The 1991 Constitution of Thailand

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Abstract: In December 1991, Thailand enacted its fifteenth constitution since the Thai military's overthrow of the absolute monarchy in 1932. As was the case with most of the previous Thai constitutions, the promulgation of the 1991 Thai Constitution was preceded by a military coup. Further conforming to Thailand's constitutional history and tradition, the coup-leaders, after suspending the 1978 Constitution, attempted to enact a new constitution legitimizing the military's role in the government. Yet they were less successful than in the past as is indicated by the substance of the 1991 Constitution and the events surrounding its enactment. The public became involved in the constitution-drafting process by voicing its opposition to provisions empowering military and government officials at the expense of elected representatives. Consequently, although the executive branch of government remains dominant, the provisions of the 1991 Constitution afford the elected House of Representatives greater political power than in the past vis-à-vis both the appointed Senate and the Council of Ministers. Moreover, there appears to be a greater willingness by the judiciary to challenge government actions, and several governmental reforms and constitutional amendments are currently under consideration. Thus, while much of the past authoritarian constitutional tradition remains intact in the 1991 Constitution, these changes signal the possible emergence of new, more representative constitutional traditions in Thailand. This article analyzes the events surrounding the enactment of the 1991 Constitution as well as the relevant provisions of the new Constitution in light of Thailand's constitutional, political, social, and cultural history.

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I. INTRODUCTION

Since the end of the absolute monarchy in 1932, Thailand has been ruled in accordance with written constitutions. There have been fifteen constitutions, including the current Constitution promulgated in December 1991, to which must be correlated thirteen successful military coups and eighteen elections. Hence, the relationship between constitutions, coups and elections has been described as the cycle of Thai politics: a military coup suspends the old constitution; a new constitution is enacted; elections are held; time passes until a perceived crisis leads to another military coup.

This cycle of Thai politics was re-enacted once again in 1991-92. In late February 1991, the Thai military seized power from the civilian government of Prime Minister Chatichai Choonhavan and suspended the...
1978 Constitution. Although several pretexts were given by the military leaders for the coup, the alleged corruption of the Chatichai administration was paraded as the principal reason. The military takeover met with little dismay in Thailand, particularly when the military leaders quickly promised a new constitution and elections, and selected Anand Panyarachun as Prime Minister. The military coup, however, did not follow the pattern of previous power usurpations as there was no interference with political parties, the press, commerce or civil liberties.

The new Constitution was enacted in December 1991, and elections followed in March 1992. Yet the Thai political cycle was unexpectedly

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7 The following has been said about the 1978 Constitution: "The longevity of this Constitution is quite remarkable, when considered against the background of turbulent Thai politics, and optimistic political observers believe it could succeed in laying a strong foundation for the establishment of a secure democratic leadership that might become institutionalized eventually." Sombat Chantomvong & Montri Chenvidyakarn, Constitutional Rule and the Institutionalization of Leadership and Security in Thailand, in LEADERSHIP AND SECURITY IN SOUTHEAST ASIA 141, 142 (Stephen Chee ed., 1991) [hereinafter Chantomvong & Chenvidyakarn].

8 One Thai commentator observed that the coup "was viewed with ambivalence and at best it received a lukewarm response from the public." DHIRAVEGIN, supra note 4, at 232. He goes on to note that the Chatichai administration was viewed as corrupt which was compounded by high-handed behavior. Id. Another observer commented: "For the general public, the coup seemed acceptable." Bunbongkarn, supra note 5, at 132.

9 Bunbongkarn, supra note 5, at 133.

10 The 1991 Interim Constitution became Thailand's fourteenth constitutional document since 1932. RADTHATHAMMANOON [Constitution] (B.E. 2534, Mar. 1, 1991), translated in CONSTITUTION FOR THE ADMINISTRATION OF THE KINGDOM (Int'l Translations Office trans., Thail., 1991). For the original Thai version see 108 RAADCHAKIDJAA [ROYAL THAI GOV'T GAZETTE] pts. 29, 37, 40. An English translation is reprinted in 45 ROYAL THAI GOV'T nos. 1-3 (Int'l Translations Office trans, Thail., 1991). Pursuant to this document, the National Peace-Keeping Council (the leaders of the military coup) could appoint and dismiss the prime minister and a National Legislative Assembly (NLA). The appointed NLA was to perform the legislative function and draft a new constitution. Id. § 6, para. 1.


