

Chapter 3: Popular Participation Under the Coustitution

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CHAPTER 3

POPULAR PARTICIPATION UNDER THE CONSTITUTION

I: Introduction

Since the political transformation from the absolute monarchy to the constitutional monarchy, Thailand has had 15 constitutions, with a varied extent of political participation being catered for thereunder. The democratic regime of the country is generally classified as the *representative democracy*, by which the people have had no political power to take part in political activities except in a general election of members of the House of Representatives¹. Some constitutions recognised the people's right to participate, in some form, in the exercise of the sovereignty, for example, the Constitution of the Kingdom of Thailand B.E. 2492 (1949), the Constitution of the Kingdom of Thailand B.E. 2511 (1968) and the Constitution of the Kingdom of Thailand B.E. 2517 (1974). These constitutions conferred on the King the prerogative to call for a referendum for the purpose of approving the draft Constitution Amendments. However, in fact, no referendum took place for that very purpose. Until now, the popular political participation in Thailand has been visualised in the form of casting votes in general elections and participating in demonstrations that even led to series of political violences.

The representative democracy in Thailand has reflected a number of weaknesses ranging from the instability of the government to corruption, lack of political vision and transparency deficiency. These weaknesses have led to the non-democratic and unconstitutional form of political change, that is, the coup d'état². Thus, efforts are enshrined in the current constitution to unravel the problems. One of the solutions is to ameliorate popular political participation by framing the constitution in the direction of facilitating more participatory democracy. To this end,

¹ Amorn Chandara-Somboon, "*The Election Day: The 'Final Chapter' or the 'Introductory Chapter' and After the Democracy*", Essays on Legal Structures and Mechanisms of the Constitution, Bangkok: the Institute of Policy Studies, 1992, p. 68.

² Amorn Raksasat, "*Introduction: the Government and the People*", Thai Government and Politics under the Popular Constitution, Bangkok: V. J. Press, 2001, p. 15.

there have been established measures with regard to the referendum, the people's right to propose a Bill and to remove key persons from office. Furthermore, supervisory systems by means of qualified persons have also been introduced.³ In effect, in the process of drafting the current Constitution, a public hearing was actually conducted for comments on the draft as prepared by members of the Constituent Assembly, who were indeed indirectly elected by the people. Thus, the current Constitution emerges as a fruit of the people's mutual assent and sense of belonging. The people agree to abide by this national charter.⁴

Several chapters and sections in the current Constitution recognise the popular political participation. New rights, that have found no precedented recognition under previous Constitutions, are proclaimed by the present Constitution. Given that the rights and liberties as recognised by the current Constitution are directly binding upon the National Assembly, the Council of Ministers, Courts and other State organs in enacting, applying and interpreting laws, it follows, therefore, that the Thai people can invoke such rights and liberties regardless of whether or not subordinate laws are subsequently enacted to accommodate them (section 27⁵). The Chapter on Directive Principles of Fundamental State Policies states that the State shall promote and encourage public participation in laying down policies, making decisions on political issues, preparing economic, social and political development plans, and inspecting the exercise of State powers at all levels (section 76) and that the State shall promote and encourage public participation in the preservation and the protection of the natural resources and the environment (section 79⁶). The

³ Anek Laothammathat, "*Self-Determination Democracy*", Thai Folkway: An Essay in Commemoration of A Century of Predee Panomyong, Series 2, Political Thoughts, Bangkok: Children Foundation Press, 2001, pp. 5 - 6.

⁴ Bowornsak Uwano, Good Governance in Thai Society, Bangkok, Duantula Press, 1999, pp. 92 – 93.

⁵ **Section 27:** Rights and liberties recognised by this Constitution expressly, by implication or by decisions of the Constitutional Court shall be protected and directly binding on the National Assembly, the Council of Ministers, Courts and other State organs in enacting, applying and interpreting laws.

⁶ **Section 79:** The State shall promote and encourage public participation in the preservation, maintenance and balanced exploitation of natural resources and biological diversity and in the promotion, maintenance and protection of the quality of the environment in accordance

provisions of this Chapter are apparently intended to serve as directive principles for preparing legislation and determining policies for the administration of the State affairs. In this connection, the Council of Ministers that will assume the administration of the State affairs is also required to make a clear statement to the National Assembly as regards the activities it intends to carry out in the implementation of the constitutional directive principles. The Cabinet must as well prepare and submit to the National Assembly an annual report on the result of the implementation, including problems and obstacles encountered (section 88). As a result, any government which will assume the administration of the State affairs must take action in accordance with the directive principles of fundamental State policies as provided in the section 76 and the section 79 above⁷.

