

## CHAPTER 4

### THE PROTECTION OF THE HUMAN RIGHTS UNDER A NEW CONSTITUTIONAL FRAMEWORK

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#### **I: Introduction**

The concept of protecting rights and human rights is aimed at protecting the rights and liberties of any person, regardless of the differences in race, nationality, sex, colour, language, culture, religion and so on, on the ground that every human being has these rights and liberties even before the emergence of the state.<sup>1</sup> The United Nations (UN) has subsequently adopted the concept and concretely translated it into the instrument called the Declaration on the Human Rights that was announced on 10<sup>th</sup> December 1948 for the purposes of, firstly, declaring member countries' intention to afford serious protection of human rights as required by the United Nations Charter and, secondly, applying the concept as the common standard among member countries and as the guideline for their own domestic affairs<sup>2</sup>. In effect, the human rights concept as encapsulated in the aforesaid Declaration on the Human Rights had immense significance and much influence on members of the Constituent Assembly in drafting the Constitution of the Kingdom of Thailand B.E. 2492 (1949)<sup>3</sup>. The replication of this international instrument was, indeed, found both in the phraseology and conceptualisation. In this instance, the Chapter on Rights and Liberties of the Thai People as contained in the Constitution of 1949 reflects many concepts of human rights, especially the concept of the 'citizen's

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<sup>1</sup> Worapot Wisarutpit, *Rights and Liberties under the Constitution*, Bangkok: Winyoochon, 1995, p. 36.

<sup>2</sup> Gulpol Polwan, *Human Rights in Thai Society*, p. 89.

<sup>3</sup> Yud Sanguthai, quoted in Wissanu Kreu-ngam, *Constitution of the Kingdom of Thailand*, Bangkok: Prachaniti, 1949, p. 884.

right’ and the political right<sup>4</sup>. The Constitution of the Kingdom of Thailand B.E. 2517 (1974), largely based upon the Constitution of the Kingdom of Thailand B.E. 2492 <sup>5</sup> (1949), included the concept of human rights as well. Subsequent Constitutions such as the Constitution of the Kingdom of Thailand B.E. 2521 (1978), the Constitution of the Kingdom of Thailand B.E. 2534 (1991) or even the Constitution currently in force have derived influence from the human rights ideology. It must, however, be said that although the current Constitution has introduced certain measures and mechanisms dedicated to the protection of human rights, there have been encountered problems with regard to the enforcement. Of particular interest is the problem encircling the protection of rights and liberties of aliens or non-nationals due to the absence of clear-cut separation between human rights *per se* and the rights enjoyable by Thai citizens. In this Chapter, discussions of the protection of human rights under the current Constitution are advanced in three parts: (1) human rights under the current Constitution, (2) the problem concerning aliens as holders of rights and liberties and (3) measures and mechanisms for protecting human rights.

## **II: Human Rights under the Current Constitution**

The present Constitution recognises more rights and liberties than ever visualised in previous Constitutions. The recognition of rights and liberties is principally found in two chapters, namely, Chapter III on the Rights and Liberties of the Thai People (section 26 to section 65) and Chapter VIII (which deals with Courts) Part I on General Provisions (section 233 to section 254). Moreover, section 4, in Chapter I on General Provisions, provides that human dignity, rights and liberties of the people shall be protected whilst section 5 expressly enunciates that the Thai people, irrespective of their origins, sexes or religions, shall enjoy equal protection under the Constitution. Although the Constitution makes no clear

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<sup>4</sup> Gulpol Polwan, Development of the Human Rights, Bangkok: Winyoochon, 1985, p. 126.

<sup>5</sup> Minutes of the Meeting of Members of the Constituent Assembly No. 1/2516, dated Wednesday 31<sup>st</sup> October 1973, p. 8/1.

separation between ‘*human rights*’, on the one hand, and the rights and liberties that are regarded as the ‘*citizen’s rights*’ on the other, some rights and liberties are perceivably natural rights and liberties of the individual at birth, irrespective of citizenship of the State. The natural rights and liberties should be regarded as “human rights”, too. These natural rights and liberties under the current Constitution will be discussed at fuller length below.