12 Bhuchongkul, supra note 5, at 315.

13 Concerning the election see Neher, supra note 3, at 566-601; SURIN MAISRIKROD, THAILAND'S TWO GENERAL ELECTIONS IN 1992 4-25 (1992) [hereinafter MAISRIKROD]; Surin Maisrikrod, Thailand
disrupted when the pro-military coalition which emerged as successful from the March elections turned to General Suchinda Kraprayoon, the principal coup leader, to become prime minister.\textsuperscript{14} Suchinda accepted the prime ministership, despite having unequivocally stated previously he would not do so, and he proceeded to appoint a cabinet containing many of the same people he had earlier jettisoned from power.\textsuperscript{15} Demonstrations erupted in Bangkok and elsewhere in the country against Suchinda's ascent to the prime ministership and the clear intent of the military to retain political control, and in May 1992, the military moved to quell the protesters with force.\textsuperscript{16} The Thai reaction to the deaths and brutality was shock, embarrassment and outrage. The Reverend Monarch of Thailand, King Bhumibol Adulyadej, brought the violence to a dramatic end by simultaneously meeting with Suchinda and the main opposition figure, Chamlong Srimuang.\textsuperscript{17} Suchinda stepped down, and following another intervention by the Monarch, Anand became prime minister once again until the elections of September 1992.\textsuperscript{18} The September election resulted in a different coali-

\textsuperscript{14} The first choice of the pro-military coalition for Prime Minister, Narong Wongwan, the leader of the party which obtained the most seats in the March 1992 election, proved to be an embarrassment because of suspected links to drug trafficking. It was following these revelations that Suchinda was nominated for Prime Minister. See Neher, supra note 3, at 601; Maisrikrod, Thailand 1992, supra note 13, at 329-330; The Man Who Would Be PM, ASIAWEEK, Apr. 10, 1992, at 32; Rodney Tasker, Premier of Last Resort, FAR E. ECON. REV., Apr. 16, 1992, at 10-11.

\textsuperscript{15} Neher, supra note 3, at 601-02; MAISRIKROD, supra note 13, at 24-25.


\textsuperscript{17} MAISRIKROD, supra note 13, at 33; Neher, supra note 3, at 604; Maisrikrod, Thailand 1992, supra note 13, at 331, 334; King Gives Advice to Help End Crisis, BANGKOK POST WKLY. REV., May 29, 1992, at 20; Cynthia Owens, Deliberate Actions ofThai Royal Family Follow Precedent Set During 1973 Crisis, ASIAN WALL ST. J., May 25, 1992, at 3.

\textsuperscript{18} Neher, supra note 3, at 604; Rodney Tasker, The Ringmaster Returns, FAR E. ECON. REV., June 25, 1992, at 8-9; Anand Appointed Premier, BANGKOK POST WKLY. REV., June 19, 1992, at 1.
tion gaining the most seats, and Chuan Leekpai, leader of the coalition partner with the largest representation, became prime minister.¹⁹

Debate about the form and substance of a new constitution figured prominently in the 1991-92 political convulsions. During the drafting of the 1991 Constitution,²⁰ the central issue was the role that the military was going to play in the direct governing of the country.²¹ The debate centered on the authority of the appointed Senate vis-à-vis the elected House of Representatives,²² who would nominate the prime minister, and whether cabinet members would have to resign from government or military positions.²³ "[T]he military's attempt to dictate a constitution written in blatantly self-interested terms was thwarted by public opposition that threatened to spread out of control."²⁴ The final result, however, still largely favored extensive military involvement in the governance of Thailand.²⁵ Consequently, the principal constitutional debating point in the Spring of 1992 was whether the 1991 Constitution, which permitted a non-


²⁰ Regarding the drafting of the 1991 Constitution see infra text accompanying notes 87-104.