As the Constitution recognises the popular political participation as ‘the civil right’ of the Thai People, it thus follows that only Thai citizens can be the holders of this right. Other rights of popular participation, other than those recognised as the rights of the Thai people, can be exercised by non-Thai citizens as provided by law. Obviously, the rights of the popular participation embodied in the current Constitution reflect the individualism ideology. However, the holders of the rights of the popular participation under the present Charter range from the private individual, the group of persons, the traditional community to the local government organisation. This diversity regarding the holders of rights of popular participation is, in effect, consistent with the customs of Thai society, leading, in turn, to efficacy in the administration of state affairs as a whole. Moreover, the Constitution strives to lay down measures and mechanisms for protecting and safeguarding the rights and liberties of the people by spelling out duties of the state in various respects in order that the people can appropriately take part in the tasks of the state in line with the spirits of the Constitution.

with the persistent development principle as well as the control and elimination of pollution affecting public health, sanitary conditions, welfare and quality of life.

⁷ Parinya Dhavanarumitkul, “The Popular Political Participation under the New Constitution and the Direct Democracy”, *The Administrative Law Journal*, Vol. 17, Part 2, 1998, p. 63.

To understand the ideas underlying the recognition of the right of the popular political participation in the current Constitution, the following three aspects need to be closely examined, viz, (1) the popular participation in respect of the holder of the right, (2) the exercise of the right of the popular participation and the duty of the State, and (3) measures and mechanisms facilitating effective and practical popular participation. All this will be dealt with in turn.

II: Popular Participation in Respect of the Right Holders

According to the current Constitution, the holder of the right of the popular political participation can be classified into four categories: 1) a private individual, (2) a group of persons, (3) a local community, and (4) a local government organisations.

1. The Right of the Popular Participation Exercisable by Private Individuals

Rights to participate in political activities may be exercised by the individual as such. This is the fundamental mode of exercising rights. Each individual person can take part in political and administrative activities and in the inspection of the exercise of state powers.

1.1 The Rights and Liberties to Participate in Political Activities and in the Administration

An analysis of provisions of the Constitution reveal that any person can enjoy the following rights and liberties to take part in political and administrative affairs: the right and liberty to assemble peacefully and without arms (section 44⁸), the right and liberty to unite and form an association or organisation (section 45⁹), the right

⁸ **Section 44:** A person shall enjoy the liberty to assemble peacefully and without arms.

The restriction on such liberty under paragraph one shall not be imposed except by virtue of the law specifically enacted for the case of public assembling and for securing public convenience in the use of public places or for maintaining public order during the time when the country is in a state of war, or when a state of emergency or martial law is declared.

⁹ **Section 45:** A person shall enjoy the liberty to unite and form an association, a union, league, co-operative, farmers' group, private organisation or any other group.

and liberty to unite and form a political party (section 47¹⁰), right and liberty in preservation and protection of natural resources and environment (section 56¹¹), right to get access to public information (section 58¹²), right in public hearing

The restriction on such liberty under paragraph one shall not be imposed except by virtue of the law specifically enacted for protecting the common interest of the public, maintaining public order or good morals or preventing economic monopoly.

¹⁰ **Section 47:** A person shall enjoy the liberty to unite and form a political party for the purpose of making political will of the people and carrying out political activities in fulfilment of such will through the democratic regime of government with the King as Head of the State as provided in this Constitution.

The internal organisation, management and regulations of a political party shall be consistent with fundamental principles of the democratic regime of government with the King as Head of the State.

Members of the House of Representatives who are members of a political party, members of the Executive Committee of a political party, or members of a political party, of not less than the number prescribed by the organic law on political parties shall, if of the opinion that their political party's resolution or regulation on any matter is contrary to the status and performance of duties of a member of the House of Representatives under this Constitution or contrary to or inconsistent with fundamental principles of the democratic regime of government with the King as Head of the State, have the right to refer it to the Constitutional Court for decision thereon.

In the case where the Constitutional Court decides that such resolution or regulation is contrary to or inconsistent with fundamental principles of the democratic regime of government with the King as Head of the State, such resolution or regulation shall lapse.

¹¹ **Section 56:** The right of a person to give to the State and communities participation in the preservation and exploitation of natural resources and biological diversity and in the protection, promotion and preservation of the quality of the environment for usual and consistent survival in the environment which is not hazardous to his or her health and sanitary condition, welfare or quality of life, shall be protected, as provided by law.

Any project or activity which may seriously affect the quality of the environment shall not be permitted, unless its impacts on the quality of the environment have been studied and evaluated and opinions of an independent organisation, consisting of representatives from private environmental organisations and from higher educational institutions providing studies in the environmental field, have been obtained prior to the operation of such projects or activity, as provided by law.

The right of a person to sue a State agency, State enterprise, local government organisation or other State authority to perform the duties as provided by law under paragraph one and paragraph two shall be protected.

¹² **Section 58:** A person shall have the right to get access to public information in possession of a State agency, State enterprise or local government organisation, unless the disclosure of such information shall affect the security of the State, public safety or interests of other persons which shall be protected as provided by law.