### 1. The Human Dignity

Human dignity is, for the first time, given clear recognition in the Constitution, as embodied in several provisions. Most apparently, it is pronounced in section 4 that human dignity, rights and liberties of the people are afforded protection. Next, section 26 sets forth a requirement that all State authorities, in exercising their powers, have regard to human dignity, rights and liberties of the people in accordance with the provisions of the Constitution. In addition, section 28 allows an individual to invoke human dignity or exercise his or her rights and liberties in so far as it does not violate rights and liberties of other persons or run counter to the Constitution or good morals. Based on these three provisions, the Constitution intends to protect human dignity from intervention by State authorities, and the individual can be the subject of human dignity either among the individuals or between the individual and the State official.

However, some problems arise in defining the very new term “human dignity”. In fact, at the time of drafting, some have proposed the use of the expression ‘human right’ rather than the term ‘human dignity’. According to the German jurists and the Constitution (the Basic Law) of Germany<sup>6</sup>, the term “human dignity” connotes the human-being’s distinctive value that comes into existence as a consequence of being a human and that is free from any conditions such as race or religion. This special value is intended to give a human-being freedom to develop or improve personal personalities under his or her own responsibility and, in addition,

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<sup>6</sup> Montri Roobsuwan *et al*, *The Spirits of the Constitution*, Bangkok: Winyoochon, 1999, p. 86.

is based upon two essential fundamentals, namely, the right in life and body and the right to enjoy equality. In the case of Thailand, the Court of Justice is the major organ to give the definition and the scope of ‘human dignity’.

## 2 Right and Liberty to Act by Reference to Religious Principles and Personal Beliefs

An assertive statement is found in section 38 of the Constitution that a person shall enjoy full liberty to profess a religion. Given that persons with different beliefs can, in Thai society, be delicately assimilated and live together without conflicts, the Constitution allows personal adherence to individual beliefs as well. An illustration can be found in the recognition of the Islamic family law as the law applicable to Islamic residents in the four southernmost provinces of Thailand. However, such right and liberty must not be contrary to the duty of the citizen and must not be at variance with the public order or the good morals. For example, a Thai monk is, unlike in Japan, not allowed to have a spouse, for it is prohibited by the Act on Ecclesiastical Organisation B.E. 2505 (1962). Nevertheless, it is permissible to establish a new sect provided that legal requirements must be met.<sup>7</sup>

## 3. Rights of Children, Youth and Family Members

Since the children, youth and family members usually become the victim of violence and unfair conduct, as much witnessed in newspaper reports, the Constitution seeks to protect these people from such incidence. In this regard, section 53 paragraph one of the Constitution states that children, youth and family members shall have the right to be protected by the State against violence and unfair treatment. Indeed, it is for the first time that the Constitution gives recognition of rights of children, youth and family members.

## 4. Right and Liberty in Life and Person

Chapter III on the Rights and Liberties of the Thai People and Chapter VIII on The Courts (Part I: General Provisions) recognise the protection of the rights and liberties of life and person. It is for the first time that the rights and liberties are

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<sup>7</sup> *Ibid.*, pp. 103-104.

recognised in separate chapters of the same constitution. Such separation may probably be due to the difficulty in the distinction between the ‘human right’ and the ‘citizen’s right’, as previously discussed. In this connection, Chapter VIII of the Constitution (dealing with ‘Courts’) may aim to protect rights and liberties of the people, irrespective of their nationality, in criminal justice administration<sup>8</sup>.

The rights and liberties of life and person under the current Constitution are as follows.

#### 4.1 Rights and Liberties in Life and Person

Section 30 of the Constitution protects a person from the torture, brutal act or punishment by a cruel or inhumane means. This provision aims to restrain actions of the State upon private individuals. For instance, no State official can commit the extraordinary killing except in the case of reasonable defence. By parity of reasons, punishment by death penalty is not permitted to be executed by a cruel or inhumane means.

#### 4.2 The Right to Criminal Justice Administration

By and large, the rights involving criminal justice administration are recognised in the Penal Code. However, the current Constitution re-recognises such rights, as follows.

##### 1) Protection of Right against an Arrest, Detention, Issuance of a Warrant in a Criminal Case

Under section 237<sup>9</sup>, only the Courts have the power to issue a warrant of arrest. Previously, both the Court and the administrative official or the senior police

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<sup>8</sup> Pongthep Dhepkajana, “*The Courts under the Current Constitution*”, *Essence of the Popular Constitution*, Bangkok: Matichon, 1998, p. 309.

