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SESSION III

The Political and Administrative Reform in Asia

LEGAL AND INSTITUTIONAL REFORM IN EAST ASIA: CASE STUDY OF THAILAND

by
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I. Introduction

This paper examines the development of constitutional law under the political reform in Thailand in the 1990s, as a case study on legal and institutional reform following pro-democratic movements in East Asia.

Since the late 1980s, we have seen many pro-democratic movements in East Asian countries such as the Philippines (1986), Thailand (1992) and Indonesia (1998). The successful pro-democratic movements usually led to constitutional law reform directed toward eliminating negative legacies from the era of authoritarian or dictatorial government, and establishing a new framework for democratic governance. For example, the present 1987 Philippines Constitution was enacted following the People's Power Revolution that defeated the Marcos government. The 1987 Constitution not only returns to the model of the U.S. Constitution, but also adopts some new provisions and mechanisms for democratization. The Constitution established some constitutional organs to monitor the government, such as the Human Rights Commission. In Indonesia, the 35-year Suharto government fell in 1998, and it was followed by constitutional amendments and the enactment of laws for democratization. However, Indonesia still seems to be seeking a new framework for stability of its parliamentary system.

Thailand experienced the so-called "Bloody May" incident in 1992, in which

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many people were killed and wounded when the Military fired into mass demonstration. The people were protesting the Army Commander, one of the Coup leaders of 1991, taking the position of Prime Minister. After this incident, “the development of democracy” or “political reform” was strongly propounded for advancing democratization, and it resulted in a series of amendments to the 1991 Constitution (in 1992, 1995 and 1996). Although the amendments of 1995 introduced many reforms, a more comprehensive revision of the constitution was proposed. Hence, under the 1996 Amendment, the Constitutional Drafting Assembly, separate from the Parliament, was established to draft the new Constitution. After eight months of debate and public hearings nationwide, the CDC adopted a draft in August 1997, and then the draft was sent to the Parliament and approved in September. After approval by the King, the Constitution of the Kingdom of Thailand 1997 went into force on 11 October 1997.

As seen later, the content of the 1997 Constitution, which is the direct result of political reforms in the 1990s, differs from the former Constitutions of Thailand, and is progressive in many respects. Political reform or democratization in Thailand in the 1990s started from the movement to protest military rule, so one of the tasks of constitutional reform is to eliminate or exclude the mechanisms built into the former constitutions to legitimize the rule of the military groups. However, the scope of the 1997 Constitution is not limited to this aspect. Rather, most reforms introduced by the 1997 Constitution are intended to build a framework for enhancing democratic governance.

In this regard, it should be recalled that historically parliamentary politics in Thailand not only were unable to prevent a resurgence of the Coup, but also provided an excuse for the Military to return to power. Since 1989, there has been a resurgence of civilian rule as a Prime Minister took office through general election. However, the government was not free from allegations of corruption as well as political maneuvering among political parties, including heavy use of non-confidence motions against the government. The decomposition of the government was the main excuse for the 1991 Coup. Such political maneuvering was seen even in the constitutional reform after 1992. In other words, the political reform was motivated by the unsatisfactory situation of the Thai parliamentary democracy.

The following sections examine “traditional” constitutional issues before 1992, and then consider some important components of reforms under the 1997 Constitution.

II. “Traditional” Issues in Constitutional Law in Thailand

The most eminent feature of constitutionalism in Thailand is the number of Constitutions it encompasses. From the first Constitution of 1932 to the present 1997 Constitution, Thailand has had a total of 15 such documents. The reason that Thailand has had so many Constitutions is that there were the frequent changing of political power through military coup. When a coup succeeded, the new group brought down the Parliament and repealed the existing Constitution. It was perceived as inevitable that each new coup group would enact its own new Constitution legitimizing their governance in place of the Constitution they repealed. Many of the coups resulted from power games among the ruling military groups, so there were few differences between the Constitutions. However, each new group tried to plant provisions or mechanisms within the Constitution that would help them in the continuation and facilitation of their own rule after parliamentary politics were restarted. As pointed out below, the demands of the people seeking democracy have primarily concentrated upon the elimination of such undemocratic aspects of the Constitution.

The most outright approach used by military groups was the enactment of “interim constitutions”. The Constitutions of Thailand can be classified into two categories: “interim constitutions” and “permanent constitutions”. An interim constitution is one that is enacted shortly after a coup for setting up a tentative framework of governance, and replaces the repealed Constitution. Usually, there are only a few provisions contained in an interim constitution, and significant provisions such as those concerning rights and freedom of the people are lacking. As for the Parliament, the interim constitution provides for the setting up of a one-house parliament comprising members nominated by the Prime Minister (rather than by election). Furthermore, some interim constitutions have contained provisions giving the Prime Minister strong authority.