(section 59¹³), right to participate in the decision-making process of State officials in the performance of administrative functions which affect or may affect the individual's own rights and liberties (section 60¹⁴), right to resist peacefully the coup d' état (section 65¹⁵), right to submit a Bill with votes of not less than fifty thousand in number (section 170¹⁶), right to remove persons from office in local government organisations (section 286¹⁷), and right to submit local ordinances (section 287¹⁸).

¹³ **Section 59:** A person shall have the right to receive information, explanations and reasons from a State agency, State enterprise or local government organisation before permission is given for the operation of any project or activity which may affect the quality of the environment, health and sanitary conditions, the quality of life or any other material interest concerning him or her or a local government and shall have the right to express his or her opinion on such matters in accordance with the public hearing procedure, as provided by law.

¹⁴ **Section 60:** A person shall have the right to participate in the decision-making process of State officials in the performance of administrative functions which affect or may affect his or her rights and liberties, as provided by law.

¹⁵ **Section 65:** A person shall have the right to resist peacefully any act committed for the acquisition of the power to rule the country by a means which is not in accordance with the modes provided in this Constitution.

¹⁶ **Section 170:** The persons having the right to vote of not less than fifty thousand in number shall have a right to submit a petition to the President of the National Assembly to consider such law as prescribed in Chapter 3 and Chapter 5 of this Constitution.

A bill must be attached to the petition referred to in paragraph one.

The rules and procedure for the petition and the examination thereof shall be in accordance with the provisions of the law.

¹⁷ **Section 286:** If persons, having the right to vote in an election in any local government organisation, of not less than three-fourths of the number of the voters who are present to cast ballot consider that any member of the local assembly or any administrator of that local government organisation is not suitable to remain in office, such member or administrator shall vacate the office, as provided by law.

The voting under paragraph one shall be made by not less than one-half of the total number of the persons having the right to vote.

¹⁸ **Section 287:** Persons, having the right to vote in any local government organisation, of not less than one-half of the total number of the persons having the right to vote in that local government organisation shall have the right to lodge with the President of the local assembly a request for the issuance by the local assembly of local ordinances.

The request under paragraph one shall be accompanied by the draft local ordinances.

The rules and procedure for the lodge of request and the examination thereof shall be as provided by law.

1.2 The Rights and Liberties to Participate in the Inspection of the Exercise of State Powers

Under the Constitution, the rights and liberties to take part in the inspection of the exercise of State powers include the right to bring a lawsuit in the event where the individual's rights or liberties as recognised by the Constitution are violated (section 28¹⁹, paragraph two), the right to sue a State agency, State enterprise, local government organisation or other State authority to perform the duties as provided by law (section 56²⁰ paragraph three), the right to present a petition (section 61²¹), right to sue a State agency, State enterprise, local government organisation or other State authority which is a juristic person to be liable for an act or omission (section 62²²), the right to request State officials or their superiors to explain reasons and act

¹⁹ **Section 28:** A person can invoke human dignity or exercise his or her rights and liberties in so far as it is not in violation of rights and liberties of other persons or contrary to this Constitution or good morals.

A person whose rights and liberties recognised by this Constitution are violated can invoke the provisions of this Constitution to bring a lawsuit or to defend himself or herself in the court.

²⁰ **Section 56:** The right of a person to give to the State and communities participation in the preservation and exploitation of natural resources and biological diversity and in the protection, promotion and preservation of the quality of the environment for usual and consistent survival in the environment which is not hazardous to his or her health and sanitary condition, welfare or quality of life, shall be protected, as provided by law.

Any project or activity which may seriously affect the quality of the environment shall not be permitted, unless its impacts on the quality of the environment have been studied and evaluated and opinions of an independent organisation, consisting of representatives from private environmental organisations and from higher educational institutions providing studies in the environmental field, have been obtained prior to the operation of such project or activity, as provided by law.

The right of a person to sue a State agency, State enterprise, local government organisations or other State authority to perform the duties as provided by law under paragraph one and paragraph two shall be protected.

²¹ **Section 61:** A person shall have the right to present a petition and to be informed of the result of its consideration within the appropriate time, as provided by law.

²² **Section 62:** The right of a person to sue a State agency, State enterprise, local government organisation or other State authority which is a juristic person to be liable for an act or omission done by its Government official, official or employee shall be protected, as provided by law.

in compliance with law (section 70, paragraph three²³), and the right with voters of not less than fifty-thousand in number to request the Senate to remove persons from political positions (section 304²⁴).

2. The Right of the Popular Participation Exercisable by Groups of Persons

Certain rights afforded to individuals under the current Constitution also fall under conditions, whereby private individuals, rather than exercising their rights in their own capacity, will have to do so collectively or in collaboration with others. These rights include the right and liberty to unite and form an independent organisation to present opinions evincing environmental impacts assessment for a project or activity that may seriously affect the quality of the environment (section 56, paragraph two), the right to unite and form an independent organisation to present opinions on consumer protection (section 57²⁵), the right to be member of

²³ **Section 70:** A Government official, official or employee of a State agency, State enterprise or local government organisation and other State official shall have a duty to act in compliance with the law in order to protect public interest, and provide convenience and services to the public.

