nytimes.com/1998/05/31/magazine/the-real-asian-miracle-asia-devalued.html>> (2 November 2009).

¹⁴⁶⁴ Andrew Tanzer, "Asian Will Rise Again", *Forbes Magazine*, 23 March 2008 <<http://www.forbes.com/forbes/1998/0323/6106114a.html>> (23 November 2009).

¹⁴⁶⁵ Mohd Azizuddin Mohd Sani, "Mahathir Mohamad as a Cultural Relativist: Mahathirism on Human Rights", a paper presented at the 17th Biennial Conference of Asian Studies Association of Australia, Melbourne, 1-3 July 2008, at 7.

governments.¹⁴⁶⁶ Mixing with the economic growth rate from these countries, proponents of Asian values believe that an Asian-style authoritarian government is more appropriate for the region or at least certain countries of Asia, than the democratic values and institutions of the West.¹⁴⁶⁷ Furthermore, there is a risk to the rule of law because the idea of strong government generally forms the weak boundary between state and civil society.¹⁴⁶⁸

In addition to the strong state model, Asian values promotes the collective good as the basis for the organisation of society. By emphasising the collective good as public policy, Asian political leaders could employ Asian values to veil their own authoritarian grip on power.¹⁴⁶⁹ The collective good supports the belief that the community should take priority over individuals. It is therefore legitimate for the state to limit personal freedom for the sake of political stability and economic prosperity. By relying upon the collective good, Asian values does not only affect the principle of limit government. The priority on the group and strong government also directly undermines the rights and freedoms of the individual which is fundamental to both democracy and human rights.¹⁴⁷⁰

Contradicting to the basic elements of democracy is the fact that Asian values supports restraints on basic speech and political freedom.¹⁴⁷¹ Although liberal democracy and the rule of law are not the same concept, the two ideologies share common ground of individual rights and freedoms especially civil and

¹⁴⁶⁶ Clark D Neher, "Asian-Style Democracy" (1994) 34(11) *Asian Survey* 949, at 956.

¹⁴⁶⁷ Samuel Huntington, "The West Unique, Not Universal" (1996) 75(6) *Foreign Affairs* 28, at 38.

¹⁴⁶⁸ Philip J Eldridge, *The Politics of Human Rights in Southeast Asia*, Routledge Curzon, New York, 2002, at 37.

¹⁴⁶⁹ Chua Beng Huat, "Asian Values: Is an Anti-Authoritarian Reading Possible?" in Mark Beeson (ed), *Contemporary Southeast Asia: Regional Dynamics, National Differences*, Palgrave Macmillan, Hampshire, 2004, at 101.

¹⁴⁷⁰ Michael C Davis, "Human Rights, Political Values, and Development in East Asia" in Adamantia Pollis and Peter Schwab (eds), *Human Rights: New Perspectives, New Realities*, Lynne Rienner, Colorado, 2000, at 140.

¹⁴⁷¹ Greg Hunt and Joshua Frydenberg, "How Democracy is Dismantling Asian Values?", *The Age*, 13 January 1999.

political rights. For example, control over all information and control over freedom of assembly found in authoritarian states appears to be a foreign function of a government in the country where the rule of law is well-developed. When a government is able to control information and freedom of expression, the public is left with no effective system of checks and balances and this normally leads to abuse of power and corruption.¹⁴⁷²

The negative correlation between Asian values and the rule of law is further found in the context of human rights. While Asian values claims that the community must take precedence over individuals, human rights and the rule of law appear to be more individualistic.¹⁴⁷³ To preserve the community and national security, it is again justifiable for the government to deny certain individual's rights which are guaranteed by the Universal Declaration of Human Rights.¹⁴⁷⁴ For example, hiding under the cloak of national security, illegal arrest and detention are routine for police in some Asian countries.¹⁴⁷⁵ To the greater length of Asian values, certain governments use it to defend the killing of the people who disagree with the government policy.¹⁴⁷⁶

Accordingly, Asian values favouring state dominance can cause more harm than good to the rule of law principle of limit government.¹⁴⁷⁷ The close relationship among the rule of law, democracy and human rights could also

¹⁴⁷² Gong Renren, "Freedom of Expression and Social Development: An Empirical Analysis of the Great Leap Forward" in Enrol Mendes and Anik Lalonde-Roussy (eds), *Bridging the Global Divide on Human Rights: A Canada-China Dialogue*, Ashgate, Hants, 2003, at 263-264.

¹⁴⁷³ Xiaorong Li, "Asian Values and the Universality of Human Rights" in Martha Meijer (ed), *Dealing with Human Rights: Asian and Western Views on the Value of Human Rights*, World View Publishing, Oxford, 2001, at 39.

¹⁴⁷⁴ William Korey, *NGOs and the Universal Declaration of Human Rights: A Curious Grapevine*, Palgrave, New York, 2001, at 469.

¹⁴⁷⁵ Asian Human Rights Commission, *Rule of Law and Human Rights in Asia*, Human Rights Correspondence School, Hong Kong, 2006, at 38.

¹⁴⁷⁶ For example see, Frank B Tipton, *Asian Firms: History, Institutions, and Management*, Edward Elgar, Cheltenham, 2007, at 85.

¹⁴⁷⁷ Greg Felker, "Southeast Asian Development in Regional and Historical Perspective" in Mark Beeson (ed), *Contemporary Southeast Asia: Regional Dynamics, National Differences*, Palgrave Macmillan, Hampshire, 2004, at 56.

warrant such statement. It is not surprising that Asian values has attracted a large amount of critics not only by the Western but also the Asian academics and scholars.¹⁴⁷⁸ Since the debate of Asian values remains alive, it is necessary to examine what the critiques of Asian values are.¹⁴⁷⁹ It is expected that the examination can identify, if there is any, the connection between Asian values and Thai values and how such connection can impact the function of the rule of law in Thailand.

5.3.3 Asian values, Thai values and the rule of law

It is essential to recognise that the concept of Asian values is not free from criticism. Many scholars have identified a substantial number of flaws in applying the concept to Asia. These flaws all seem to attempt to point in the same direction that Asian values is simply a cloak for arrogant regimes which pose risk to human rights, democracy and the rule of law.¹⁴⁸⁰ Yet, Asian values remains relevant because there appears to be underlying common attitudes throughout much of Asia which is different from other regions of the world.¹⁴⁸¹ Since values provide the society with fairly stable and similar orientations, Asian values at least represents that there are patterns of behavior which are common to only Asian countries and Asian peoples.¹⁴⁸²

¹⁴⁷⁸ For example see, Amartya Sen, *Human Rights and Asian Values*, Carnegie Council on Ethics and International Affairs, New York, 1997, at 11; Richard A Wilson, *Human Rights, Culture and Context: Anthropological Perspectives*, Pluto Press, Chicago, 1997, at 9.

¹⁴⁷⁹ For example see, Michael Kelly Connors, "Cultural and Politics in the Asia-Pacific: Asian Values and Human Rights" in Michael Kelly Connors, Rémy Davison, and Jörn Dosch (eds), *The New Global Politics of the Asia-Pacific*, Routledge Curzon, Oxfordshire, 2004, at 199-212; Heather Widdows, "Why and What Global Ethics?" in Ronald Commers, Wim Vandekerckhove, and An Verlinden (eds), *Ethics in an Era of Globalisation*, Ashgate, Hampshire, 2008, at 98; Conor Gearty, "Truth, Free Speech and Knowledge: the Human Rights Contribution" in Saw Swee-Hock and Danny Quah (eds), *The Politics of Knowledge*, Institute of Southeast Asian Studies, Singapore, 2009, at 42-55.

¹⁴⁸⁰ Xiaorong Li, "Asian Values and the Universality of Human Rights" in Martha Meijer (ed), *Dealing with Human Rights: Asian and Western Views on the Value of Human Rights*, World View Publishing, Oxford, 2001, at 37.

¹⁴⁸¹ H Patrick Glenn, *Legal Traditions of the World*, Oxford University Press, Oxford, 2007, at 303.

¹⁴⁸² James L Spates, "The Sociology of Values" (1983) 9 *American Review of Sociology* 27, at 36.

However, the differences in values within the area that is geographically defined as Asia must be recognised.¹⁴⁸³ Indeed, the lack of such recognition has affected the creditability of the Asian values debate. Two following critiques can represent the deficiency of such recognition. Each Asian country may possess particular values which are not part of what constitutes the mainstream “Asian values”. It seems misleading therefore to presume that any value found in an Asian country is “Asian values”. It may be true that some of these particular cultures can also form a negative correlation to the rule of law in the same way “Asian values” does to the rule of law. Yet, it is misleading to conclude that these values are “Asian values”.

In saying this, there is a disjointed connection between Asian values, Thai values and the rule of law. Certain types of culture in Thailand are not part of “Asian values”.¹⁴⁸⁴ The closest link which could be drawn from Asian values is that some of Thai values are *similar* to, but not the *same* as Asian values. Less problematic to identify, “Thai values”, concurrently discussed in chapter four include respect those with seniority; gratitude as a response to patrons; and social harmony – do not like to disagree with anyone.¹⁴⁸⁵ These Thai values develop from the long history of the country, but not from Confucian belief which creates the basis of the mainstream Asian values.¹⁴⁸⁶ When Asian values is portrayed as Thai values and employed to justify the government policy, such policy must very well be questioned. Hiding behind the debate of Asian

¹⁴⁸³ Han Sung-Joo, “Asian Values: An Asset or a Liability?” in Han Sung-Joo (ed), *Changing Values in Asia: Their Impact on Governance and Development*, Japan Centre for International Exchange, Japan, 1999, at 4-5.

¹⁴⁸⁴ Danny Unger, *Building Social Capital in Thailand*, Cambridge University Press, Cambridge, 1998, at 27-28.

¹⁴⁸⁵ See also, Somporn Sangchai, *Coalition Behavior in Modern Thai Politics*, Institute of Southeast Asian Studies, Singapore, 1976; Jan Servaes, “Beyond Differences in Cultural Values and Modes of Communication” in Shi Xu, et al (eds), *Read the Cultural Other*, Mouton, Berlin, 2005; Kanok Wongtrangan, “Thai Bureaucratic Behaviour: The Impact of Dual Values on Public Policies” in Lim Teck Ghee (ed), *Reflections on Development in Southeast Asia*, Institute of Southeast Asian Studies, Singapore, 1988, at 59.

¹⁴⁸⁶ Amartya Sen, *Development as Freedom*, Oxford University Press, Oxford, 2001, at 234.

values could be an attempt of any political leader to verify an order or an activity which may not comply with the rule of law principle.

5.3.3.1 The critiques of Asian values

There are a number of critics who articulately disagree with the Asian values concept albeit on different grounds. It is noted that there are at least two critiques of Asian values which rely on the ground that Asian values cannot actually represent every value in Asia. The first criticism is that Asian nations share nothing in common and as such the concept of Asian values is distorted.¹⁴⁸⁷ The second criticism is that it is wrong for Asian values to align itself exclusively with Confucian values.¹⁴⁸⁸ Accordingly, there is a growing amount of literature which questions the legitimacy of the concept.¹⁴⁸⁹ For Thailand where Asian values and Thai values are not entirely equated, the two critiques help affirm the concern about using Asian values to disguise any illegitimate political policy.

5.3.3.1.1 Asian values or values in Asia?

The first critique has rejected Asian values on the ground that the concept itself is so general and it simply cannot apply to every value in Asia.¹⁴⁹⁰ Asian nations are not identical, and some perhaps share very little in common with another, besides their geographic proximity. Asia is a large continent that is made up of over five major religions, twenty or more different languages and over fifty different nationalities. Cultural difference can be traced back as far

¹⁴⁸⁷ Roda Mushkat, *International Environmental Law and Asian Values: Legal Norms and Cultural Influences*, University of British Columbia Press, Canada, 2004, at 11.

¹⁴⁸⁸ Lee Seung-hwan, *A Topography of Confucian Discourse*, Homa Sekey Books, Paramus, 2004, at 171-185.

¹⁴⁸⁹ For example, see David Kelly, "Freedom as an Asian Value" in Ole Bruun and Michael Jacobsen (eds), *Human Rights and Asian Values: Contesting National Identities and Cultural Representations in Asia*, Curzon Press, London, 2003; Bob Beatty, *Democracy, Asian Values, and Hong Kong: Evaluating Political Elite Beliefs*, Praeger, Westport, 2003; Daniel A Bell, *Beyond Liberal Democracy: Political Thinking for an East Asian Context*, Princeton University Press, New Jersey, 2006.