<sup>9</sup> **Section 237:** In a criminal case, no arrest and detention of a person may be made except where an order or a warrant of the Court is obtained, or where such person commits a flagrant offence or where there is such other necessity for an arrest without warrant as provided by law. The arrested person shall, without delay, be notified of the charge and details of such arrest and shall be given an opportunity to inform, at the earliest convenience,

official had the power to issue a warrant of arrest or detention. In order to protect the right and liberty of the people, this section also states that a warrant of arrest or detention of a person may be issued where (a) there is reasonable evidence that such person is likely to have committed a serious offence which is punishable as provided by law or (b) there is reasonable evidence that such person is likely to have committed an offence and there also exists a reasonable cause to believe that such person is likely to abscond, tamper with the evidence or commit any other dangerous act. This requirement is apparently intended to play the check-and-balance role *vis-à-vis* the exercise of the State power. In addition, the section states that the arrested person shall, without delay, be given an opportunity to inform, at the earliest convenience, his or her relative, or the person of his or her confidence, of the arrest. For guaranteeing the right of the accused in a criminal case, the same section mandates that the arrested person being kept in custody be sent to the Court within forty eight hours as from the time that person arrives the office of the inquiry official in order for the court to consider whether there is a reasonable ground under the law for the detention of the arrested person or not.

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his or her relative, or the person of his or her confidence, of the arrest. The arrested person being kept in custody shall be sent to the Court within forty eight hours as from the time of his or her arrival at the office of the inquiry official in order for the court to consider whether there is a reasonable ground under the law for the detention of the arrested person or not, except for the case of *force majeure* or any other unavoidable necessity as provided by law.

A warrant of arrest or detention of a person may be issued where:

(1) there is reasonable evidence that such person is likely to have committed a serious offence which is punishable as provided by law; or

(2) there is reasonable evidence that such person is likely to have committed an offence and there also exists a reasonable cause to believe that such person is likely to abscond, tamper with the evidence or commit any other dangerous act.

## 2) A Safeguard of Rights against a Search by the State Official

For the purpose of guaranteeing the right against a search by the State official and protecting the private right, section 238 of the current Constitution states that in a criminal case, a search in a private place shall not be made except where an order or a warrant of the Court is obtained or there is a reasonable ground to search without an order or a warrant of the Court as provided by law.

## 3) Rights of the Suspect or the Accused

The Constitution ensures that the suspect or the accused will obtain the efficient and fair trial. To this end, it is provided in section 241 of the Constitution that that, in a criminal case, the suspect or the accused has the right to a speedy, continuous and fair inquiry or trial. Apart from this safeguard, the suspect or the accused in a criminal case is afforded other significant rights as follows.

In the first place, the Constitution confers upon the suspect or the accused the right to have an advocate or a person of his or her confidence attend and listen to interrogations. This right is a novelty introduced by the current Constitution in order to guarantee that the suspect or the accused will be free from the inducement, promise, threat, deceit, torture, physical force or any other unlawful act by the State official. Any statement given or obtained in the course of a due inquiry may be admissible in evidence in court.

Next, the suspect or the accused is allowed to inspect or require a copy of his or her statements made during the inquiry or documents pertaining to such statements. This right is, in effect, connected with the right to have an advocate or a person of confidence attend and listen to interrogations. The documentary examination will reveal whether the statements given at the inquiry are right or wrong.

## 4) The Right to Legal Aid from the State

Although the individual is protected by the Constitution in connection with criminal justice administration, a person may not be able to exercise the protected rights and liberties fully by reason of inability to afford an attorney. To curb this

practical restraint, the Constitution imposes on the State a duty to provide an advocate for the accused, as set forth in section 242.

#### 5) Protection of Witnesses and the Injured in a Criminal Case

As a person acting as a witness in a criminal case is prone to dangers, it is usually the case that a person refuses to become the witness in the court. Such being the case, the criminal justice administration is fraught with much difficulty in seeking co-operation from witnesses. It is in response to this actuality that the Constitution strives to protect persons becoming witnesses in criminal cases. In this instance, the current Constitution states that a witness in a criminal case has the right to protection, proper treatment, necessary and appropriate remuneration from the State as provided by law.

As with the protection of the witness in a criminal case, the Constitution affords protection to the injured in a criminal case or his or her heirs as well.

#### 6) Right to Compensation in the Event of Mistaken Criminal Proceedings

A person may suffer an injury from a mistake in criminal proceedings. The Constitution is determined to compensate the victim of such mistake. Sections 246 of the Constitution provides that any person who has become an accused in a criminal case and has been detained during the trial shall, if it appears from the final judgment of that case that the accused did not commit the offence or the act of the accused does not constitute an offence, be entitled to appropriate compensation, expenses and the recovery of any right lost on account of that incident, upon the conditions and in the manner provided by law.