In performing the duty and other acts relating to the public, the persons under paragraph one shall be politically impartial.

In the case where the persons under paragraph one neglect or fail to perform the duties under paragraph one or paragraph two, the interested person shall have the right to request the persons under paragraph one or their superior to explain reasons and request them to act in compliance with the provisions of paragraph one or paragraph two.

²⁴ **Section 304:** Members of the House of Representatives of not less than one-fourth of the total number of the existing members of the House or voters of not less than fifty-thousand in number have the right to lodge with the President of the Senate a complaint in order to request the Senate to pass a resolution under section 307 removing the persons under section 303 from office. The said request shall clearly itemise circumstances in which such persons have allegedly committed the act.

Senators of not less than one-fourth of the total number of the existing members of the Senate have the right to lodge with the President of the Senate a complaint in order to request the Senate to pass a resolution under section 307 removing a senator from office.

The rules, procedure and conditions for the lodging of the complaint by the voters under paragraph one shall be in accordance with the organic law on counter corruption.

²⁵ **Section 57 :** The right of a person as a consumer shall be protected as provided by law.

The law under paragraph one shall provide for an independent organisation consisting of representatives of consumers for giving opinions on the enactment and

the National Economic and Social Council (section 89²⁶), the right to initiate and propose a bill (section 170), the right to remove persons from local government organisations (section 286), the right to propose local ordinances (section 287), the right to request the Senate to remove persons from political positions (section 304).

3. The Popular Participation Exercisable by Local Communities

For a local community to enjoy the right of the popular participation, it is necessary that residents of that local community assemble as a traditional community. Once a traditional community is formed, it shall, under the Constitution, have the right to conserve or restore their customs, local knowledge, arts or good culture and participate in the management of natural resources and the environment (section 46²⁷).

4. The Popular Participation Exercisable by Local Government Organisations

The concept of the popular participation exercisable by a local government organisation aims to promote the self-government democracy. Unlike the popular participation exercisable by local communities above, this philosophy is not a novelty; it has, in effect, been embedded in several former constitutions. The current Constitution attempts to put forward more independent and participatory local government organisations by recognising a number of rights that each local

issuance of law, rules, and regulations and on the determination of various measures for consumers protections.

²⁶ **Section 89:** For the purpose of the implementation of this Chapter, the State shall establish the National Economic and Social Council to be charged with the duty to give advice and recommendations to the Council of Ministers on economic and social problems.

A national economic and social development plan and other plans as provided by law shall obtain opinions of the National Economic and Social Council before they can be adopted and published.

The composition, source, powers and duties and the operation of the National Economic and Social Council shall be in accordance with the provision of law.

²⁷ **Section 46:** Persons so assembling as to be a traditional community shall have the right to conserve or restore their customs, local knowledge, arts or good culture of their community and of the nation and participate in the management, maintenance, preservation and exploitation of natural resources and the environment in a balanced fashion and persistently as provided by law.

government organisation may exercise. Towards this direction, local government organisations have autonomy in laying down policies for their governance, administration, personnel administration and finance and have powers and duties particularly on their own part (section 284²⁸ paragraph one). In addition, they have the right to form the Local Officials Committee (section 288²⁹), the right to provide

²⁸ **Section 284:** All local government organisations shall enjoy autonomy in laying down policies for their governance, administration, personnel administration, finance and shall have powers and duties particularly on their own part.

The delineation of powers and duties between the State and a local government organisation and among local government organisations themselves shall be in accordance with the provisions of the law, having particular regard to the promotion of decentralisation.

For the purpose of the continual development of decentralisation to a higher level, there shall be the law determining plans and process of decentralisation, the substance of which shall at least provide for the following matters:

(1) the delineation of powers and duties in the management of public services between the State and a local government organisation and among local government organisations themselves;

(2) the allocation of taxes and duties between the State and a local government organisation, having regard to burdens of the State *vis-a-vis* the local government organisation and those among local government organisations themselves;

(3) the setting up of a committee to perform the duties in (1) and (2) consisting, in an equal number, of representatives of relevant Government agencies, representatives of local government organisations and qualified persons possessing the qualifications as provided by law.

In the case where the delineation of powers and duties and the allocation of taxes and duties under (1) and (2) have been made for any local government organisation, the committee under (3) shall review them every five years as from the date of the delineation of powers and duties or the date of the allocation of taxes and duties, as the case may be, in order to consider the suitability of the delineation of powers and duties and the allocation of taxes and duties previously made, having particular regard to the promotion of decentralisation.