¹⁴⁹⁰ Edward Friedman, "Asia as a Fount of Universal Human Rights" in Peter van Ness (ed), *Debating Human Rights: Critical Essays for the US and Asia*, Routledge, New York, 1999, at 56.

as 2000BC. Some of those traditions have been altered or lost throughout time either by a triggering event such as a war or a cultural revolution or by natural evolutionary change. With this in mind, it is difficult for one to see how Asian values can represent the values in Asia as an entire continent.¹⁴⁹¹

Given that Asia is so heterogeneous, some scholars conclude that the debate about Asian values is over. Frances Fukuyama once argued that “since few people today seem to be interested in making the case for Asian values as the basis for distinctive political or economic institutions, criticising the concept may seem a bit like beating a dead horse.”¹⁴⁹² Nevertheless, considering the fact that the use and acceptance of Asian values remains vibrant in Asia, the conclusion Fukuyama reached might seem a little overstated.¹⁴⁹³ Being part of a global society, it is essential to appreciate and respect cross cultural implications.¹⁴⁹⁴ As Randall Peeranboom suggested, perhaps it may be more useful if the debate of “Asian values” transforms to a debate of “values in Asia.”¹⁴⁹⁵

In fact, there are a large number of “values in Asia” which have never been raised under the umbrella of Asian values. It will be delusive if the rights of the individual being subordinate to the collective interest are the only predominant values in Asia. In Thailand the value of non-violence and harmony is rather prevailing than the collective interest.¹⁴⁹⁶ By invoking the

¹⁴⁹¹ Alice Erh-Soon Tay, “Introduction” in Alice Erh-Soon Tay (ed), *East Asia – Human Rights, Nation – Building, Trade*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, at 13.

¹⁴⁹² Frances Fukuyama, “Asian Values in the Wake of the Asian Crisis” in Farrukh Iqbal & Jong –Il You (eds), *Democracy, Market Economics & Development*, World Bank, Washington D.C., 2001, at 151.

¹⁴⁹³ Surya Subedi, “Are the Principles of Human Rights Western Ideas? An Analysis of the Claim of the Asian Concept of Human Rights from the Perspectives of Hinduism” (1999) 30 *California Western International Law Journal* 45, at 66.

¹⁴⁹⁴ Michael C Davis, “Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values” (1998) 11 *Harvard Human Rights Journal* 109, at 110.

¹⁴⁹⁵ Vitit Muntarbhorn, *Dimensions of Human Rights in the Asia – Pacific Region*, Office of the National Human Rights Commission of Thailand, Bangkok, 2002, at 8.

¹⁴⁹⁶ Vitit Muntarbhorn, “Rule of Law and Aspects of Human Rights in Thailand” in Randall Peerenboom (ed), *Asian Discourses of Rule of Law*, Routledge Curzon, London, 2004, at 356.

debate of Asian values in the country where the collective interest is not dominant would simply question the creditability and the motive behind the use of Asian values. This appears to be a case of Thailand where Robert Albritton and Thawilwadee Bureekul argued that there was a low response rate towards the concept of Asian values in Thai society.¹⁴⁹⁷

5.3.3.1.2 Asian values is Confucian values

Based upon the relatively similar ground of the first critique, opponents of Asian values have also rejected the reference to Confucianism. This is because Asian values cannot solely be equated with Confucianism which does not represent the beliefs of many Asian nations.¹⁴⁹⁸ It appears that the connection between Asian values and Confucianism has been advocated only by a certain number of leaders of Asian nations for political purposes. Lee Kuan Yew is one who admitted that such a difference is in fact made only between Western concepts and “East Asian” concepts and not “Asian” concepts.¹⁴⁹⁹ According to Lee, Asian values is therefore just “East Asian” values in disguise and these values only apply to Korean, Japan, China and Vietnam.¹⁵⁰⁰

Of course, these four countries do not represent the entire Asian continent and such a reference to “Asian values” is somewhat misleading. This is only one of many examples of how the concept can be manipulated to serve a particular purpose and it is not representative of the entire values in Asia. So long as the debate over the contrast between the Western ideology and the Asian ideology rests on the word “Asian values”, it is necessary to move

¹⁴⁹⁷ Robert Albritton and Thawilwadee Bureekul, “Developing Democratic Elections under a New Constitution in Thailand” in Christian Schafferer (ed), *Understanding Modern East Asia Politics*, Nova Science, New York, 2005, at 154.

¹⁴⁹⁸ Amartya Sen, *Human Rights and Asian Values*, Carnegie Council on Ethics and International Affairs, New York, 1997, at 11; Richard A Wilson, *Human Rights, Culture and Context: Anthropological Perspectives*, Pluto Press, Chicago, 1997, at 17.

¹⁴⁹⁹ Fareed Zakaria, “Culture Is Destiny: A Conversation with Lee Kuan Yew” (1994) 73(2) *Foreign Affairs* 109, at 113.

¹⁵⁰⁰ Fareed Zakaria, “Culture Is Destiny: A Conversation with Lee Kuan Yew” (1994) 73(2) *Foreign Affairs* 109, at 113.

beyond Confucianism to develop local variants of modernity.¹⁵⁰¹ Buddhism, Islam, Christianity and Hinduism are all long-standing religions, some of which have been a part of Asia for centuries and perhaps are considered as a better representation for what Asia stands for today.¹⁵⁰²

Furthermore, critics have also argued that it is incorrect for the proponents of Asian values to contribute the economic success of certain Asian nations to Confucianism.¹⁵⁰³ Confucianism was repeatedly assumed by many Asian leaders to represent the economic growth in the Asian region.¹⁵⁰⁴ Some Asian businessmen even called themselves “Confucian capitalists.”¹⁵⁰⁵ However, in a controversial announcement, both the former Prime Minister of Singapore, Lee Kuan Yew and the former Prime Minister of Malaysia, Mahathir Mohamad were once so frustrated with the economic stagnation in their countries, during the founding of their nation-states, that they blamed Confucianism for stifling the entrepreneurial spirit.¹⁵⁰⁶

Not surprisingly, there is no direct evidence to suggest that the economic success of these Asian nations is contributed or even partially contributed to Confucianism.¹⁵⁰⁷ The more logical answer is that the economic success of these Asian nations is based on their exports and most importantly, their economic policies.¹⁵⁰⁸ The recent economic boom in China is an example of

¹⁵⁰¹ Randall Peerenboom, “Beyond Universalism and Relativism: the Evolving Debates about Values in Asia” (2003) 14 *Indiana International and Comparative Law Review* 1, at 83.

¹⁵⁰² Frances Fukuyama, “Asian Values in the Wake of the Asian Crisis” in Farrukh Iqbal & Jong –Il You (eds), *Democracy, Market Economics & Development*, World Bank, Washington D.C., 2001, at 149-168.

¹⁵⁰³ Kishore Mahbubani, “The Pacific Way” (1995) 74(1) *Foreign Affairs* 100, at 100-102.

¹⁵⁰⁴ Yuan Shu, “Globalisation and Asian Values: Teaching and Theorising Asian American Literature” (2005) 32(1) *College Literature* 86, at 90.

¹⁵⁰⁵ See generally, Souchou Yao, *Confucian Capitalism: Discourse, Practice and the Myth of Chinese Enterprise*, Routledge Curzon, London, 2002.

¹⁵⁰⁶ Evelyn Hu-DeHart, “Introduction: Asian American Formations in the Age of Globalisation” in Evelyn Hu-DeHart (ed), *Across the Pacific: Asian Americans and Globalisation*, Temple University Press, Philadelphia, 1999, at 5.

¹⁵⁰⁷ Daryl Koehn, *Local Insights, Global Ethics for Business*, Rodopi, New York, 2001, at 3.

¹⁵⁰⁸ For example see, Hui Feng, *The Politics of China's Accession to the World Trade Organisation: The Dragon Goes Global*, Routledge, New York, 2006, at 47; Organisation for Economic Co-operation and

this. Over the last twenty years, China has experienced an economic boom, mostly contributed to a change towards economic rationalism, the allowance of foreign investment and trade.¹⁵⁰⁹ This change had little, if not, nothing to do with Confucianism, which has been a main belief in China for centuries before the nation has a strong economy.¹⁵¹⁰

5.3.3.2 Evidence of Asian values in Thailand

It is not uncommon for both Western and Asian scholars to include Thailand in the list of Asian countries when they discuss about the concept of Asian values. For example, James Tang argued that Asian values is challenged by political liberalisation which has forced the Philippine, South Korean, Taiwanese and Thai governments to be more accountable.¹⁵¹¹ To rebut the presumption of Asian values that democracy is not a workable regime for Asian politics, Kim Dae Jung illustrated many Asian civilian governments which received support from “people power” including Thailand.¹⁵¹² When David Hitchcock conducted his research on Asian values to compare with American values, Thailand was among seven countries where he chose to undertake his study.¹⁵¹³

Development, *Regional Integration in the Asia Pacific: Issues and Prospects*, Bob Hawke Prime Ministerial Centre, University of South Australia, 2005, at 283.

¹⁵⁰⁹ Doug Guthrie, *China and Globalisation: The Social, Economic and Political Transformation of Chinese Society*, Routledge, New York, 2009, at 203-205.

¹⁵¹⁰ Wang Yanzhong, “Chinese Values, Governance, and International Relations: Historical Development and Present Situation” in Han Sung-Joo (ed), *Changing Values in Asia: Their Impact on Governance and Development*, Japan Centre for International Exchange, Japan, 1999, at 15.

¹⁵¹¹ James Tang, “A Clash of Values? Human Rights in the Post Cold War World”, a conference proceeding on *The Future of the Asia – Pacific Region* organised by the Shizuoka Prefectural Government and the Organising Committee of the Asia – Pacific Forum, Japan, 28 March 1997.

¹⁵¹² Kim Dae Jung, “Is Culture Destiny? The Myth of Asia’s Anti-Democratic Values” (1994) 73(6) *Foreign Affairs* 189, at 193.

¹⁵¹³ David Hitchcock, “The United States and East Asia: New Commonalities and Then, All those Differences”, a conference proceeding on *The Future of the Asia – Pacific Region* organised by the Shizuoka Prefectural Government and the Organising Committee of the Asia – Pacific Forum, Japan, 28 March 1997.

Thai scholars also refer to Asian values when they discuss about state of human rights protection in Asia¹⁵¹⁴ and in Thailand.¹⁵¹⁵ At the fifth Asian Law Institute Conference, National University of Singapore in 2008, Asian values was argued to be part of Thai culture and Asian values was suggested to be one of the cultural obstacles to the operation of the rule of law in Thailand.¹⁵¹⁶ With a number of literatures referring to Thailand in the context of Asian values, it is not surprising if one would perceive that Thailand also follows the notion of Asian values. Nonetheless, this raises the question if such perception contains a correct understanding of Thai values. Is Thailand's rule of law jeopardised because Thai values are part of Asian values?

Admittedly, there are certain Thai values which have similar characteristics to those of Asian values. As previously discussed in chapter four, the cultural influence which may affect the rule of law principle in Thailand includes patronage relationship, respect for those who are superior and social harmony. Also found in Southeast Asian countries, the patronage relationship and the superior-subordinate relationship are the principal pattern of exchange interaction which determines power, authority and the citizen's role in society.¹⁵¹⁷ In general, the similarity of the values which forms the basis of the political and social structure of South, Southeast, and East Asia might suggest that Thai values are Asian values.

On the contrary, in the context of human rights, Asian values does not appear to dominate the collective rights in Thailand. Vitit Muntarbhorn pointed out

¹⁵¹⁴ Vitit Muntarbhorn, *Dimensions of Human Rights in the Asia – Pacific Region*, Office of the National Human Rights Commission of Thailand, Bangkok, 2002, at 7-8.

¹⁵¹⁵ Naruemon Thabchumpon, "Human Rights in Thailand: Rhetoric or Substance on Asian Values" in Leena Avonius and Damien Kingsbury (eds), *Human Rights in Asia: A Reassessment of the Asian Values Debate*, Palgrave Macmillan, New York, 2008, at 141.

¹⁵¹⁶ The debate of Asian values was discussed in the Human Rights Panel by Thai and foreign scholars during the session on "The Evolution of the Rule of Law in Thailand: The Thai Constitutions", the 5th Asian Law Institute Conference at National University of Singapore, 22 May 2008.