²¹ The struggle between military and civilian authority in Thailand is the theme of Chai-anan Samudavanija & Suchit Bunbongkam, Thailand, in MILITARY-CIVILIAN RELATIONS IN SOUTHEAST ASIA 78 (Zakaria Haji Ahmad & Harold Crouch eds., 1985) [hereinafter Samudavanija & Bunbongkarn]. They conclude that:

[T]he political supremacy of the military has been an outstanding feature in the modern Thai political system since 1932. An absence of strong participatory political institutions and a lack of legitimacy on the part of civilian regimes enable the politicized military to seize power and establish an authoritarian regime without much difficulty. Its organizational complexity and adaptability, prestige, wealth, and control of the mass media are important political resources for control over all other political institutions, including the cabinet, the National Assembly and, to a lesser extent, political parties.

Id. at 114

²² It has been observed that: "The most important aspect of a Thai constitution is not the provision and protection of civil and political liberties, but the extent to which it allows the elected House of Representatives to participate in the political process." Samudavanija, supra note 4, at 321.

²³ A review of the contentious constitutional issues that arose during the drafting of the 1991 Constitution is provided by Neher, supra note 3, at 598-99; Bunbongkarn, supra note 5, at 136-37; Bhuchongkul, supra note 5, at 319-21.


²⁵ MAISRIKROD, supra note 13, at 20-21.
elected person to become prime minister,\textsuperscript{26} should be amended to require the prime minister to come from the elected House of Representatives.\textsuperscript{27} Such an amendment was approved following the bloodshed of May 1992.\textsuperscript{28}

The intense recent debate about the contents of the 1991 Constitution and the number of constitutions that litter the last six decades of Thai history highlight the importance of “documentary constitutionalism” in Thailand. In other words, Thais have accepted the idea that there should exist a single document expressing the formal law on the structures, principles and powers of government and the rights and duties of citizens.\textsuperscript{29}

Constitutions in Thailand, however, have not normally provided neutral rules to regulate participation and competition among political groups; rather they have been major tools in maintaining the power of those who write them.\textsuperscript{30} Most political commentators have accepted the notion that the role of a constitution in Thailand has been to legitimate the authority exercised by the then-dominant political forces.\textsuperscript{31} One commentator has observed:

\begin{quote}
[A] new one [constitution] has been written and issued each time a shift in political dominance has taken place and with the primary purpose of protecting the new regime coming into power. Each ruling group has striven to consolidate its position and in so doing has changed the rules of the game and published a new constitution.\textsuperscript{32}
\end{quote}

Thus, as political forces shift, constitutions have been revoked and rewritten to reflect the new political balance.

\textsuperscript{26} Hence, Suchinda’s ascent to the prime ministership was constitutionally proper.


\textsuperscript{28} Amendment of the Constitution of the Kingdom of Thailand No. 4 (Int’l Translations Office trans., Thail., Sept. 10, 1992) (Thai version in 109 RAADCHAKIDJAA [ROYAL THAI GOV’T GAZETTE] pt. 95 (1992)). See Neher, supra note 3, at 604; Amendments Sail Through 2 Readings, BANGKOK POST WKLY. REV., June 5, 1992, at 3 [hereinafter Amendments Sail Through 2 Readings]. However, the amendment only came into force following the September 1992 election.


\textsuperscript{30} Samudavanija, supra note 4, at 320.

\textsuperscript{31} Id. at 321.