The proceeding under paragraph four shall be effective when the approval of the Council of Ministers has been obtained and the National Assembly has been notified thereof.

²⁹ **Section 288:** The appointment and removal of officials and employees of a local government organisation shall be in accordance with the need of and suitability of each locality and shall obtain prior approval from the Local Officials Committee, as provided by law.

The Local Officials Committee under paragraph one shall consist, in an equal number, of representatives of relevant Government agencies, representatives of local government organisations and qualified persons possessing the qualifications as provided by law.

education and professional training in accordance with the suitability to and the need of the locality (section 289³⁰) and the right to promote and maintain the quality of the environment in the locality and to participate in the preservation of natural resources and environment outside the area of the locality only in the case where the livelihood of the inhabitants in the area may be affected.

III. The Exercise of the Right of the Popular Participation Analysed by Reference to the Duty of the State

Based on the classical German-style classification, the right of the popular participation considered by reference to the duty of the state can be divided into three types, namely, (1) the right as the individual liberty (*status negativus*), (2) the right enjoyable only when the state creates it (*status positivus*) and (3) the right to participate in the exercise of state powers or to create the political will (*status activus*).³¹ Let us explain these rights in more detail below.

1. The Right as the Individual Liberty (*status negativus*)

The ‘right as the individual liberty’ signifies such right as may be enjoyed by a private individual with his or her own will, without any action of the state. Given that an individual is bestowed the right at the outset, the individual is to be protected against violation or restriction of such right by any action of the state. In the case where the right is intervened or violated by the state, the individual may seek remedies from the state.

The transfer, promotion, increase of salaries and the punishment of the officials and employees of a local government organisation shall be in accordance with the provisions of the law.

³⁰ **Section 289:** A local government organisation has the duty to conserve local arts, custom, knowledge or good culture.

A local government organisation has the right to provide education and professional training in accordance with the suitability to and the need of that locality and participate in the provision of education and training by the State; provided that it shall not be contrary to section 43 and section 81, as provided by law.

In providing education and training in the locality under paragraph two, the local government organisation shall also have regard to the conservation of local arts, custom, knowledge and good culture.

The rights that rest upon the ‘*status negativus*’ class and bear relevance to the popular participation include the right to express opinions (section 39³²), the right to assemble peacefully and without arms and the right to unite and form an association or an organisation (section 45).

2. The Right Enjoyable Only Upon Creation by the State (*status positivus*)

This category explicates such right the exercise of which is not possible in the absence of some action by the state with respect to the right. Rights of this kind are generally the right to demand some state action and the right to take legal proceedings.

As far as the popular participation is concerned, under the Constitution, the *status positivus* category of rights include right to get access to public information (section 58) and right to participate in the decision-making process of State officials in the performance of administrative functions which affect or may affect the individual rights and liberties (section 60).

3. The Right to Participate in the Exercise of State Powers or to Create the Political Will (*status activus*).

³¹ Banjerd Sinkhaneti, *Fundamentals of Rights and Liberties and Human Dignity under the New Constitution*, Bangkok: Winyoochon Press, 2000, pp. 48 – 49.

³² **Section 39:** A person shall enjoy the liberty to express his or her opinions, make speeches, write, print, publicise, and make expression by other means.

The restriction on liberty under paragraph one shall not be imposed except by virtue of the provisions of the law specifically enacted for the purpose of maintaining the security of the State, safeguarding the rights, liberties, dignity, reputation, family or privacy rights of other person, maintaining public order or good morals or preventing the deterioration of the mind or health of the public.

The closure of a pressing house or a radio or television station in deprivation of the liberty under this section shall not be made.

The censorship by a competent official of news or articles before their publication in a newspaper, printed matter or radio television broadcasting shall not be made except during the time when the country is in a state of war or armed conflict; provided that it must be made by virtue of the law enacted under the provisions of paragraph two.

The owner of a newspaper or other mass media business shall be a Thai national as provided by law.

No grant of money or other properties shall be made by the Senate as subsidies to private newspaper or other mass media.

This type of right is recognised by law as the “civil right”. Only Thai citizens can exercise the right to participate in the exercise of state powers or to create the political will. This class of rights ranges from the right to cast a vote in a general election, the right to become candidate in an election, the right to form a political party or to have direct participation.

A survey through the Constitution reveals that this type of right encompass the right to elect members of the House of Representatives (section 104³³ and section 105³⁴), the right to elect Senators (section 123³⁵ and section 124³⁶), the right

³³ **Section 104:** In a general election, a voter shall have the right to cast ballot for only one list of candidates prepared by the political party and, in an election on a constituency basis, for one candidate in that constituency.

In an election of a member of the House of Representatives to replace the member of the House of Representatives elected on a constituency basis whose office becomes vacant under section 119 (2), a voter shall have the right to cast ballot for one candidate in that constituency.

The election shall be by direct suffrage and secret ballot.