¹⁵¹⁷ Clark D Neher, "Asian-Style Democracy" (1994) 34(11) *Asian Survey* 949, at 950.

that the Thai Constitution offers a number of individual rights as well as the rights of communities which are akin to international standards.¹⁵¹⁸ In fact, the rights of community are very much confined in the environmental area.¹⁵¹⁹ For Naruemon Thabchumpon, it is not because of Asian values that is a driven force of human rights debate. The discourse of human rights emerged as a national issue when politicians and local authorities were forced to react to human rights situations and conflicts at the grassroots, especially in the Muslim-majority region of southern Thailand.¹⁵²⁰

In an attempt to define the social values of Thais, a national book on *Thailand into the 2000's* pointed out that Thais are highly individualistic and resisting regimentation.¹⁵²¹ This is also observed by Bevars Mabry who believed that Thai individualism derived from the Buddhist law of karma.¹⁵²² As previously discussed in chapter four of the thesis, the law of karma holds everyone responsible for their action or inaction. In this attribution, the law of karma rejects the possibility of transfer of merit or demerit from one person to another because each individual is entirely on his or her own.¹⁵²³ Since the national religion emphasises karmic individualism, according to many sociologists, individualism is sometimes seen as one of the nature of the Thai personality.¹⁵²⁴

¹⁵¹⁸ Vitit Muntarbhorn, "Rule of Law and Aspects of Human Rights in Thailand" in Randall Peerenboom (ed), *Asian Discourses of Rule of Law*, Routledge Curzon, London, 2004, at 350.

¹⁵¹⁹ Sections 66 and 67 of the 2007 Constitution.

¹⁵²⁰ Naruemon Thabchumpon, "Human Rights in Thailand: Rhetoric or Substance on Asian Values" in Leena Avonius and Damien Kingsbury (eds), *Human Rights in Asia: A Reassessment of the Asian Values Debate*, Palgrave Macmillan, New York, 2008, at 141.

¹⁵²¹ National Identity Board, *Thailand into the 2000's*, Office of the Prime Minister, Bangkok, 2000, at 82.

¹⁵²² Bevars D Mabry, "Work Behaviour in a Buddhist Culture: The Thai Experience" (1979) 3(2) *Journal of Cultural Economics* 57, at 60.

¹⁵²³ A L Herman, "Community: Violence, Peace and the Ways of Community" in Chanju Mun (ed), *Buddhism and Peace: Theory and Practice*, Jung Bup Sa Buddhist Temple of Hawaii, Hawaii, 2006, at 116.

¹⁵²⁴ Chuachan Chongsatityoo and Sman Chatiyonondhi, "Thailand" in Willy Wielemans and Pauline Choi-Ping Chan (eds), *Education and Culture in Industrialising Asia*, Leuven University Press, Leuven, 1992, at 390; Robert Mole, *Thai Values and Behaviour Patterns*, C.E. Tuttle, Rutland, 1973, at 67; Alexandra R Karpur-Fic, *Thailand: Buddhism, Society, and Women*, Shakti Malik, New Delhi, 1998, at 520; Clark D Neher, *Modern Thai Politics*, Schenkman, Massachusetts, 1979, at 155.

To further the analysis on the religious point of view, Asian values is often based upon Confucianism.¹⁵²⁵ Thailand on the other hand, retains deep traditional roots centred on Buddhist-inspired social values.¹⁵²⁶ In denying the connection between Asian values and Thai values, Philip Eldridge viewed that the historical continuity of institutions such the King and Buddhism makes Thailand relatively aloof from Asian values polemic.¹⁵²⁷ Similar to Eldridge's view, Amartya Sen's critique of Asian values focused on the religious background.¹⁵²⁸ For Sen, Confucian is not the only philosopher in Asia. Other Asian countries which practice Buddhism including Thailand find similar pronouncements in favour of individual freedom as the entitlement of every human being.¹⁵²⁹

Turning to the context of democracy, it is hard to bring to an end that Asian values is the cause of democracy instability in Thailand. While Asian values puts across that democracy is a system so alien to Asian cultures, a research by Robert Albritton and Thawilwadee Bureekul showed a very high level of support for democratic processes and institutions in Thailand.¹⁵³⁰ It is true that Asian democracy and Thai democracy share some common features such as patron-client relations which potentially cause damage to democracy and the rule of law¹⁵³¹ and that cultural factors become significant in sustaining

¹⁵²⁵ Richard Pearshouse, "Asian Values and Universal Human Rights" (2000) 10(1) *Polemic* 23, at 23.

¹⁵²⁶ Chua Beng Huat, "Asian Values: Is an Anti-Authoritarian Reading Possible?" in Mark Beeson (ed), *Contemporary Southeast Asia: Regional Dynamics, National Differences*, Palgrave Macmillan, Hampshire, 2004, at 100.

¹⁵²⁷ Philip J Eldridge, *The Politics of Human Rights in Southeast Asia*, Routledge Curzon, New York, 2002, at 70.

¹⁵²⁸ Amartya Sen, *Human Rights and Asian Values*, Carnegie Council on Ethics and International Affairs, New York, 1997, at 13.

¹⁵²⁹ Amartya Sen, "Universal Truths: Human Rights and the Westernising Illusion" (1998) 20(3) *Harvard International Review* 40, at 41-42.

¹⁵³⁰ Robert Albritton and Thawilwadee Bureekul, "Consolidating Democracy in Thailand: the First Four Years of Democracy under the Constitution of 1997", a paper delivered at *the International Political Science Association Meeting*, Japan, 12 July 2006.

¹⁵³¹ Clark D Neher and Ross Marley, *Democracy and Development in Southeast Asia: the Winds of Change*, Westview Press, Boulder, 1995, at 13-28.

support for democracy.¹⁵³² However, as previously discussed, it does not mean that such cultural factors are equivalent to Asian values.

In the recent years, there have been a few studies which attempt to gauge the relationship between Asian values and Thai values. These studies recognise the difficulty to identify a set of Thai values because of ethnic, social and economic status difference across the nation.¹⁵³³ However, there appears to be a mutual agreement that Thai values are deeply divided into rural and urban, resulting in conflicting perception of democracy and the rule of law.¹⁵³⁴ For rural residents, patronage relationship is essential and they would vote for politicians who stay close to the voters in both a physical and cultural sense.¹⁵³⁵ For urbanites, individual independence from government leads to a greater interest in shaping civil liberties to prevent any government interference.¹⁵³⁶

¹⁵³² Robert Albritton and Thawilwadee Bureekul, "Social and Cultural Supports for Plural Democracy in Eight Asian Nations: a Cross-National, Within-Nation Analysis", *Asian Barometer Working Paper Series* No. 31, Asian Barometer Project, Taipei, 2005.

¹⁵³³ Surin Maisrikrod, "Joining Values Debate: The Peculiar Case of Thailand" (1999) 14(2) *Journal of Social Issues in Southeast Asia* 402.

¹⁵³⁴ For example see, Anek Laothamatas, "A Tale of Two Democracies: Conflicting Perception of Elections and Democracy in Thailand" in R H Taylor (ed), *The Politics of Elections in Southeast Asia*, Cambridge University Press, New York, 1996, at 201-223; Robert Albritton and Thawilwadee Bureekul, "Consolidating Democracy in Thailand: the First Four Years of Democracy under the Constitution of 1997", a paper delivered at the *International Political Science Association Meeting*, Japan, 12 July 2006.

¹⁵³⁵ Robert Compton, *East Asian Democratisation: Impact of Globalisation, Culture, and Economy*, Praeger, Westport, 2000, at 44-45; Daniel Arghiros, "Political Structures and Strategies: A Study of Electoral Politics in Contemporary Rural Thailand" (1995) Occasional Paper No. 31, University of Hull Centre for South-East Asian Studies; William Callahan and Duncan McCargo, "Vote Buying in Thailand's Northeast" (1996) 26 *Asian Survey* 376; Eiji Murashima, "Local Elections and Leadership in Thailand" (1987) 25 *The Developing Economies* 363; Anek Laothamatas, "A Tale of Two Democracies: Conflicting Perception of Elections and Democracy in Thailand" in R H Taylor (ed), *The Politics of Elections in Southeast Asia*, Cambridge University Press, New York, 1996, at 208.

¹⁵³⁶ Daniel King and Jim LoGerfo, "Thailand: Toward Democracy Stability" (1996) 7(1) *Journal of Democracy* 102, at 105; William Callahan, *Cultural Governance and Resistance in Pacific Asia*, Routledge New York, 2006, at 139; Amrita Daniere and Anchana Naranong, "Tangible and Intangible Civic Spaces in Bangkok's Slum" in Amrita Daniere, et al (eds), *The Politics of Civic Space in Asia: Building Urban Communities*, Routledge, New York, 2009, at 73-74; Robert Albritton and Thawilwadee Bureekul, "Social and Cultural Supports for Plural Democracy in Eight Asian Nations: a Cross-National, Within-Nation Analysis", *Asian Barometer Working Paper Series* No. 31, Asian Barometer Project, Taipei, 2005.

In Thailand, this rural-urban cleavage is a significant factor in support for government. Nonetheless, Thailand is not the only Asian country which experiences such cleavage. The factor appears to be sustained across the other Asian countries including Japan, Hong Kong, China, Mongolia, the Philippines and Taiwan.¹⁵³⁷ For Robert Albritton and Thawilwadee Bureekul, the divergence of beliefs between rural and urban society is the only value which comes close to Asian values.¹⁵³⁸ For others, the idea of Asian values has never really caught on in Thailand.¹⁵³⁹ This is perhaps a reason as to why when former Prime Minister Thaksin Shinawatra referred to Asian values, he did not use the term to rebut *universality of human rights* or *liberal democracy*, rather Asian values according to him, is about *having a sense of balance in life*.¹⁵⁴⁰

5.3.3.3 Lesson learned from Asian values and the rule of law

One reason why it is important, if not crucial, to examine Asian values in the context of the rule of law lies within the relationship of the two concepts. As shown at various sections of this chapter, there appears to be a pessimistic correlation between Asian values and the rule of law. Such a correlation, will however, not be uniform across every Asian nation. While some Asian countries possess certain strong types of values that coincide with Asian values, others may not. Indeed, the extent of the correlation varies among each Asian nation and it would be misleading to presume that the state of human rights, democracy and the rule of law in Asia is predominantly impacted by Asian values. Thailand is proved to be a classic example.

¹⁵³⁷ Robert Albritton and Thawilwadee Bureekul, "Social and Cultural Supports for Plural Democracy in Eight Asian Nations: a Cross-National, Within-Nation Analysis", *Asian Barometer Working Paper Series* No. 31, Asian Barometer Project, Taipei, 2005.

¹⁵³⁸ Robert Albritton and Thawilwadee Bureekul, "Thailand Country Report: Public Opinion and Political Power in Thailand", *Asian Barometer Working Paper Series* No. 34, Asian Barometer Project, Taipei, 2007, at 26.

¹⁵³⁹ For example see, Naruemon Thabchumpon, "Human Rights in Thailand: Rhetoric or Substance on Asian Values" in Leena Avonius and Damien Kingsbury (eds), *Human Rights in Asia: A Reassessment of the Asian Values Debate*, Palgrave Macmillan, New York, 2008, at 141.

¹⁵⁴⁰ Statement of Thaksin Shinawatra in the Opening Ceremony of the 6th Global Forum on Reinventing Government, Seoul, 24 May 2005.

Although the concept of Asian values suffers from a number of interpretative drawbacks, it is still somewhat vibrant to the identity of Asia.¹⁵⁴¹ Indeed, Asian values should not always be used as a defence against Western ideology.¹⁵⁴² Rather Asian values should be used to remind both Asian and Western scholars that there are communal human rights as well as individualistic human rights; there could be non-liberal variants of democracy; and that the rule of law may exist in non-democratic regime.¹⁵⁴³ This is the result of cultural difference.¹⁵⁴⁴ And it is culture which is the foundations of the rule of law and other norms of governance according to Amir Licht, Chanan Goldschmidt and Shalom Schwartz.¹⁵⁴⁵

While Asian values is not a popular debate in Thailand, few Thai social norms do share the common characters of Asian values. Patronage relationship, the superiority rule and social harmony are found in Thai social norms as well as under the umbrella of Asian values. Since Asian values has a capability to reject human rights, democracy, and ultimately the rule of law, Thailand needs to be more cautious in handling these social norms. These social norms, once they are politically manipulated, can potentially destroy the function of the rule of law in Thailand. This is even so where there are external influences such as globalisation which may substantially ward off the relationship between cultures and political institutions in the country.