The interim constitution is usually followed by enactment of a permanent constitution and general elections. Permanent constitutions usually contain more provisions than the interim constitutions, including clauses regarding human rights and freedom of the people. Permanent constitutions set up a bicameral parliament comprising the Senate and the House of Representatives. Since ruling groups are usually reluctant to enact a permanent constitution, enactment of a permanent constitution is the first and principal demand raised by the democratic groups.

Even if a permanent constitution was enacted, it usually contained some clauses or mechanisms considered useful for legitimizing and extending the military's rule. Until the first direct election of Senators in Thailand in 2001, Senators had been nominated by the Prime Minister or the ruling group. In the past, some constitutions had contained provisions enabling government officials to take the office of Prime Minister, minister or member of parliament without resigning their current positions. Thus, senators at that time included retired and incumbent government officials, including Military and Police. Other than this, the Prime Minister was not required to be a member of the Parliament, and it enabled the leader of the ruling group to be Prime Minister without being elected. In addition, the post of President of the Parliament was considered important for managing or controlling parliamentary procedures. Therefore, the President of the Parliament was assigned to be President of the Senate, while the position of Vice President of the Parliament became President of the House of Representatives. This type of arrangement was considered to favor the ruling group, since the Senate was usually under the control of the ruling group.

The democratic movement had demanded the elimination or exclusion of these undemocratic aspects of the Constitution. Indeed, the 1992 Amendments of the 1991 Constitution are largely devoted to these issues. Under these amendments, the post of President of Parliament was changed to President of the House of Representatives. Some provisions prohibit taking the position of minister or member of Parliament or other permanent governmental official at the same time. In addition, the Prime Minister must be elected from among the members of the House of Representatives.

Examples of “Traditional” Constitutional Issues (Before 1992)

	Undemocratic	Democratic
No	PM must be chosen from among the members of the House of Representatives	Yes
No	PM/Minister may not simultaneously be a permanent government official	Yes
No	President of the Parliament = President of the House of Representatives (In the past, Senators were nominated by Prime Minister, not by election)	Yes
	Interim Constitution	Permanent Constitution

III. Reforms under the 1997 Constitution

Reforms concerning traditional constitutional issues began shortly after the Bloody May event, and dealt with a series of constitutional amendments. Many important issues, however, such as the matter of the Senate were dealt with thoroughly in the 1997 Constitution.

There are more provisions in the 1997 Constitution than are contained in the former Constitutions. (336 Articles, including transitional provisions). One reason for the increase in the number of provisions is that many independent organs were established, and the Constitution contains many provisions concerning the organization of such organs and procedures for nomination or appointment to positions provided by the Constitution.

As shown in the number of provisions, reforms under the Constitution are rather comprehensive, but for an overview of the reforms under the Constitution, it may be useful to classify such reforms into 3 categories: (1) Reform for increasing political participation by the people, (2) Reforms for promoting and enhancing human rights protections and (3) Reforms for ensuring and promoting the transparency, fairness and effectiveness of the government. The principal reforms of each category are as follows (not exclusive):

1) Participation by the people

Reform of the Senate (Election)

Reform of the system for electing members of the House of Representatives

(small constituency system and party list system)

Decentralization

Initiatives and Referendum

2) Human rights protection

Increase of the provisions regarding the rights and freedoms of the people.

Establishment of the National Human Rights Commission

Establishment of the Constitutional Court and the Administrative Courts

Judicial Reform (especially criminal justice)

3) Transparency, fairness and effectiveness of the government

Establishment of the Constitutional Court and the Administrative Court

Establishment of the Parliamentary Ombudsman

Introduction of the system for “Examination of the Exercise of State Power”

(Chapter 10)

Disclosure of the assets of PM, ministers, MPs and other public officials

Establishment of the National Counter Corruption Commission

Impeachment (by resolution of the Senate)

Special Criminal Procedures relating to certain public offices (Supreme Court)