In each constituency, the counting of votes from every polling station altogether shall be conducted and the result of the vote-counting shall be announced publicly at any single place in that constituency as designated by the Election Commission, except that in the case where necessity arises in a particular locality, the Election Commission may provide otherwise in accordance with the organic law on the election of members of the House of Representatives and senators.

The provisions of paragraph four shall apply *mutatis mutandis* to the counting and announcement of votes received by each party-list in each constituency under section 103.

³⁴ **Section 105:** A person having the following qualifications has the right to vote at an election:

(1) being of Thai nationality; provided that a person who has acquired Thai nationality by naturalisation must hold the Thai nationality for not less than five years;

(2) being not less than eighteen years of age on 1st January of the year of the election; and

(3) having his or her name appear on the house register in the constituency for not less than ninety days up to the date of the election.

A voter who has a residence outside the constituency under section 103 within which his or her name appear in the house register, or who has his or her name appear in the house register in the constituency for the period of less than ninety days up to the date of the election, or who has a residence outside the Kingdom of Thailand shall have the right to cast ballot in an election in accordance with rules, procedure and conditions provided by the organic law on the election of members of the House of Representatives and senators.

³⁵ **Section 123:** The person having the right to vote at an election of senators may cast ballot, at the election, for one candidate in that constituency.

to become a candidate for a general election of members of the House of Representatives (section 107³⁷), the right to become a candidate for an election of Senators (section 125³⁸), the right to form a political party (section 47), the right

The election shall be by direct suffrage and secret ballot.

In the case where a *Changwat* can have more than one senator, the candidates who receive the highest number of votes in respective order in the number of senators that the *Changwat* can have shall be elected as senators.

³⁶ **Section 124:** The provisions of section 105 and section 106 shall apply *mutatis mutandis* to the qualifications and prohibitions to which a person having the right to be a candidate in an election of senators shall be subjected.

³⁷ **Section 107:** A person having the following qualifications has the right to be a candidate in an election of members of the House of Representatives:

- (1) being of Thai nationality by birth;
- (2) being not less than twenty five years of age on the election day;
- (3) having graduated with not lower than a Bachelor's degree or its equivalent except for the case of having been a member of the House of Representatives or a senator before;
- (4) being a member of any and only one political party, for a consecutive period of not less than ninety days, up to the date of applying for candidacy in an election;
- (5) a candidate in an election on a constituency basis shall also possess any of the following qualifications:
 - (a) having his or her name appear in the house register in *Changwat* where he or she stands for election for a consecutive period of not less than one year up to the date of applying for candidacy;
 - (b) having been a member of the House of Representatives in *Changwat* where he or she stands for election, a member of a local assembly or a local administrator of such *Changwat* before;
 - (c) being born in *Changwat* where he or she stands for election;
 - (d) having studied in an educational institution situated in *Changwat* where he or she stands for election for a consecutive period of not less than two academic years before;
 - (e) having served in the official service before or having had his or her name appear in the house register in *Changwat* where he or she stands for election for a consecutive period of not less than two years before.

³⁸ **Section 125:** A person having the following qualifications has the right to be a candidate in an election of senators:

- (1) being of Thai nationality by birth;
- (2) being of not less than forty years of age on the election day;
- (3) having graduated with not lower than a Bachelor's degree or its equivalent;
- (4) having any of the qualifications under section 107 (5).

with votes of not less than 50,000 in number to present a bill (section 170), the right to participate in a referendum (section 214³⁹), the right with votes of not less than 50,000 in number to submit a request to the Senate to remove persons from political positions (section 304), the right to remove persons from positions in a local government organisation (section 286), the right to present local ordinances (section 287), the right of the community to manage the natural resources and the environment (section 46), right in natural resource and environment (section 56), right for the public hearing (section 59), and the right to peacefully resist the coup d'état (section 65).

³⁹ **Section 214:** In the case where the Council of Ministers is of the opinion that any issue may affect national or public interests, the Prime Minister, with the approval of the Council of Ministers, may consult the President of the House of Representatives and the President of the Senate for the purpose of publishing in the Government Gazette calling for a referendum.

A referendum shall be for the purpose of public consultation as to whether the important issue under paragraph one, which is not the issue contrary to or inconsistent with this Constitution, will be approved or not. A referendum shall not be held on an issue specifically relating to any individual or group of persons.

The publication under paragraph one shall fix the date of the referendum, which shall not be earlier than ninety days and shall not be later than one hundred and twenty days as from the date of its publication in the Government Gazette, and the date of the referendum shall be the same throughout the Kingdom.

While the publication under paragraph one is in force, the State shall take action to ensure that persons who agree or disagree with such issue can express their opinions equally.

The persons having the right to vote in an election of members of the House of Representatives shall have the right to vote in a referendum.