¹⁵⁴¹ Donald Emmerson, "Singapore and the Asian Values Debate" (1995) 6(4) *Journal of Democracy* 95, at 96.

¹⁵⁴² Elizabeth M Zechenter, "In the Name of Culture: Cultural relativism and the Abuse of the Individual" (1997) 53 *Journal of Anthropological Research* 319, at 328.

¹⁵⁴³ Randall Peerenboom, "Varieties of Rule of Law" in Randall Peerenboom (ed), *Asian Discourses of Rule of Law*, Routledge Curzon, London, 2004, at 1-47.

¹⁵⁴⁴ Bryan S K Kim, Donald R Atkinson, and Peggy H Yang, "The Asian Values Scale: Development, Factor Analysis, Validation, and Reliability" (1999) 46(3) *Journal of Counselling Psychology* 342.

¹⁵⁴⁵ See, Amir Licht, Chanan Goldschmidt, and Shalom Schwartz, "Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance" (2007) 35 *Journal of Comparative Economics* 659.

5.4. GLOBALISATION AND THE RULE OF LAW

5.4.1 Globalisation: Its concept and encounter in Asia

Globalisation is an ideology which emerged around fifty years ago from social science and has traditionally been given a more narrow meaning by economists as merely ‘economic globalisation’.¹⁵⁴⁶ The modern ideology of globalisation is more widely defined. Yet, it is multidimensional in scope.¹⁵⁴⁷ Globalisation suggested in the thesis is the process of unification of local phenomena into a single society. It entails not only the integration of markets, but also the emergence of global civil society.¹⁵⁴⁸ Globalisation, as so defined, combines economic, technological, socio-cultural and political forces together, so global society may function as one system, which promotes mobility of capital, labour, information and ideas.¹⁵⁴⁹

Globalisation, like most other ideologies, has its supporters and critics.¹⁵⁵⁰ Most of the debate for and against globalisation is focused on issues which do not concern this thesis. What is important for the present purpose is to identify the relationship, if any, between globalisation and the rule of law in Asia, especially in Thailand. Specifically, it is the question of whether that relationship, if exists, can promote the concept of equality before the law. As globalisation carries several dimensions in scope, its impact on inequality,

¹⁵⁴⁶ Thomas L Friedman, *The World is Flat: A Brief History of the Twenty-first Century*, Allen Lane, London, 2005, at 421; Danilo Zolo, *Globalisation: An Overview*, European Consortium for Political Research Press, Hampshire, 2007, at 1; Peter Beyer, *Religion and Globalisation*, Sage, London, 1994, at 8-9.

¹⁵⁴⁷ Thomas Meyer, “From Godesberg to the Neue Mitte: The New Social Democracy in Germany” in Anthony Giddens (ed), *The Global Third Way Debate*, Polity Press, Cambridge, 2001, at 81.

¹⁵⁴⁸ Joseph Stiglitz, “Globalisation and Development” in David Held and Mathias Koenig-Archibugi (eds), *Taming Globalisation: Frontiers of Governance*, Polity Press, Cambridge, 2003, at 37.

¹⁵⁴⁹ Anthony Giddens, *The Consequences of Modernity*, Stanford University Press, California, 1990, at 64.

¹⁵⁵⁰ For example see, Randall D Germain (ed), *Globalisation and Its Critics*, Macmillan Press, New York, 2000; Jagdish Bhagwati, *In Defense of Globalisation*, Oxford University Press, New York, 2004; Robert K Schaeffer, *Understanding Globalisation: The Social Consequences of Political, Economic, and Environmental Change*, 2nd ed, Rowman and Littlefield, Maryland, 2003.

conflict and democracy might not always be positive to the rule of law.¹⁵⁵¹ When globalisation cannot yield beneficial effect in one country, the attempt to introduce the rule of law through globalisation may be inefficient.¹⁵⁵²

As previously discussed, Asian values plays a pivotal role in disrupting the relationship between globalisation and the rule of law in certain Asian countries.¹⁵⁵³ The Asian values debate has emerged in countries, like Singapore and China, to contest the harmonisation of these two ideologies.¹⁵⁵⁴ Asian values has often been used as a defence against a global trend towards an “Asian democracy”.¹⁵⁵⁵ In Singapore, the success of the Asian values defence has on occasions been considerable.¹⁵⁵⁶ As for other areas of Asia, such as Thailand, the extent of success is checkered. As Asian values is not dominant, it is not difficult to find numerous examples where Thailand has encouraged globalisation, without reference to Asian values.

While globalisation may be challenged by Asian values in some parts of Asia, it has gathered considerable momentum in Thailand.¹⁵⁵⁷ This in turn appears to have assisted in the reinforcement of Thailand’s rule of law. It has done this in many direct and indirect ways, including, but not limited to, the development of ideology of the Thai judicial system, the Thai Constitution, foreign economic policy and investment, and more obviously in the

¹⁵⁵¹ Michael D Ward and Krisian Skrede Gleditsch, “Globalisation’s Impact on Poverty, Inequality, Conflict, and Democracy” in John O’Loughlin, Lynn Staeheli, and Edward Greenberg (eds), *Globalisation and Its Outcomes*, Guildford Press, New York, 2004, at 159-191.

¹⁵⁵² Don Robotham, *Culture, Society and Economy: Bringing Production Back in*, Sage, London, 2005, at 8.

¹⁵⁵³ Tim Lindsey, “Indonesia: Devaluing Asian Values, Rewriting Rule of Law” in Randall Peerenboom (ed), *Asian Discourses of Rule of Law*, Routledge Curzon, London, 2004, at 286-312.

¹⁵⁵⁴ Selvaraj Velayutham, *Responding to Globalisation*, Institute of Southeast Asian Studies, Singapore, 2007, at 54-55.

¹⁵⁵⁵ Kenneth Christie, “Regime Security and Human Rights in Southeast Asia” (1995) 43 *Political Studies* 204, at 212, 216-217.

¹⁵⁵⁶ Philip J Eldridge, *The Politics of Human Rights in Southeast Asia*, Routledge, London, 2002, at 32-59.

¹⁵⁵⁷ Peter Warr, “Boom, Bust and Beyond” in Peter Warr (ed), *Thailand Beyond the Crisis*, Routledge Curzon, London, 2005, at 3-61.

strengthening of Thailand's reputation on preserving human rights.¹⁵⁵⁸ All of these topics and more are discussed in greater detail in the previous chapters of the thesis, but for the present purposes it is only necessary to mention a few.

Of course, not all of the development of these topics can be attributed to globalisation, nor can it be said that globalisation necessarily promotes the rule of law in every aspect.¹⁵⁵⁹ All that is contended is that, for Thailand, there seems to be greater momentum towards the promotion of globalisation, which in turn, appears to be reinforcing, in one way or another, the rule of law.¹⁵⁶⁰ Although there is little evidence or research to support this view, the more obvious dynamic effects that globalisation has on reinforcing the rule of law in Thailand should not be understated.¹⁵⁶¹ For example, the effect of globalisation such as information exchange or international network made Thai people more aware of the global legal standard.¹⁵⁶²

5.4.2 Different dimension of globalisation and the rule of law

Most analysts accept that globalisation is enormously consequential for societies at all levels of economic and social development.¹⁵⁶³ The massive consequences certainly explain the reason as to why modern globalisation is

¹⁵⁵⁸ Yash Ghai, "Rights, Social Justice, and Globalisation in East Asia" in Oanne R Bauer and Daniel A Bell (eds), *The East Asian Challenge for Human Rights*, Cambridge University Press, New York, 1999, at 263.

¹⁵⁵⁹ Amy Chua, *World on Fire*, Doubleday, New York, 2003, at 177-185.

¹⁵⁶⁰ Yuxue Xue, "Managing Globalisation in Thailand: A Human Development Approach", a speech given at the *CNBC Strategic Forum*, UN Conference Centre, Thailand, 11 May 2007.

¹⁵⁶¹ E Osei Kwadwo Prempeh, et al, *Globalisation and the Human Factor: Critical Insights*, Ashgate, Hampshire, 2004, at 29.

¹⁵⁶² Chong Ju Choi, Brian Hilton, and Carla Millar, *Emergent Globalisation: A New Triad of Business Systems*, Palgrave Macmillan, Hampshire, 2004, at 132; "Debate over Rights: Rejecting Western Pressure, Asia Tables Its Own Definition", *Asiaweek*, 30 June 1993, at 24.

¹⁵⁶³ John O'Loughlin, Lynn Staeheli, and Edward Greenberg, "Globalisation and Its Outcomes: An Introduction" in John O'Loughlin, Lynn Staeheli, and Edward Greenberg (eds), *Globalisation and Its Outcomes*, Guildford Press, New York, 2004, at 9.

called ‘21st Century phenomenon’.¹⁵⁶⁴ Yet, few agree as to what dimensions of globalisation combine and how these dimensions interact.¹⁵⁶⁵ Economic, political, cultural and social dynamics are not simply different facets of a single globalisation, but rather they all mingle and interpenetrate as well.¹⁵⁶⁶ While it is complex to pin down the facets of globalisation, the outcome of globalisation towards the legal system across the world is eminent. That is globalisation generates certain common patterns of laws and regulations.¹⁵⁶⁷

For the purpose of assessing how globalisation can encourage the rule of law to become one of common or general jurisprudence in Asia, only economic and political dimensions of globalisation will be examined.¹⁵⁶⁸ The reason is that globalisation is most criticised in these two contexts.¹⁵⁶⁹ This is particularly so in Asia where globalisation is not always voluntary – it is sometimes subject to conditions, coercion or even imposition.¹⁵⁷⁰ As a result, it is often argued that the emerging legal patterns required by involuntary globalisation could even be a deception for imposing the Western ideology.¹⁵⁷¹ If this is true, then perhaps it is desirable for Asian nations to re-consider how they would like to proceed with the effect of globalisation.¹⁵⁷²

¹⁵⁶⁴ John A Mathews, “Dragon Multinationals: New Players in 21st Century” (2006) 23(1) *Asia Pacific Journal of Management* 5, at 5-27.

¹⁵⁶⁵ Tony Schirato and Jen Webb, *Understanding Globalisation*, Sage, London, 2003, at 9.

¹⁵⁶⁶ Jan Nederveen Pieterse, *Globalisation and Culture: Global Mélange*, Rowman and Littlefield, Plymouth, 2009, at 14.

¹⁵⁶⁷ Paul Brietzke, “Globalisation, Nationalism, & Human Rights” (2005) 17 *Florida Journal of International Law* 633, at 649.

¹⁵⁶⁸ William Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, Cambridge University Press, Cambridge, 2009, at 18-21.

¹⁵⁶⁹ For example see, Tony Porter, “Disaggregating Authority in Global Governance” in Hans Krause Hansen and Dorte Salskov-Iversen (eds), *Critical Perspectives on Private Authority in Global Politics*, Palgrave Macmillan, Hampshire, 2008, at 27-50; Mark Rupert, “From Liberal Globalisation to global Democratisation”, *Ideologies of Globalisation: Contending Vision of a New World Order*, Routledge, London, 2000, at 65-93; Anthony McGrew, “Power Shift: from National government to Global governance” in David Held (ed), *Globalising World?: Culture, Economics, Politics*, 2nd ed, Routledge, Oxford, 2004, at 127-167.

¹⁵⁷⁰ Ranbir Singh, “Globalisation, Asia and Emerging Challenges of Law”, a paper presented at the 2nd *ASLI Conference*, Chulalongkorn University, Bangkok, 26-27 May 2005, at 552.

¹⁵⁷¹ Yuan Shu, “Globalisation and Asian Values: Teaching and Theorising Asian American Literature” (2005) 32(1) *College Literature* 86, at 93-94.

¹⁵⁷² Australian Chamber of Commerce and Industry, “Globalisation”, *ACCI Review No. 84*, February 2002.