\textsuperscript{32} MYA SAW SHIN, THE CONSTITUTIONS OF THAILAND 59 (1981) [hereinafter SHIN].
Given the blatant manipulative purpose of past Thai constitutions, it is not surprising that Thai constitutions have been referred to as having no "soul." By this it is meant that the key actors have little regard for the spirit of constitutional rule as practiced and understood in the West. Yet one insightful analysis suggests that achieving a Western style of constitutional rule in Thailand is inconsistent with Thailand’s social values. In particular, the historic locus of power in Thai society is in its elites and not in the people as in Western-style constitutional systems. Consequently, Thai constitutions have been designed to facilitate the rule of elites and not to act as a constraint on rulers. It is this constraint on rulers that can be viewed as the essence of constitutionalism which has been seen as missing

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32 Chantornvong & Chenvidyakarn, supra note 6, at 144.
35 Id. at 290, 304, 309-10. The primary Thai social value this author refers to is the existence within Thailand of a social structure reliant upon patron-client relationships. Id. at 289-90. See infra text accompanying notes 71-72. Wongtrangan concludes:

History shows that the Thai monarchy existed uninterrupted for almost seven-hundred years. Logically, values underlying the system of an absolute monarchy have been deep-rooted in the political and psycho-social thinking of the people. Present-day Thais, therefore, are inclined to accept ruling from above and expect the ruler to protect and assist them. This kind of thinking evidently indicates that the ruling power does not belong to the people (the inferior or the subordinate) but rather to the King or the elite (the superior).

36 Id. at 290.
37 The author further suggests "that there exists a conflict between Thai constitutional content and its social context." Id. at 293. Here he makes reference to the constitutional function assigned elected members of parliament to protect the public interest versus their social role as intercessor in the bureaucracy on behalf of constituents. The conflict is between the general role and the specific interests. Id. at 291-94.

Finally, Wongtrangan postulates that there exists "the traditional belief that power cannot be divided." Id. at 290. He suggests that Thais are familiar with strong rulers and do not understand or accept the idea of division of power and consequent checks and balances of authority. Id. at 295, 297. Reliance is placed on the personal qualities of the rulers in order to avoid abuse of power. See id. at 310. The author also states: "[A]ccording to the patron-client value, they (Thais) tend to think that is the duty of a good ruler to perform services for the people of his own volition and the people have no right to demand such services." Id. at 293.
38 Samudavanija, supra note 4, at 321. Wongtrangan, supra note 35, at 296-301, indicates that little constraint is placed on the executive in the exercise of authority. See infra text accompanying notes 113-77.
in Thailand. Hence, the constitutions of Thailand have been viewed as primarily law-in-books or nominal and not law-in-action or normative.39

Is the 1991 Constitution of Thailand different than its predecessors? The inability of the military coup leaders to force the acceptance of a constitution perpetuating their involvement in the political process40 is a clear indication that the 1991 Constitution is indeed different. The Supreme Court of Thailand’s unprecedented decision declaring as unconstitutional a government order by the coup leaders41 suggests a new attitude towards constitutionalism. Moreover, the revocation by the elected House of Representatives of a government decree perceived as interfering with judicial independence42 provides further evidence of a new view regarding constitutionalism. Constitutional change is being discussed in Thailand concerning several of the key institutions and mechanisms of governance,43 suggesting that substantial constitutional reform may only be beginning. Capitalism-driven, economic success has made Thailand of the 1990s an economically, socially and politically different country than Thailand of the 1970s,44 thus requiring a different approach to constitutional issues than in the past. Taken together, what has and is occurring evidences a break from the traditional approach to Thai constitutions and the creation of new consti-

39 Edward McWhinney, Constitution-Making: Principles, Process, and Practice 8-9 (1981) [hereinafter McWhinney]. The law-in-books refers to the positive law as enacted by the legislature whereas the law-in-action means the actual, de facto practice of the law as influenced by community attitudes and expectations. "This dichotomy between abstract constitutional principle, as drafted, and concrete governmental application of that principle" is especially marked "in the case of some more recent ventures in constitution-making where the constitutional charter takes on a politically hortatory, programmatic character, and reads more in the nature of a statement of ideological principles than a practical blueprint for government." Id. at 9. In such a case, the constitution has a symbolic as opposed to functional quality and appears to be "designed more for public relations at home or abroad than as a genuinely operational legal charter. The more rhetorical the formulations in the charter, the more it may appear that the constitution is intended to be nominal and not normative..." Id. at 9.