If it appears from the referendum that the people voting in the referendum are less than one-fifth of the persons having the right to vote, the issue for which consultation is sought shall be deemed to be disapproved by a majority of people. If the people voting in the referendum are more than one-fifth of the persons having the right to vote and it appears that the people voting in the referendum approve it by a majority of votes, the issue for which consultation is sought shall be deemed to be approved by a majority of people.

The referendum under this section shall have the mere effect of advice given to the Council of Ministers on that issue.

The rules and procedures for voting in the referendum shall be in accordance with the organic law on referendum.

IV: Measures and Mechanisms Facilitating Efficacy of the Right of Popular Participation

Despite provisions of the Constitution dedicated to popular participation, such black letters will be of no real value if measures and mechanisms to facilitate the efficacy of popular participation are lacking. Such measures and mechanisms are discussed here.

In this instance, measures and mechanisms intended to foster the potency of the right of popular participation can be divided into two categories, viz, (1) measures and mechanisms expediting popular participation and (2) measures and mechanisms that direct State agencies to act in accordance with the Constitution. This will be explained in greater detail below.

1. Measures and Mechanisms Facilitating Popular Participation

The measures and mechanisms instrumental to popular participation can be visualised in two dimensions; first, the political dimension and, secondly, the legal perspective.

1.1 Political Measures and Mechanisms

The Constitution comes up with the Chapter on the Directive Principles of Fundamental State Policies. Under this very Chapter, the State is politically directed to take the following actions, which, in effect, apparently bolsters popular participation.

(1) Promoting and encouraging public participation in formulating policies and making decisions on political issues, preparing economic, social and political development plans, and inspecting the exercise of State powers at all levels (section 76);

(2) Decentralising powers to localities for the purpose of independence and self-determination of local affairs. (section 78);

(3) Promoting and encouraging public participation in the preservation, maintenance and balanced exploitation of natural resources and biological diversity. (section 79).

In this instance, the Constitution itself states in section 88 that the provisions of the Chapter on the Directive Principles of Fundamental State Policies are intended to serve as directive principles for legislating and determining policies for the administration of the State affairs and that the Council of Ministers assuming the administration of the State affairs shall clearly state to the National Assembly the activities intended to be carried out for the administration of the State affairs in the implementation of the directive principles of fundamental State policies and shall, in addition, prepare and submit to the National Assembly an annual report on the result of the implementation, including problems and obstacles encountered. Further, section 89 mandates the state to establish the National Economic and Social Council to be charged with the duty to give advice and recommendations to the Council of Ministers on economic and social problems for the purpose of the implementation in accordance with the directive principles of fundamental state policies.

1.2 Legal Measures and Mechanisms

The legal measures and mechanisms in support of popular participation in the national administration are also reflected in several provisions of the Constitution which allow representatives of people to join independent organisations playing vital roles in scrutinising the exercise of state powers in particular contexts specified, as illustrated by the following cases.

(1) In the case where any project or activity which may seriously affect the quality of the environment is to be undertaken, it is required that, prior to the operation of such project or activity, comments be sought from an independent organisation, consisting of representatives from private environmental organisations and from higher educational institutions providing studies in the environmental field (section 56 paragraph two).

(2) In the context of consumer protection, an independent organisation that consists of representatives of consumers must be approached for its opinions on the enactment and issuance of relevant law, rules and regulations and the determination of relevant measures (section 57).

2. Measures and Mechanisms Directing State Agencies to Act in Accordance with the Constitution

The following measures and mechanisms are in place for compelling state agencies to act in accordance with the Constitution.

2.1 Binding Effect of the Constitutional Rights and Liberties on the National Assembly, Council of Ministers, Courts and other State Organs

The right of popular participation is part of the rights and liberties recognised in the Constitution. The Constitution lays down the mechanism to support the sanctity of the right in the section 27. Under the section 27, rights and liberties recognised by the Constitution expressly, by implication or by decisions of the Constitutional Court shall be protected and directly binding on the National Assembly, the Council of Ministers, Courts and other State organs in enacting, applying and interpreting laws. It follows, therefore, that the provisions supporting the constitutional rights and liberties can be enforced albeit there is no enactment of subordinate laws.

2.2 Recognition of the Right to Bring a Lawsuit Challenging Violation of Constitutional Rights and Liberties.

Section 28 of the Constitution recognises the right of the people to bring a lawsuit or to invoke a defence in court in the case where his or her constitutional rights and liberties are violated. This being so, a person whose right of popular participation, that is recognised by the Constitution, is not properly accommodated can have a recourse to the court.