### **III. The Problem Regarding Aliens as the Holders of Rights and Liberties**

Although the rights and liberties under the Constitution can theoretically be divided, by reference to their sources, into two categories, namely, the ‘human right’ and the ‘citizen’s right’, the Constitution contains no candid distinction between these two categories. In effect, the fact that the provisions setting out fundamental rights and liberties are located in the Constitution as an integral part of the chapter on “Rights and Liberties of the Thai People” leads to the question as to whether, even in respect of the human rights, the holders of the rights can be Thai citizens



only and non-nationals or aliens are thus placed outside the protective net of the Constitution.

With regard to this academic issue, it has been maintained by two leading experts in the Constitution Law – Prof. Dr. Yud Sanguthai<sup>10</sup> and Prof. Dr. Wissanu Kreu-ngam<sup>11</sup> – that only Thai citizens can be the holders of rights and liberties that are recognised by the Constitution and this is the case with every constitution, the reason being that the constitution of any State determines the relationships between the State and its nationals. According to this proposition, although the constitutional provisions that set out rights and liberties of Thai people use the expression “any person shall have the right” or “any person shall have liberty”, the word “any person” must be perceived of as signifying only “Thai people”, that is to say, “Thai nationals” or “Thai citizens”.<sup>12</sup> If the Constitution intends to confer some particular rights or liberties upon aliens, such intention must specifically be made clear in the given provisions. In the absence of such a specific provision spelling out the right and liberty of non-citizens, their rights shall be in accordance with treaties and other laws rather than the Constitution.

At the time of the drafting of the current Constitution, members of the Constituent Assembly made an effort to dissolve the confusion by entitling the chapter as “Chapter III: Rights and Liberties of Persons” and dividing it into three parts: Part I on General Provisions, Part II on Fundamental Rights and Liberties and Part III on Rights and Liberties of Citizen. It was actually explained that the arrangement of provisions in this fashion would serve three purposes, viz:

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<sup>10</sup> Yud Sanguthai, *Constitution of the Kingdom of Thailand*, B.E. 2511 (1968), Bangkok: Bamrungrasarn, 1968, p. 130.

<sup>11</sup> Wissanu Kreu-ngam, *The Constitution*, Bangkok: Sawangsit, 1987, p. 655.

<sup>12</sup> See also Pokin Polakun, *Problems and Some Thoughts in the Thai Constitution*, Bangkok: Public Policies Study Project, The Association of Social Science of Thailand, 1986, p. 99 (equating the term “Thai people” with “any Thai citizen”).

(1) to conceptualise the prioritisation of rights in the interest of interpretation in case of conflicting rights or liberties;

(2) to distinguish human rights (that emerge at birth) and citizen's rights (that stem from recognition by the state);

(3) to draw a clear demarcation between the protection of aliens and the protection afforded to the Thai citizens only.<sup>13</sup>

However, the approach mentioned above lapsed after an objection. As a result, the current Constitution still entitles the chapter that recognises fundamental rights and liberties as “Rights and Liberties of the Thai People” as ever. Nevertheless, non-nationals can invoke certain rights and liberties as the human rights as provided in other chapters in the Constitution. For example, an alien may call into play the rights and liberties in connection with criminal proceedings under Chapter VIII or may claim the rights and liberties under section 4 of the Constitution which provides that “the human dignity, right and liberty of any person shall be protected.” Perceivably, this provision covers the rights and liberties in life and person and in equality.<sup>14</sup>

#### **IV: Measures and Mechanisms for Preventing Human Rights Violation**

Section 27 of the Constitution states that rights and liberties by this Constitution shall be directly binding on the National Assembly, the Council of Ministers, Courts and other State organs. In other words, rights and liberties under the Constitution are binding upon the Executive, the Legislative and the Judiciary. The binding force indeed reflects the supremacy of the Constitution. In fact, even in the absence of such upfront mention in section 27, the provisions of the Constitution are already binding on all State organs. Section 27 merely restates this consequence.

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<sup>13</sup> Summary of the Meeting of the Working Group (appointed by the Committee on Constitution Drafting), held at the Imperial Queens Park Hotel, 17<sup>th</sup> – 20<sup>th</sup> April 1997, p. 25.