This is not an easy task for some Asian nations. For Thailand, the challenges lie in certain traditional cultures that have played in Thai politics and society for a long time. When globalisation institutions demand changes in law and policy, it is not surprising to see some Thai people protest about the new global requirement. Challenges in relying on globalisation to promote the rule of law in Thailand also include the concerns about national sovereignty, regional policy coordination and the use of military power. While the momentum for globalisation increases, these challenges appear to blur the benefit which the rule of law gains through globalisation in both economic and political dimensions.¹⁵⁷³

5.4.2.1 Economic dimension and the rule of law

The origin of modern globalisation in the economic context can be traced as far back as 1944 to the establishment of the Bretton Woods system.¹⁵⁷⁴ The Bretton Woods system of monetary management established the rules for commercial and financial relations amongst the world's major industrial states.¹⁵⁷⁵ This system eventually applied to most Asian nations, including Thailand. The system was the first example of a fully negotiated monetary order intended to govern financial relations among independent nation states, subject to conditions on domestic law and policy.¹⁵⁷⁶ It is considered as the beginning of how economic globalisation has come to assist Asian nations in implementing and promoting the rule of law.¹⁵⁷⁷

¹⁵⁷³ Johannes Dragsbaek Schmidt, "Globalisation, Democratisation, and Labour Social Welfare in Thailand" in Johannes Dragsbaek Schmidt and Jacques Hersh (eds), *Globalisation and Social Change*, Routledge, London, 2000, at 158.

¹⁵⁷⁴ Paul R Krugman and Maurice Obstfeld, *International Economics: Theory and Policy*, 6th ed, Pearson Education Asia, China, 2004, at 546.

¹⁵⁷⁵ Manfred B Steger, *Globalisation: A Very Short Introduction*, Oxford University Press, Oxford, 2003, at 37.

¹⁵⁷⁶ Ross Buckley, "The Role of the Rule of Law in the Regulation of Global Capital Flows" in Spencer Zifcak (ed), *Globalisation and the Rule of Law*, Routledge Curzon, Oxford, 2005, at 140.

¹⁵⁷⁷ John Hewko, "Foreign Direct Investment: Does the Rule of Law Matter?", *Carnegie Endowment Working Papers* No. 26, Carnegie Endowment for International Peace, April 2002, at 3.

Economic globalisation and its effects on the rule of law arrived in Asia through certain international economic institutions that were established by the Bretton Woods delegates.¹⁵⁷⁸ These institutions include the World Trade Organisation (“WTO”), the World Bank (“WB”) and the International Monetary Fund (“IMF”). The fundamental requirement of these institutions is that member states must comply with certain criteria before these states are given financial assistance and the rule of law is one of the main criteria.¹⁵⁷⁹ Not only does a debtor state pay the interest on the loan, but also must carry out certain domestic reforms, including changes in domestic law and policy that assists in the implementation and promotion of the rule of law.¹⁵⁸⁰

One area where this is evident is the WB project on “Rule of Law and Development.”¹⁵⁸¹ Under the project, the rule of law index is created for each nation to measure the relationship between the rule of law and foreign investment. The logic of this index is that the stronger the rule of law becomes in an Asian nation, the more attractive that nation is for foreign investment and vice versa.¹⁵⁸² This index works on the basis that transparency and good governance follows from a stronger perception of the rule of law.¹⁵⁸³ This in turn, attracts foreign investment and trade, because of the increased

¹⁵⁷⁸ Steven B Kamin, “The Revived Bretton Woods System: Does It Explain Developments in Non-China Developing Asia?”, a paper presented at the Federal Reserve Bank of San Francisco Symposium on *The Revived Bretton Woods System: A New Paradigm for Asian Development*, 4 February 2004.

¹⁵⁷⁹ Harry G Johnson, “The International Monetary System and the Rule of Law” (1972) 15(2) *Journal of Law and Economics* 277, at 291.

¹⁵⁸⁰ Rosalyn Higgins, “International Law in a Changing International System” (1999) 58(1) *Cambridge Law Journal* 78, at 82.

¹⁵⁸¹ See World Bank, *Rule of Law and Development*

<<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20934363~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062,00.html>> (21 April 2009).

¹⁵⁸² The Worldwide Governance Indicators can be accessed via <<http://info.worldbank.org/governance/wgi/index.asp>> (24 April 2009).

¹⁵⁸³ Sachiko Morita and Durwood Zaelke, “Rule of Law, Good Governance, and Sustainable Development”, a conference proceeding presented at the 7th International Conference on *Environmental Compliance and Enforcement*, Morocco, 9-15 April 2005.

transparency of political and legal stability of the Asian nation. For this, economic globalisation creates the supportive mechanism for the rule of law.

Like the WB, the IMF also focuses on the rule of law index. It states that every additional point in the rule of law index for low-income Asian nations would increase growth by about two and a half percentage points each year.¹⁵⁸⁴ Foreign investors in Asia are generally aware of this figure and rate the prediction of the WB index as reliable and a good source of information in estimating stability.¹⁵⁸⁵ There are also other economic assessments which emphasise good governance as a main factor in influencing investor confidence.¹⁵⁸⁶ It is not unreasonable to state that if the investment climate continues to be positive, eventually the economic globalisation index will be considered as a major driving force for incentive of the rule of law.

However, in order to achieve this status as a major driving force, it is necessary that each Asian nation ensures that the structure of their legal system has passed the international standard. For some Asian nations, like Thailand, this requirement would involve some reform to the legal system.¹⁵⁸⁷ In terms of the influence of capital market, trade and investment, the reform needs to be capable of creating a predictable legal regime with fair, transparent and effective judicial institutions.¹⁵⁸⁸ Such capability was discussed at the International Commission of Jurists Conference in Cape Town. At the

¹⁵⁸⁴ Ari Aisen, "Determinants of Growth in Low-Income Asia", a paper presented at the conference *Policy and Challenges for Developing Asia- Perspectives from the IMF and Asia*, Tokyo, 19-20 April 2007.

¹⁵⁸⁵ Rosalyn Higgins, "International Law in a Changing International System" (1999) 58(1) *Cambridge Law Journal* 78, at 82.

¹⁵⁸⁶ Kaspar Richter, "Thailand's Growth Path: From Recovery to Prosperity", *World Bank Policy Research Working Paper* No. 3912, May 2006.

¹⁵⁸⁷ Carlos M Peláez and Carlos A Peláez, *Globalisation and the State: International Institutions, Finance, the Theory of the State and International Trade*, Palgrave Macmillan, Hampshire, 2008, at 110-156.

¹⁵⁸⁸ USAID, *Strengthening the Rule of Law & Respect for Human Rights* <http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/rule_of_law/> (29 April 2008).

Conference, it was pointed out that predictable legal regimes are of the utmost importance to the new market order.¹⁵⁸⁹

In response to the views of the Cape Town Conference and the Asian economic crisis in 1997, Thailand underwent substantive legal reform.¹⁵⁹⁰ This reform was initially focused on the alterations of the banking and finance law in Thailand.¹⁵⁹¹ Later, further amendments were made to the Thai Civil Procedural Code, Criminal Code and human rights legislation.¹⁵⁹² Even though the focus of the reform was to strengthen the market-based strategy to corporate debt restructuring and banking facilities, Thailand managed to alter some of its other laws in line with the notion of the rule of law. This includes including the enforcement of the 1997 Constitution which was labelled the best blueprint for decreasing arbitrary use of power by ruling elite.¹⁵⁹³

However, not all of these changes have been welcomed. Anti-globalisers in Thailand identified the following drawbacks of economic globalisation. Firstly, globalisation is the door that opens up Thailand to the exploitation of the international market and to the facilitation of the so-called “sweatshops”.¹⁵⁹⁴ These sweatshops are evident particularly in the clothing and textile industry in the rural regions of Thailand where labour is very inexpensive. Secondly, income inequality and the rise of children in the workforce are all seen as

¹⁵⁸⁹ Andrew Clapham, *Globalisation and the Rule of Law* <<http://www.reports-and-materials.org/Globalization-and-the-Rule-of-Law.htm>> (21 April 2008).

¹⁵⁹⁰ Stefan G Koeberle, “Public Sector Reform: A Post-Crisis Opportunity” in Peter Warr (ed), *Thailand Beyond the Crisis*, Routledge Curzon, London, 2005, at 187-207.

¹⁵⁹¹ Kewin Hewison, “After the Asian Crisis: Challenges to Globalisation”, an inaugural public lecture delivered at the Armidale Town Hall, New South Wales, 23 November 1999, at 8.

¹⁵⁹² *Thailand's Economic Reform*, Progress Report, January 1999.

¹⁵⁹³ Bidhya Bowornwathana, “Politics of governance Reform in Thailand” in Ali Farazmand (ed), *Handbook of Comparative and Development Public Administration*, Marcel Dekker, New York, 2001, at 432-433; International Monetary Fund, *Camdessus Welcomes Thai Decision to Sustain Reform Efforts without Further IMF Financing* <<http://www.imf.org/external/np/sec/nb/1999/nb9959.htm>> (28 April 2009).

¹⁵⁹⁴ Theodore H Moran, *Beyond Sweatshops: Foreign Direct Investment and Globalisation in Developing Countries*, The Brookings Institution, Washington D.C., 2002, at 88.

“spill-over” effects of globalisation.¹⁵⁹⁵ Thirdly, these anti-globalisers pleaded for the nationalist response to *save* the country and its businesses from economic globalisation and foreign control.¹⁵⁹⁶

In support of their argument, anti-globalisers pointed to a substantial number of Thai people who lost their life savings with the shares they invested prior to the 1997 financial crisis.¹⁵⁹⁷ A large number of local businesses became bankrupt.¹⁵⁹⁸ The energy, transportation and telecommunication industries were privatised in order to transfer the money to the foreign creditors who were main supporters of Thai economy.¹⁵⁹⁹ As a result, the law reform which was part of the obligation Thailand signed with the IMF allowed the foreign creditors to be able to “conveniently” receive repayment. The stability and predictability in law arguably became somewhat questionable. It was further argued that the changes in domestic law might have been made to serve foreign investors rather than the Thai people.¹⁶⁰⁰

Although there was no evidence to prove such a conspiracy, such views were shared throughout Thailand and in fact, across other Asian nations.¹⁶⁰¹ Ironically, the rule of law which is considered to have benefited from economic globalisation has been blurred with the painful experience of those

¹⁵⁹⁵ Wayne Ellwood, *The No-Nonsense Guide to Globalisation*, New Internationalist Publications, London, 2004, at 98.

¹⁵⁹⁶ Kevin Hewison, “Resisting Globalisation: A Study of Localism in Thailand” (2000) 13(2) *The Pacific Review* 279, at 285.

¹⁵⁹⁷ Kesinee Chutivichit, “The Fall of an Angel: A Social and Political Reflection Derived from Thai Short Stories Written During the 1997 Economic Crisis” (2005) 10 *Thammasat Review* 1 <<http://www.tu.ac.th/resource/publish/interview/vol10.html>> (29 April 2009).

¹⁵⁹⁸ Palin Poocharoen, “Relocation to Thailand: Two Case Studies” in Ludo Cuyvers (ed), *Globalisation and Social Development: European and Southeast Asian Evidence*, Edward Elgar Publishing Limited, Northampton, 2001, at 208.

¹⁵⁹⁹ Laurids S Lauridsen, “The Financial Crisis in Thailand: Causes, Conduct and Consequences?” (1998) 26(8) *World Development* 1575, at 1584.

¹⁶⁰⁰ Pasuk Phongpaichit and Chris Baker, *Thaksin: The Business of Politics in Thailand*, Silkworm Books, Chiang Mai, 2004, at 122.

¹⁶⁰¹ For example see, François Godement, *The Downsizing of Asia*, Routledge, London, 1999.

Thai people which lost out in the financial crisis of the late 1990s.¹⁶⁰² The scepticism of economic globalisation sparked a campaign of localism as nationalist agendas to resist to globalism.¹⁶⁰³ Those businessmen turn politicians who were financially survived the crisis have strategically transformed localism to be their political policy.¹⁶⁰⁴ Unfortunately, these politicians and their policy do not yield the positive effect to the rule of law and they took opposite stand to the political dimension of globalisation.

5.4.2.2 Political dimension and the rule of law

Globalisation in the economic context is not the only framework to promote the rule of law in Thailand. Indeed, globalisation in the political context is also fruitful. In some respects, it could be argued that globalisation in the non-economic context produces a better result as it avoids the undesirable “spill-over” effects of economic globalisation. For one reason, non-economic globalisation would avoid any conspiracy theory that the “West” through the IMF, the WB and the WTO, are attempting to exploit the economic resources of Thailand.¹⁶⁰⁵ For another, the political focus may have a better effect on the rule of law since political globalisation fundamentally deals with how political leaders use and misuse their political power.

Political globalisation refers to the intensification and expansion of political interrelations across the globe.¹⁶⁰⁶ It therefore involves the processes of the evolution of political arrangement and knowledge beyond the framework of

¹⁶⁰² Saneh Chamarik, *Thai Human Rights in Global Perspective* (in Thai), The Thai Research Fund, Bangkok, 2006, at 281-285.