Establishment of the Auditing Commission and the Election Commission

As this list shows, reforms under the 1997 Constitution are rather comprehensive, but the following reforms are important to consider here. First of all, the most significant reform of the parliamentary system was the introduction of the system for election to the Senate. There were concerns that this reform would bring to the Senate the same political maneuvering seen among political parties in the House of Representatives. So the Constitution excludes partisanship from the Senate by requiring that candidates for Senator not be a member of any political party, nor to have certain relationships with any political party as prescribed in the Constitution. Therefore, theoretically, Senators are expected to be free from inter-party political maneuvering under this Article. The term of office of a Senator is 6 years, and any person who a Senator is restricted to one term only. This provision is intended to prevent a Senator from seeking special interests for his/her constituency, and instead,

to concentrate on the more general interests of the Kingdom. Based on the “neutrality” or theoretical non-partisan character of the Senate, the Senate is given a significant role in the constitutional system, especially in the nomination or appointment of public positions under the Constitution. However, it is another matter whether the Senators actually do act as the Constitution specifies. As results from the first Senatorial election in 2000 demonstrate, some Senators have a variety of relationships with the political parties.

Secondly, it should be pointed out that the 1997 Constitution has established a kind of plurality system for monitoring the Government, which will function supplementary to the traditional separation of powers. Several constitutional organs have been newly established by the Constitution such as the National Human Rights Commission, Parliamentary Ombudsman, the National Counter Corruption Commission, Election Commission, and the Auditing Commission. Other than these organs, the Constitutional Court and the Administrative Court have established ways for strengthening judicial review.

An interesting inventory scheme established by the Constitution is the series of measures provided in Chapter 10: “Examination of the Exercise of State Authority”, such as disclosure of the assets of certain public officials, and impeachment procedures. Under the impeachment procedures, any person in a public office provided by the Constitution or other laws, may be removed from that office by resolution of the Senate on the grounds that the person conducted certain crimes or malpractice as specified by the Constitution or other laws. (The resolution requires a vote of three-fourths of the total number of Senators.) The National Counter Corruption Commission is responsible for the investigation and examination of evidence and facts.

Furthermore, the Parliamentary Ombudsman and Human Rights Commission have been set up to receive complaints from people who have suffered damages from the actions of administrative organizations or governmental officials, or from human rights infringements. These organizations’ authority is primarily limited to investigation and recommendations, but the actual impact is expected to be substantial. These schemes give the people channels to participate in or to have their opinions

incorporated into governance.

They see that the classical framework based on the concept of separation of powers does not necessarily guarantee the proper functioning of democratic governance, and thus, they consider it necessary to put in place additional mechanisms for monitoring or improving that governance. On the other hand, it is true that the Constitution has many rather innovative aspects, and much preparation is needed for implementation. Implementation of the newly introduced institutions and procedures is raising other problems. It is certain that much time will be required before such a sophisticated system begins to work as designed. The increasing costs of these organizations is another factor obstructing implementation. However, it appears that the confidence of the Thai people is deepening with respect to parliamentary democracy (or, at least in the sense that we do not yet have any better system than the parliamentary system), and that they support the new framework under the Constitution.

IV. The Necessity of the Study on Reforms after Democratization

It is not unusual for Constitutions of countries with authoritarian political systems to contain some kind of mechanism to legitimize or cover up more or less undemocratic rule. Further, it is not surprising that a study of constitutional law in Asian countries has focused on the undemocratic aspects of their Constitutions. After we have seen the many democratic movements in this region, there is no reason not to extend our study to the changing constitutional law of those countries seeking a new framework for democratic governance. Legal and institutional reform in East Asian countries is neither perfect, nor working as well as it was designed to do. Such institutions themselves are but one product of the political process, and they also have to work under changing political situations. Thus, it is necessary to examine not only the legal framework, but also the actual situation of its implementation or functioning. Corruption would be the important factor in analyzing legal and institutional reforms after democratization, since corruption stimulates the feeling of inequality among the people, and it brings the people to an awareness of the problem of authoritarian polity, as well as of malfunctioning parliamentary polity.

**Comparison of the principal Constitutional Organizations:
1991 Constitution and 1997 Constitution**

1991 Constitution	1997 Constitution
Constitutional Monarchy	Constitutional Monarchy
Parliament Senate (no election; nominated by PM) House of Representatives (election)	Parliament Senate (election) House of Representatives (election/party list) <u>Parliamentary Ombudsman</u> <u>National Human Rights Commission</u>
Cabinet (Prime Minister and ministers)	Cabinet (Prime Minister and ministers) MP has to resign when appointed as PM/ Minister
Constitutional Judge Commission (<i>ad hoc</i>) Court of Justice	Constitutional Court Court of Justice <u>Division of Criminal Cases for the</u> <u>Person in a Political Position</u> Administrative Court
	<u>Counter Corruption Commission</u> <u>Election Commission</u> <u>Auditing Commission</u>