<sup>14</sup> Banjerd Singkaneti, *Fundamental Principles of Rights, Liberties, and the Human Dignity under the New Constitution*, Bangkok: Winyoochon, 2000, pp. 65-67.

Given the binding effect of the provisions affording protection of human rights, the Constitution attempts to set forth several measures and mechanisms directed at forestalling violation of these rights, as will now be brought out.

1. The Requirement That Legislation by the Legislative  
Restricting Rights or Liberties Be under the Conditions  
Provided by the Constitution

In previous constitutions, the recognition of rights and liberties was found in two fashion. First, rights and liberties were recognised on certain conditions as directly spelled out in the constitution itself whilst, in another way, the recognition of rights and liberties was made “as provided by law”. The latter approach would apparently provide some room for the Legislature to distort or depart from the spirits of the Constitution by enacting laws having the effect of restricting rights and liberties of the people. Some legal scholars have expressed their opinion that the Legislative is permitted to pass only legislation that restricts rights and liberties but has no power to make any law to the effect of terminating constitutionally protected rights and liberties.<sup>15</sup> Having said that,. there has been no guarantee of such result. As a means to caution the Legislature or those exercising the legislative power that the law to be passed would not totally deprive the people of their basic rights and liberties, the Constitution sets forth crucial criteria in section 29, as follows.

Firstly, it requires that the restriction of rights and liberties shall not be imposed except by virtue of provisions of the law specifically enacted for the purpose determined by this Constitution. This requirement is aimed at guaranteeing rights and liberties of the people and assuring the supremacy of the constitution. In principle, enacting laws restricting rights and liberties recognised by the Constitution is not permitted except by virtue of provisions of the law specifically enacted for the purpose determined by the Constitution.

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<sup>15</sup> Yud Sanguthai, Principles of the Constitution and the Law on General Election, Lecture Notes for Graduate Studies, Faculty of Political Science, Bangkok: Thammasat University Press, 1970, p. 131.

Secondly, section 29 also mandates that that law that is passed to restrict rights and liberties of the people make a clear mention of the provision of the Constitution that authorises such restricting enactment. This requirement is, in fact, intended to give warnings to those concerned in the law-making; law-makers will need to have a check-list of the provisions of the Constitution that allow them to make the law that has the effect of restricting constitutional rights and liberties, thereby encouraging the law-makers to exercise this power with circumspection.

Further, it is set out in section 29 also that legislation that will be passed to restrict rights and liberties of the people must be of general application and must not be intended to apply to any particular case or any particular person. Obviously, this aims to prevent the issuance of administrative orders in the form of law.

## 2. The Protection of Human Rights by the Judiciary

In fact, the violation of the human rights can always be found. In principle, the State recognising the 'rule of law' will have the judiciary to inspect whether the exercise of state powers is in violation of rights and liberties of the people. In this regard, section 28 paragraph two of the Constitution states: "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." Under the Constitution, there are four main judicial bodies: the Court of Justice, the Administrative Court, the Military Court and the Constitutional Court. The Court of Justice is the court having the power to try and adjudicate all cases not falling under the jurisdiction of the Administrative Court, the Military Court and the Constitutional Court.

For the purpose of assuring judicial independence in trial and adjudication and promoting transparency in the personnel administration of the courts, the Constitution also establishes an open system for the selection of judges of the Constitutional Court and the Administrative Court, whereby qualified persons can be selected to join the judicial committee as well. The term of office of the qualified persons on the committee is determined by the Constitution. The trial of a case in the Constitutional Court will not be subject to the hierarchical supervision and only the judges conducting the hearing can deliver judgment of the case. The distribution,

recall and transfer of case-files can be made as provided by laws and a transfer of any judge is permissible only when the judge gives consent to the transfer.

The Constitution also prescribes certain measures for preventing and combating corruption in the judiciary circle in order to create a transparent and fair trial. Such measures include the requirement as to the declaration of assets and liabilities and the removal of judges from office, as contained in section 331 (2).

3. Protection of Human Rights and Examination of  
Violation of Human Rights under the Supervision  
of the National Human Rights Commission

The Constitution provides for a complimentary measure for protecting human rights and inspecting human rights violation. The measure is through the setting up of the National Human Rights Commission. The Commission has powers and duties to examine whether the exercise of state powers affects human rights and to prepare a report to the National Assembly and the Council of Ministers for further proceeding. It is expected that the Commission's power in connection with the examination of the exercise of state powers will, to some extent, result in encouraging improvement of laws intended to protect human rights.

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