¹⁶⁰³ Michael Kelly Connors, “Democracy and the Mainstreaming of Localism in Thailand” in Francis Loh Kok Wah and Joakim Öjendal (eds), *Southeast Asia Responses to Globalisation*, Nordic Institute of Asian Studies, Copenhagen, 2005, at 265-266.

¹⁶⁰⁴ Joakim Öjendal, “Democratisation amidst Globalisation in Southeast Asia: Empirical Findings and Theoretical Reflections” in Francis Loh Kok Wah and Joakim Öjendal (eds), *Southeast Asia Responses to Globalisation*, Nordic Institute of Asian Studies, Copenhagen, 2005, at 357-358.

¹⁶⁰⁵ Mahathir Mohamad, “Globalisation Not Suitable for All”, *Bangkok Post*, 18 July 1999.

¹⁶⁰⁶ Manfred B Steger, *Globalisation: A Very Short Introduction*, Oxford University Press, Oxford, 2003, at 56.

the nation-state. In other words, political globalisation is a shift from national government to multilayered governance which in turn forms transnational civil society.¹⁶⁰⁷ However, not every nation in Asia is able to capitalise on the opportunity in strengthening civil society. Little success has been achieved in nations like Burma where the people are still suffering from the brutality of the military dictatorship.¹⁶⁰⁸ Even the evolution of Thailand into a quasi-democratic nation resulted in many military interventions, which seem to flush away a rule-governed society based on the consent of citizens.¹⁶⁰⁹

While Thailand may not yet fully grasp every benefit of political globalisation, the country acknowledges that political globalisation does facilitate the rule of law.¹⁶¹⁰ The first facilitation is that Thailand is moving towards liberal democracy.¹⁶¹¹ Even if political globalisation does not equate to globalising democracy, liberal democracy gains more support from globalisation. And although democracy does not equate to the rule of law, the positive relationship between the two concepts is profound.¹⁶¹² One aspect is that true democracy maintains conditions so that citizens are free to criticise their government.¹⁶¹³ Any abuse of power in the government would be exposed and those who are corrupt may not be able to return to govern the country.

¹⁶⁰⁷ David Held, et al, *Global Transformations; Politics, Economic and Culture*, Stanford University Press, California, 1999, at 438.

¹⁶⁰⁸ Monique Skidmore, "Introduction: Burma at the Turn of the Twenty-First Century" in Monique Skidmore (ed), *Burma at the Turn of the Twenty-First Century*, University of Hawaii Press, Honolulu, 2005, at 7.

¹⁶⁰⁹ Mary Kalor, *Global Civil Society: An Answer to War*, Polity Press, Cambridge, 2003, at 1-2.

¹⁶¹⁰ Gordon Silverstein, "Globalisation and the Rule of Law: A Machine That Runs of Itself" (2003) 1(3) *International Journal of Constitutional Law* 427.

¹⁶¹¹ For example see, Sabino Cassese, "The Globalisation of Law" (2005) 37(4) *New York University Journal of International Law and Politics* 973.

¹⁶¹² Thomas Carothers, "The Rule of Law Revival" (1998) 77(2) *Foreign Affairs* 95, at 98.

¹⁶¹³ Ariadne Vromen and Katherine Gelber, *Powerscape*, Allen & Unwin, New South Wales, 2005, at 42.

The fact that democracy is spreading across Asia implies that there is a strengthening of the rule of law and nothing more.¹⁶¹⁴ There is even political discussion about the formation of an “international cosmopolitan democracy”.¹⁶¹⁵ This cosmopolitan democracy according to David Held would contain among other characteristics, a formal separation of political and economic interests and the use of transnational referenda.¹⁶¹⁶ For Thailand, the first characteristic would help lessen money politics which results in conflicts of interest and corruption while the second characteristic requires Thailand to fulfil international legal obligation such as international legal frameworks on human rights.

Originally, economic globalisation through inter-state trade was always a dominating factor in the development of international law which resulted in the gradual growth of trade treaties.¹⁶¹⁷ With the increase in trade across border, other issues surrounding trade treaties also emerge including condition or standard of living for people in a trade-partner state.¹⁶¹⁸ These processes raise an important set of issues pertaining to the principle of state sovereignty and how the people in such state are treated. As a result, international law develops a further pre-occupation with human rights and a country which fails

¹⁶¹⁴ Takeshi Inoguchi & Edward Newman, “Introduction: Asian Values and Democracy in Asia”, a conference proceeding on *The Future of the Asia – Pacific Region* organised by the Shizuoka Prefectural Government and the Organising Committee of the Asia – Pacific Forum, Japan, 28 March 1997.

¹⁶¹⁵ See generally, Montserrat Guibernau, “Globalisation, Cosmopolitanism, and Democracy: An Interview with David Held” (2001) 8(4) *Constellations* 427, at 430; Kanishka Jayasuriya, “Globalisation, Sovereignty, and the Rule of Law: From Political to Economic Constitutionalism?” (2001) 8(4) *Constellations* 442, at 457; Yassin El-Ayouty, Esq., *The Globalisation of the Rule of Law*, a paper presented in the Provost’s Lecture Series, State University of New York, New York, 15 May 2005.

¹⁶¹⁶ David Held, “Democracy and Globalisation” in Daniele Archibugi, David Held & Martin Köhler (eds), *Re-Imagining Political Community: Studies in Cosmopolitan Democracy*, Stanford University Press, California, 1998, at 25.

¹⁶¹⁷ Laurence Boulle, *The Law of Globalisation*, Bond University Press, Gold Coast, 2008, at 106.

¹⁶¹⁸ Robert McCorquodale and Richard Fairbrother, “Globalisation and Human Rights” (1999) 21 *Human Rights Quarterly* 735, at 742-743.

to comply with key human rights law has been economically and politically sanctioned.¹⁶¹⁹

Again, even though human rights and the rule of law are two separate ideologies, they have very close positive correlation.¹⁶²⁰ Human rights define the accepted values and standards of treatment of individuals and groups and thereby set the limits of state power. Similarly, the rule of law is concerned with the proper exercise of authority and power by the state. It stipulates the appropriate values and substantive standards for governance (such as transparency and accountability) and mandates certain processes in order to limit arbitrary use of power.¹⁶²¹ A nation which can fulfil human rights obligation is also a nation which can promote the rule of law as both concepts thrive on the principle of limit government.¹⁶²²

Through political globalisation, there are increasing numbers of member states to key human rights treaties.¹⁶²³ As an obligation to such treaties, a member state is required to be accountable for a human rights violation which is committed by a state agency.¹⁶²⁴ Political globalisation also raises the public awareness towards the exercise of state power in handling human rights disputes. Currently, Thailand is a party to seven key human rights treaties.¹⁶²⁵

¹⁶¹⁹ For example see, Morten B Pederden, *Promoting Human Rights in Burma*, Rowman and Littlefield, Maryland, 2008; Elizabeth D Gibbons, *Sanctions in Haiti: Human Rights and Democracy under Assault*, Praeger Publishers, Westport, 1999.

¹⁶²⁰ For example see, Randall Peerenboom, "Human Rights and Rule of Law: What's the Relationship?" (2005) 36(3) *Georgetown Journal of International Law* 809.

¹⁶²¹ "Human Rights and Rule of Law" <<http://www.uneca.org/agr2005/chap6.pdf>> (3 July 2009).

¹⁶²² Micheline Ishay, *The History of Human Rights: From Ancient Times to Globalisation Era*, University of California Press, California, 2008, at 3-4.

¹⁶²³ The information of whether a state is a part to one of the United Nations human rights treaties is available via the United Nations Human Rights Treaties website <<http://www.bayefsky.com/docs.php/area/ratif/node/1>> (12 December 2009).

¹⁶²⁴ Steven T Walther, "The Globalisation of the Rule of Law and Human Rights" (1999) 31 *Futures* 993, at 998-1003.

¹⁶²⁵ Thailand has ratified all seven treaties: (i) International Covenant on Economic, Social and Cultural Rights; (ii) International Covenant on Civil and Political Rights; (iii) International Convention on the Elimination of All Forms of Racial Discrimination; (iv) Convention on the Elimination of All Forms of Discrimination Against Women; and Convention on the Rights of the Child; (vi) Convention Against

Any violation of human rights is reported on a daily basis by both Thai and foreign media. This makes the public become more engaging with a violation of human rights especially one which is committed by an authority.¹⁶²⁶ The government is also pressured by international organisations to conduct a thorough investigation for those cases.¹⁶²⁷

While political globalisation has been a good supporter in strengthening the rule of law in Thailand, it is important to note that the rule of law can also be promoted in other contexts – not limiting to economic and political globalisation. This is because globalisation is the multi-faceted processes which impact social, cultural, ethical, ecological aspects of the world. For example, through cultural globalisation, the middle class in Thailand is moving away from the culture of being submissive to the authority.¹⁶²⁸ Facilitated by the internet and other technologies, they become more receptive to the idea of being equal and free as cultivated in the Western society.¹⁶²⁹ It is likely that the rule of law is accelerated by different aspects of globalisation.¹⁶³⁰ Yet, there remain a number of challenges for Thailand to overcome in order to truly garner the benefits of globalisation in promoting the rule of law.¹⁶³¹

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and (vii) Convention on the Rights of Persons with Disabilities.

¹⁶²⁶ “Two killed in Thailand’s Muslim South”, *Manager Online*, 17 March 2008

<<http://www.manager.co.th/Home/ViewNews.aspx?NewsID=9510000032422>> (11 March 2009).

¹⁶²⁷ International Crisis Group, *Thailand’s Emergency Decree: No Solution*, Asia Report No. 105, 18 November 2005 <<http://www.crisisgroup.org/home/index.cfm?id=3795>> (17 March 2009); Asian Human Rights Commission, *Thailand: Executive decree grants impunity to security forces in south of Thailand* <<http://www.ahrchk.net/ua/mainfile.php/2005/1190/>> (18 March 2009); International Commission of Jurists, *More power, less accountability: Thailand’s new emergency decree*, August 2005 <http://www.icj.org/IMG/pdf/More_power_less_acc0_D4033.pdf> (18 March 2009).

¹⁶²⁸ Soraj Hongladarom, “Democracy and Culture: A Case for Thailand”, a paper presented at the 7th East West Philosophers’ Conference, University of Hawaii, 8-20 January 1995.

¹⁶²⁹ Perry, et al, *Western Civilisation: Ideas, Politics, and Society Volume 2*, 9th ed, Houghton Mifflin Harcourt, Boston, 2008, at 592.

¹⁶³⁰ Randall Peerenboom, “Preface: Overview of Project Goals, Methodology, and Structure” in Randall Peerenboom (ed), *Asian Discourses of Rule of Law*, Routledge Curzon, London, 2004, at xix.

¹⁶³¹ Montserrat Guibernau, “Globalisation, Cosmopolitanism, and Democracy: An Interview with David Held” (2001) 8(4) *Constellations* 427, at 431.

5.4.3 Challenges in using globalisation to promote the rule of law

In order for Asia and countries like Thailand to truly benefit from the positive effects that globalisation has on the rule of law, it is necessary to recognise some of the challenges that lie ahead. Perhaps the greatest challenge for every single nation is to counter the undesirable effects that globalisation has on *national sovereignty*. While some Asian nations have chosen to embrace the global economy, the potential threat of international intervention or pressure remains a real concern for some countries. An example of this occurred after the 1997 economic crisis in many Asian countries, beginning from Thailand, where it was claimed that globalisation “forced” political and economic change and thus weakened the traditional role of the country.¹⁶³²

Indeed, the argument most put forward as evidence for the decline of state sovereignty is that globalisation has left its institutions or organisations such as the IMF, the WB and the WTO relatively independent of the power and control of nation-states.¹⁶³³ The fact that Thailand had to reform their law and policy to accommodate the IMF requirement created a strong sense that Thai sovereignty was controlled by the “outsider”.¹⁶³⁴ Even though the IMF requirement led to the better legal framework with the most welcomed 1997 Constitution, those who were affected by the crisis made their mind entirely against globalisation.¹⁶³⁵ The argument in Thailand went even further to blame globalisation as a cause in uprooting the independence of the country.¹⁶³⁶

¹⁶³² Rong Tang, “Describe the Anti-globalisation Movement and Identifying Its Motivation and Goals” (2007) 2(6) *International Journal of Business and Management* 137, at 141.