In order for the people to be able to bring a lawsuit to enforce their right of popular participation, the people must first understand jurisdictions of four Courts under the constitution, viz, the Constitutional Court, the Administrative Court, the Military Court and the Court of Justice. Any case which is not under the jurisdictions of the Constitutional Court, the Administrative Court and the Military Court falls within the jurisdiction of the Court of Justice. The case where the right of popular participation is violated should be under the jurisdiction of the Constitutional Court and the Administrative Court, as the case may be. According to the provisions on the Constitutional Court set forth in the Constitution, the Constitutional Court has powers and duties to make the determination in connection

with the constitutionality; it considers and decides whether any act or rule is contrary to or inconsistent with the Constitution. Indeed, the provisions regarding the Constitutional Court are of paramount significance and may affect the rights and liberties of the people. As far as the Administrative Court is concerned, it is independent from the Court of Justice and has powers and duties to try and adjudicate the administrative case involving a dispute arising as a consequence of an act or omission by a State agency, State enterprise, local government organisation, or State official or as a consequence of an act or omission under the responsibility of a State agency, State enterprise, local government organisation or State official in the performance of duties under the law (section 276).

Besides, the Constitution guarantees the independence of the judiciary and ensures that judicial procedure will be more independently conducted. Such guarantee is well envisioned in the criteria as follows:

- (1) The hearing of a case requires a full quorum of judges (section 236⁴⁰);
- (2) The trial of a case shall be speedy, continuous and fair (section 241⁴¹);
- (3) The trial and adjudication by judges shall not be subject to hierarchical supervision (section 249 paragraph two);
- (4) The distribution of case files to judges shall be in accordance with the rules prescribed by the law, not by absolute discretion (section 249 paragraph three);

⁴⁰ **Section 236:** The hearing of a case requires a full quorum of judges. Any judge not sitting at the hearing of a case shall not give judgment or a decision of such case, except for the case of *force majeure* or any other unavoidable necessity as provided by law.

⁴¹ **Section 241:** In a criminal case, the suspect or the accused has the right to a speedy, continuous and fair inquiry or trial.

At the inquiry stage, the suspect has the right to have an advocate or a person of his or her confidence attend and listen to interrogations.

An injured person or the accused in a criminal case has the right to inspect or require a copy of his or her statements made during the inquiry or documents pertaining thereto when the public prosecutor has taken prosecution as provided by law.

In a criminal case for which the public prosecutor issues a final non-prosecution order, an injured person, the suspect or an interested person has the right to know a summary of evidence together with the opinion of the inquiry official and the public prosecutor with respect to the making of the order for the case, as provided by law.

(5) The recall or transfer of case files shall not be permitted except in the case where justice in the trial and adjudication of the case shall otherwise be affected. (section 249 paragraph four);

(6) The transfer of a judge without the judge's prior consent shall not be permitted except in the case of termly transfer as provided by law, promotion to a higher position, being under a disciplinary action or becoming a defendant in a criminal case (section 249 paragraph five).

2.3 The Establishment of the Organs with Expertise to Guarantee the Rights and Liberties of the People

Under the current Constitution, some kinds of independent organisations are set up with an eye to promoting and keeping under control the exercise of the rights of the people and also protecting the rights and liberties as recognised by the Constitution. The independent organisations include the Ombudsman and the National Human Rights Commission.

(a) The Ombudsman

Under the provisions of the Constitution, a person can not directly submit the case to the Constitutional Court for considering and deciding the issue of the constitutionality and, in some cases, can not bring a lawsuit to the Administrative Court on his or her own volition. However, the Constitution, in establishing the Ombudsman, states that the Ombudsman has powers and duties to inspect the justification and appropriateness of the exercise of state powers. In the case where the Ombudsman is of the opinion that law, by-law, rule or any action of the State official exhibits unconstitutionality, the Ombudsman is empowered to present the case together with the opinion to the Constitutional Court or the Administrative Court, as the case may be, for consideration and decision. Therefore, where a person considers that his or her right or liberty is violated, that person may make a choice between a recourse to the Constitutional Court, through the Ombudsman, or bringing an action before the Administrative Court. With regard to a case involving the constitutionality issue, an individual may submit the case to a Court of Justice so that the Court of Justice makes a further referral to the Constitutional Court for

consideration and decision or, as an alternative, can lodge a complaint with the Ombudsman in order that the Ombudsman submits the case to the Constitutional Court for its determination. In the case where any Act or subordinate law is contrary to the Constitution, the people can protect their rights by bringing the case to the Administrative Court or lodging the case with the Ombudsman. The Ombudsman also has powers and duties to prepare a report together with opinions and suggestions to the National Assembly for the purpose of the revision of the laws.

(b) The National Human Rights Commission

The Constitution currently in force establishes the National Human Rights Commission to examine, and prepare a report on, the commission or omission of acts violating human rights in Thailand and to propose to the National Assembly and the Council of Ministers policies and recommendations with regard to the revision of laws, rules or regulations for the purpose of promoting and protecting human rights. Although most of the rights that are pertinent to popular participation are civil rights in nature, some rights can even be regarded as human rights. Illustrations are the right to assemble peacefully and without arms and the right to unite and form an association. The establishment of the National Human Rights Commission is an effort made to provide a greater safeguard of the right and liberty of popular participation.