¹⁶³³ Tony Schirato and Jen Webb, *Understanding Globalisation*, Sage, London, 2003, at 106.

¹⁶³⁴ Nicola Bullard, Walden Bello, and Kamal Malhotra, “Taming the Tigers: The IMF and the Asian Crisis” (1998) 19(3) *Third World Quarterly* 505, Roda Mushkat, *International Environmental Law and Asian Values: Legal Norms and Cultural Influences*, University of British Columbia Press, Canada, 2004, at 107.

¹⁶³⁵ Pasuk Phongpaichit and Chris Baker, *Thaksin: The Business of Politics in Thailand*, Silkworm Books, Chiang Mai, 2004, at 17.

¹⁶³⁶ Thanong Khanthong and Vatchara Charoonsantikul, “The Day Thailand Lost Sovereignty to IMF”, 4 December 1997 <<http://thanong.tripod.com/120498.htm>> (12 December 2009).

As a result, it sparked the campaign of localism to counteract globalisation. The campaign criticised globalisation to subordinate Thailand to economic colonialism.¹⁶³⁷ Localism pointed out the importance of the rural community as an opposition to economic growth, urbanisation and industrialism.¹⁶³⁸ Although the campaign originally focused on the effect of economic globalisation, a local backlash against globalisation questionably undermined the concept of the rule of law. At that time, the ex Prime Minister Thaksin Shinawatra responded to the localism trend by crafting a political platform that made his government support for businesses recovering from the crisis.¹⁶³⁹ Yet, those businesses' owners who were among Thaksin's supporters were arguably able to benefit from the same policy.¹⁶⁴⁰

Anti-globalisers also link a localism agenda to a nationalist propaganda against globalisation. They contend that globalisation creates a homogenous Western or sometimes American culture around the world.¹⁶⁴¹ Similar to the debate of Asian values, opponents of globalisation generally equate globalisation with the resultant retraction or dismissal of local cultures.¹⁶⁴² Since originated in the Western society and circulated across the world by globalisation, human rights, democracy and the rule of law would contain the Western characteristic which does not reflect national or local cultures.¹⁶⁴³ In this way, the policy of

¹⁶³⁷ Duncan McCargo, "Populism and Reformism in Contemporary Thailand" (2001) 9(1) *South East Asia Research* 89.

¹⁶³⁸ Pasuk Phongpaichit, "Developing Social Alternatives: Walking Backwards into a Klong", a paper presented to the *Thai Update*, Australian National University, Canberra, 21 April 1999.

¹⁶³⁹ Chris Baker, "Pluto-populism: Thaksin and Popular Politics" in Peter Warr (ed), *Thailand Beyond the Crisis*, Routledge Curzon, London, 2005, at 107-137.

¹⁶⁴⁰ Pasuk Phongpaichit and Chris Baker, *Thaksin: The Business of Politics in Thailand*, Silkworm Books, Chiang Mai, 2004, at 98.

¹⁶⁴¹ Tom G Palmer, "Globalisation is Grrrrreat!" (2002) 1(2) *Cato's Letter* 1, at 4.

¹⁶⁴² Tony Schirato and Jen Webb, *Understanding Globalisation*, Sage, London, 2003, at 155.

¹⁶⁴³ Carol C Gould, "Negotiating the Global and the Local: Situating Transnational Democracy and Human Rights" in Deen K Chatterjee (ed), *Democracy in a Global World*, Rowman & Littlefield, Maryland, 2008, at 71-87; Robert McCorquodale and Richard Fairbrother, "Globalisation and Human Rights" (1999) 21 *Human Rights Quarterly* 735, at 740.

localism against globalisation could undermine the concepts of human rights, democracy and ultimately the rule of law in Thailand.¹⁶⁴⁴

However, not everyone believes that localism can offer a realistic alternative to negative impacts of globalisation.¹⁶⁴⁵ Certainly, not every Thai person is an anti-globaliser. With regard to the 1997 financial crisis, most do believe that it was caused largely from within.¹⁶⁴⁶ For now, fewer Asian nations including Thailand are less likely to reject globalisation entirely for the reason of “global intervention” and thus the decrease of “national sovereignty”. Nevertheless, the possibility of an Asian backlash (such as Asian values or localism) against globalisation remains. For globalisation to be globally welcomed, there is a need to understand what the real effect of globalisation is and how to adjust the national policy to handle such effect.¹⁶⁴⁷

A second major challenge for Asia in channeling the benefits of globalisation to the rule of law is that of *regional policy coordination*.¹⁶⁴⁸ As globalisation spreads and Asia becomes more closely integrated, each Asian nation has an increasing stake in the sound policies of the others.¹⁶⁴⁹ A good example of the regional policy coordination is that of Association of Southeast Asian Nations (“ASEAN”) in which Thailand is an original member. ASEAN recognises that for genuine economic cooperation to take place, it must first address the

¹⁶⁴⁴ Neil A Englehart, “Democracy and the Thai Middle Class: Globalisation, Modernisation, and Constitutional Change” (2003) 43(2) *Asian Survey* 253, at 277-279.

¹⁶⁴⁵ Kevin Hewison, “Resisting Globalisation: A Study of Localism in Thailand” (2000) 13(2) *The Pacific Review* 279, at 288.

¹⁶⁴⁶ Thitinan Pongsudhirak, “Globalisation and Its Thai Critics” in Yoichiro Sato (ed), *Growth and Governance in Asia*, Asia-Pacific Centre for Security Studies, Hawaii, 2004, at 44.

¹⁶⁴⁷ For example see, Wisarn Pupphavesa, “Globalisation and Social Development in Thailand”, a paper presented at the Conference on *Globalisation and Social Development: Perspectives from Asia and Europe*, Antwerp, 15-16 April 2002.

¹⁶⁴⁸ Michel Camdessus, “Globalisation and Asia: The Challenges for Regional Cooperation and the Implications for Hong Kong”, a speech addressed at a conference *Financial Integration in Asia and the Role of Hong Kong*, Hong Kong, 7 March 1997
<<http://www.imf.org/external/np/speeches/1997/mds9703.htm>> (12 September 2008).

¹⁶⁴⁹ For example see, Mark Lincicome, “Globalisation, Education and the Politics of Identity in the Asia-Pacific” (2005) 37(2) *Critical Asian Studies* 179.

existing development gaps in member states.¹⁶⁵⁰ Not surprisingly, the rule of law is one of the identifiable gaps which ASEAN required each member state to promote for economic advance in ASEAN as a whole.

When the former Prime Minister Thaksin Shinawatra declared his policy “war against Muslim separatists” in 2004, it appeared to receive full domestic support as well as coordination from the ASEAN members.¹⁶⁵¹ The reason is that Thailand has endured a serious Muslim insurgency problem in the four of its southern provinces for decades. The main objective of the insurgency is to separate those provinces from Thailand.¹⁶⁵² Government statistics and reports by various non-governmental sources show that violence has deepened dramatically in recent years with more frequent bombings and assassinations of innocent people.¹⁶⁵³ The situation is extremely disturbing trade and development between the border of Thailand and Malaysia.

However, the Thai government’s handling of the southern insurgency has relied almost exclusively on the use of force.¹⁶⁵⁴ It was criticised as a heavy-handed approach which intensified a new cycle of violence when the drastic actions of Thai state officials were met with violent responses from the separatists.¹⁶⁵⁵ The result pointed to a weakening in the rule of law and posed

¹⁶⁵⁰ Jenny D Balboa, Erlinda M Medalla and Josef T Yap, “Closer Trade and Financial Cooperation in ASEAN: Issues at the Regional and National Level with Focus on the Philippines” *Discussion Paper Series* No. 2007-03, Philippine Institute for Development Studies.

¹⁶⁵¹ “Thailand Islamic Insurgency” <<http://www.globalsecurity.org/military/world/war/thailand2.htm>> (23 December 2009).

¹⁶⁵² Kanid Utitsarn, *Insurgency in 3 Provinces in Southern Part of Thailand*, U.S. Army War College, 2007.

¹⁶⁵³ Aurel Croissant, “Muslim Insurgency, Political Violence, and Democracy in Thailand” (2007) 19 *Terrorism and Political Violence* 1, at 3.

¹⁶⁵⁴ Francesca Lawe-Davies, “A Silver Lining in Thailand’s Coup?”, a speech addressed at the Singapore Institute of Defence and Strategic Studies, Asia-Pacific Centre for Security Studies, 27 September 2009.

¹⁶⁵⁵ Chaiwat Satha-Anand, “Fostering Authoritarian Democracy: The Effect of Violent Solutions in Southern Thailand” in Vedi R Hadiz (ed), *Empire and Neoliberalism in Asia*, Routledge, New York, 2006, at 169-187.

a growing threat to the protection of human rights.¹⁶⁵⁶ Consequently, the Thai government was not able to escape the criticism from ASEAN. It was both Malaysia and Indonesia which expressed their concern over the Thai counter-insurgency measures.¹⁶⁵⁷ This was a constructive role in encouraging each member state to maintain its internal policy with respect to the rule of law.

Tied closely with the first and second challenges is the further issue of the effects that globalisation has on the increased internal tensions in Asian countries and the emergence of *new security threats* that will place unprecedented demands on local and regional militaries.¹⁶⁵⁸ After the September 11 attacks, the United States' military engagement in Asia has been on the rise.¹⁶⁵⁹ With the Muslim insurgency's base in Thailand, the United States has extended its military support to the Royal Thai Army.¹⁶⁶⁰ The exercise of Cobra Gold in February 2010 marks the twenty-ninth Anniversary of military training between two countries.¹⁶⁶¹ Yet, the increase of military power is a threat to having the military ruled nation as well as undermining the rule of law.

Some "spill-over" effects of this could range from military injustices to the local people in an Asian nation to the possibility of Asia being depart from the

¹⁶⁵⁶ Asian Legal Resource Centre, "Introduction: Rule of Law Versus Rule of Lords in Thailand" (2005) 4(2) *Article* 21, at 12.

¹⁶⁵⁷ Sutin Wannabovorn, "Muslim Insurgency Discusses at ASEAN Summit", 29 November 2004 <http://www.irrawaddy.org/article.php?art_id=4163> (23 December 2009).

¹⁶⁵⁸ Connie Fogal, *Globalisation: The Destruction of the Rule of Law*, Defence of Canadian Liberty Committee, Centre for Research on Globalisation, Canada, 21 November 2001 <<http://www.globalresearch.ca/articles/FOG111A.html>> (3 January 2010).

¹⁶⁵⁹ "Gates Delivers Keynote Address to Open Asia Security Conference" <<http://www.globalsecurity.org/military/library/news/2009/05/mil-090530-afps03.htm>> (21 December 2009).

¹⁶⁶⁰ Department of Defence, "Active Duty Military Personnel Strength by Regional Area and by Country", 30 September 2007 <<http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/hst0709.pdf>> (21 December 2009).

¹⁶⁶¹ Erica Knight, "Class Familiarises US, Thai Soldiers with Non-Lethal Weapons", 3 February 2010 <<http://www.army.mil/-news/2010/02/03/34132-class-familiarizes-us-thai-soldiers-with-non-lethal-weapons/>> (23 March 2010).

rule of law.¹⁶⁶² In Thailand, the evidence was not conclusive to military operations in the south. The Thai government also increased military and police power to tackle drug dealers along the northern border.¹⁶⁶³ The “war on drugs” policy while praised by many Thais was fiercely attacked by human rights watchers for giving police and soldiers a “licence to kill”.¹⁶⁶⁴ The statistics showed that this extra judicial killing is seven times more than the judicial execution in Thailand in the previous seven decades.¹⁶⁶⁵ The rise of military finally brought back the military coup and a military-appointed government to the country during 2006-2008.

5.4.4 CONCLUSION

It is generally accepted that globalisation is a viable vehicle for promoting the rule of law in Asia. It has the capacity, both in its economic and non-economic forms, to promote the concept of limit government. In saying this, each Asian nation should be aware of the challenges that lie ahead. Some of these challenges are often clouded or surpassed by more important political and economic issues. As a result, the rule of law is often not a priority for some Asian nations. For this, Asian values is sometimes used to reject globalisation and its positive correlation with human rights, democracy and ultimately the rule of law.

While Thailand seems to be aloof from Asian values polemic, there are many other challenges to overcome in order to truly harness the benefits that globalisation has on promoting the rule of law. The traditional Thai values

¹⁶⁶² Amnesty International, “Thailand: Stop Systematic Torture in Southern Counter Insurgency” <<http://www.amnesty.org/en/for-media/press-releases/thailand-stop-systematic-torture-southern-counter-insurgency-20090113>> (12 December 2009).

¹⁶⁶³ “The Billionaire Who Lost His Country”, *The First Post*, 6 February 2007 <<http://www.thefirstpost.co.uk/1966.news-comment.news-politics.the-billionaire-who-lost-his-country>> (2 January 2009).

¹⁶⁶⁴ Asian Human Rights Commission, *Rule of Law and Human Rights in Asia*, Human Rights Correspondence School, Hong Kong, 2006, at 55-58.

¹⁶⁶⁵ David T Johnson and Franklin E Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia*, Oxford University Press, New York, 2009, at 450.

such as patronage relationship are no doubt part of the problem. Globalisation can introduce Thailand to many characteristics of the rule of law and demonstrate how the concept applies in other parts of the world. Yet, to capitalise on the opportunities offered by globalisation, it requires adjustments to domestic policies, regulations, and laws as a means of bringing them onto conformity with common standards. With reform of laws and regulations is being undertaken, it is hoped that the rule of law has a brighter future in Thailand.

CHAPTER SIX

CONCLUDING THOUGHTS

Thailand is not a nation of destruction, plunder or anarchy. It has never been a casualty of civil war or foreign control. People are not being beaten or killed in the streets, nor are their basic human rights violated. Locals and foreigners can enter and exit the nation without undue restraint or fear of unlawful incarceration. Racism, oppression and violence are not the social norms of the nation. Neither is hatred, domination or tyranny part of the culture. The nation is far from being considered as one of aggression, nor is it on the verge of political collapse. Like most other nations around the world, the people of Thailand and their foreign guests are free to live their lives without the fear of abuse of arbitrary power.

On the other hand, Thailand is not a nation that is considered as perfect. In the past, there have been occasions where there has been judicial unrest, political turmoil and military rule. Sometimes peaceful protests turn into acts of violence and sometimes there is deadly retribution. Vote rigging, bribery and other forms of malpractice are still evident in the election arena. So too are the problems of occasional arbitrary governance and widespread corruption. Corruption in particular is so embedded in the daily routine of people's lives that it is often considered as a "normal" way of doing things. At times, it has penetrated several arms of the judiciary and even other independent institutions, some of which are designed to tackle this very thing.

None of this is to mention the most daunting fact of all which is that Thailand has changed its Constitution seventeen times. This, of course, is primarily due to the high degree of political instability and frequency of military coups faced by the nation. After successful coups, military regimes abrogate existing Constitutions and promulgated new ones. While it is argued that such action

is necessary to remove rogue leaders who cannot be removed by the normal process of law, it is not denied that the approach taken has not damaged the image of Thailand. This is most unfortunate. Indeed, each time a military coup occurs, whether bloodless or not, strikes a severe blow to the image and development of the rule of law in Thailand.

With all this in mind, there is no wonder why writers have often argued that Thailand is ruled by men instead of law. Who can blame them for drawing such a broad conclusion from convincing facts like these? At times of writing this thesis similar doubts also entered the writer's mind. Admittedly, some of these facts are considered as so damning that it is difficult to conclude the other way. The popular view is indeed the easy view. When contrasting that view with no other opposing view, it seems to be even more convincing. Indeed, the combined strength of the popular view is not only arguable, but persuasive. It points to an escapable conclusion that, at times, there appears to be little restraint on the exercise of arbitrary power in Thailand.

Yet, is it the right conclusion? It might seem to be, if there is only one side of the story is given. This is especially true when that story is unopposed and often repeated to the public. It is also true when the title and context of the story is highly controversial and emotive. At first glance, headlines which read words to the effect "Another bloodless coup in Thailand" or "Political crisis in Bangkok" automatically send an often familiar sub-conscious message to the reader. That message, being similar to the last message given, reinforces the presupposed position of Thailand. It is even easy to believe the message, if one has little knowledge or understanding of the culture and tradition of the nation or if one has never visited or lived in it.

Sociological context is most important here. This is something that is similar to the problem of anatomical reform to the rule of law. It too lacks analysis of

social context. It believes that the rule of law is something that is capable of export. In most modern cases, this is simply not true. History has shown more often than not that it is impractical to replace existing key institutions with foreign ones. Rule of law reform is now on its fourth wave and the results are still not satisfactory. This is despite the billions of dollars that are spent each decade on reforming nations all around the world. Anatomical thinking and its narrow focus on reforming the judiciary and other key institutions is generally not the right solution to develop the rule of law.

Reform of the judiciary and other key institutions is an organic process not conducive to easy or quick solutions. It is costly, time-consuming and highly complex. It involves the integration of many things that are both legal and non-legal. The rule of law is not just made up of lawyers, judges and other members of the legal fraternity. It is also a normative system that resides in the minds of every citizen in society. The perception of the law is equally important as the law itself. If no one knows, understands or has faith in the law, how can the law be meaningful? Indeed, the law will have little effect if no one has access to it or receives it. People need to interact with the law otherwise it would not be worth much more than the paper it is printed on.

It is for these reasons and others why this thesis adopted a *new approach* to examine the rule of law in Thailand. Such an approach appreciates all of the things mentioned above and more. It appreciates these things by integrating key influences on the rule of law, both legal and non-legal. In this thesis, the *new approach* was explained by way of answering the following three fundamental questions. *Why* do we seek it? *What* is it? *How* do we achieve it? The answer to these questions provided the methodology and focus for the remaining chapters of the thesis. The analysis provided in the remaining

chapters is admittedly not exhaustive, nor was it supposed to be. It was intended to merely provide a proper basis for this conclusion.

In reflecting on that analysis, it appears that the judiciary has generally performed well in the past. Since its establishment in 1997, the Constitutional Court has barred a number of corrupt politicians from re-entering into politics. Where there was evidence that a political party used an illicit tactic in an election, the Constitutional Court did not fail to dissolve the dishonest political party. Established roughly at the same time as the Constitutional Court, the Administrative Courts focus to use its constitutional power to find appropriate recourse for Thai citizens who seek legal redress against their government. Historically, such power was rested in the hand of the Council of State and it was the Prime Minister who could endorse or reject the decision of the Council of State.

Now, state agencies which illegally exercised their power are ordered to compensate the victims or have their orders revoked by the independent judiciary rather than by the Prime Minister. One recent survey has shown that public confidence towards the Administrative Courts is on the rise. For the oldest judicial institution, the Courts of Justice perhaps have the hardest task to maintain their integrity and independence. Partly, this is because the expansion of their jurisdiction by the 1997 Constitution. The Courts were given power to try and adjudicate controversial cases which concerned allegations of corruption and conflicts of interest among famous politicians.

This power is specifically assigned to the Criminal Division for Holders of Political Positions in the Supreme Court. The members of the NACC were among the early convictions where the Division found them committing malfeasance by giving themselves a salary rise. The most recent decision

probably physically and mentally shakes all the justices of the Division. It was a decision on 26 February 2010 to confiscate forty six billion baht of the former Prime Minister Thaksin Shinawatra. While there was tremendous pressure from the “red shirts” supporters of Thaksin, the panel of nine judges took turns to read aloud that his assets were gained illegally through conflicts of interest when he was Prime Minister.

Despite the “red shirts” vowing to take to the streets if the Court confiscated Thaksin’s assets, there was little sign of any mass protests after the decision was handed down. Who can blame the court for ruling against Thaksin? In the judgment, the Court made it clear which assets were from Thaksin’s abuse of power and which were not. In what is considered as a fair ruling, only “dishonest” parts of the assets were confiscated. After the 2006 Coup, the Thai judiciary became an instrument or a “playground” for both supporters and opponents of Thaksin. Yet, there has not been any concrete evidence which either side can bring down the integrity and independence of the Thai judiciary. More importantly, so far there is no violence from the street demonstrations. It seems that they themselves exercised their self restraint. The different colours of their shirts only symbolically represent their different political views and nothing more.

The thesis also analyses the functions of the other independent institutions which perform their duties as constitutional oversight bodies. Upon investigating the performance of the NACC, the EC, the NHRC, the OAG and the Ombudsman, it appears that each has achieved an admirable level of success in terms of rule of law enforcement. These organisations provide Thai citizens with an independent mechanism to investigate routine grievance against public bodies. Their presence also encourages a more open climate of public administration. The level of success is also evident from the reportedly

high degree of public satisfaction with the manner of investigations conducted by these independent institutions.

This is despite the fact that a number of these institutions, such as the NACC and the EC, have, on occasion, been criticised for misconduct and other forms of unprofessional behaviour. Admittedly, they are not immune to the “cancerous” spread of political corruption. In an attempt to maintain the “clean” image of these institutions, a great deal of effort has been placed into securing the independence of each institution. For example, the 2007 Constitution has adjusted and re-introduced a rigorous selection process and high eligibility criteria for appointments of Commissioners in each institution. It is expected that the above mentioned drawbacks would gradually disappear and thus allow these key institutions continue to play a pivotal role in protecting the Constitution and promoting the rule of law in Thailand.

The “new approach” in examining the rule of law further considered a selection of key sociological factors which influence the way the rule of law operates in Thailand. Those who believe that the rule of law is a matter of law and law only may oversee the importance of religion. Buddhism as the main religion in Thailand is not only a spiritual faith. Buddhism seeps into the way Thai people think and behave. In Thai society, Buddhist law of karma was used to describe why a corrupt politician must be punished. In the Code of Judicial Conduct, a judge is required to “follow the Buddhist teaching” and “a judge must not be greedy since it will lead to personal suffering”. During the time of election, it is common to hear the famous Buddhist monks urge their followers to carefully choose the candidates – the ones that will not abuse their power.

The King also appears to play a fundamental role in restraining the exercise of arbitrary power in Thailand. This is especially true for politics. While it is recognised that the King's ability to influence the government should be minimal, his contributions to the reduction of abuse of power and to the promotion of good governance should not be overly diluted. On a number of occasions, the intervention of the King is considered as necessary to ward off or prevent a political disaster or military coup. This has maintained the peace and stability of the political system and preserved the integrity of the Constitution. Such action by the King has helped restore trust and faith back into the government for the Thai people.

However, not all sociological influences have such a positive effect on the rule of law in Thailand. It is admitted that institutions such as the military have not done any favours for Thailand's image. Although military leaders continue to assert that there will be no more coups, the latest bloodless coup in September 2006 proved that such an assertion is disingenuous. Each time the military unlawfully intervening into politics, strikes a devastating blow for the rule of law in Thailand. This is even so, considering the argument that the coup was done in good faith to remove a corrupt leader, who cannot be removed by the law. The military intervention into Thai politics is indeed an unfortunate by-product of governance and should be condemned.

Even though there are soldiers who believe that their professionalism lies in maintaining peace in the country, they themselves were caught in politics by the government policy. As such, they were seen only as a tool of the government. The present situation in the southern part of Thailand is a classic example of this. When the government decided to take a heavy-handed approach to tackle the Muslim separatists, the military was ordered to toss grenades into a mosque. While many Thais did not criticise this heavy-handed

approach, because the separatists have killed innocent civilians on a daily basis, it caused worry among human rights watchers. It is an example like this which contributes to the reason as to why the military is considered to be a negative influence on the rule of law.

At the international level, such conduct by the Thai military is routinely condemned. However, some Asian nations, not particularly Thailand, tend to hide behind the protection of what has become known as the Asian values defence. This defence tends to reject the theory of globalisation and claim that Asian nations have their own unique set of values that should be respected. Traditions and culture of Asian nations should therefore not be replaced by Western ideologies. Yet, in many ways, Western ideologies such as globalisation have appeared to help promote the rule of law in Thailand. As a product of economic globalisation, part of the Thai legal system was overhauled after the 1997 financial crisis. The reform provided Thailand with more predictable legal regime and transparency in both public and private sectors.

So, where does the analysis of the *new approach* leave Thailand? Do the negative influences on the rule of law outweigh the positive ones? In other words, is the rule of law in Thailand really a *fact* or *fiction*? The answer to this question is that Thailand is governed by the rule of law – one that is unique to Thailand. On balance, the nation does have a functional judiciary and other institutions which appear to be performing well and respected by the Thai people. This is especially true in light of their sociological context. Generally, the law is abided by and enforced when required. Despite the recent “different colours of shirts” demonstrations and political unrest, the level of abuse of arbitrary power has been kept to a minimal and is not considered as high enough to label Thailand a nation that is ruled by *men* and not by *law*.

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