40 See infra text accompanying notes 87-104, particularly the text accompanying notes 95-103.

41 See Nattaya Chetchotiros & Disathat Rojanalak, Assets Seizure Ruling Opens Pandora’s Box, BANGKOK POST, Apr. 2, 1993, at 4 [hereinafter Chetchotiros & Rojanalak, Pandora’s Box]; see also infra text accompanying notes 79-85.

42 See infra text accompanying notes 184-89.


tutional traditions including a more popularly acceptable constitutional framework. The purpose of this article is to highlight the possible emergence of new constitutional traditions by outlining the principal contents of the 1991 Constitution with a focus on the areas where recent controversy has existed. It is first useful, however, to comment briefly on the history of constitutions in Thailand and identify several key constitutional imperatives that exist irrespective of the written constitution.

II. A BRIEF REVIEW OF THAI CONSTITUTIONAL HISTORY

Thailand has a rich constitutional history which encompasses the fifteen documents of the last sixty years and, prior to that, the words and actions of the forward-looking monarchs of the late 1800s and early 1900s. This history demonstrates that power has rarely changed hands pursuant to the dictates of a written constitution. More frequently changes of government have come through extra-constitutional means, namely the coup d'état. The cycle of Thai politics, of which the coup d'état is a part, has already been noted. The principal reason new constitutions were brought into existence was to legitimate the rule of those usurping power, inevitably military authorities. As has been observed, however: "It is debatable whether the military really needs a Constitution to provide it with legitimacy to rule." Yet, new constitutions are created on a regular basis.

45 Beer makes the point that it is only in the last few decades that autonomous development of constitutional systems has taken place in Asia, the result being that: "Modern constitutional traditions in Asia have just begun." Beer, supra note 29, at 7.

46 See SHIN, supra note 32; Preben A.F. Aakesson et al., The Development of Constitutionalism in Thailand: Some Historical Considerations, in CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA 656 (Lawrence W. Beer ed., 1992) [hereinafter Aakesson et al.]. See also Samudavanija, supra note 3, at 144-56. Regarding the existence and content of constitutionalism during the period of the absolute monarchy see Wongtrangan, supra note 35, at 287-89.

47 Commenting on the popularity and acceptance of coups d'état in Thailand, Dhiravegin suggests that coups are a continuation of the traditional Thai political process where conflicts over transfers of power were common. DHIRAVEGIN, supra note 4, at 150. He further suggests that coups are "sanctioned by Thai socio-religious values." Id. at 195.

48 See supra text accompanying note 4.

49 See supra text accompanying notes 30-32.

50 Chantomvong & Chenvidyakarn, supra note 6, at 153. Traditional governmental legitimacy in Thailand arose from the ability of the government to perform state ceremonies; to maintain law and order; and to provide security from external threats. While to this list may now be added support by the electorate, one commentator has indicated that "the legitimacy of government is still measured by its capacity to perform basic functions." DHIRAVEGIN, supra note 4, at 194-96.

Concerning the military generally in Thailand, Samudavanija and Bumbongkarn have written: "The role of the military as the guardian of national institutions, traditions and virtue has elevated the mili-
The continual recreation of written constitutions is in part a product of the 1932 overthrow of the absolute monarchy and its promised replacement with constitutional, democratic government. Having usurped power to establish constitutional rule, the military has usually seen it as necessary to create a constitution-based government. The number of constitutions and the emphasis put on them has created its own momentum for a new constitution when an old one is suspended. Moreover, a constitutional document which contains elements familiar to foreign interests can assist a new government in obtaining international, and even national, acceptance. This aspect of constitution-making, although not unique to Thailand, is quite familiar there because much of the modern legal system is viewed by some as having been devised in order to appease, if not please, foreign interests. For all the above reasons, written constitutions have been an integral part of Thai political and legal history.

Thailand's constitutional history took a dramatic turn in 1973, when for the first time, there was a popularly-supported replacement of a military government by a civilian one. Despite the reassertion of military power in the 1976 coup, a professional army profession into a position of high prestige in Thai society.” Samudavanija & Bunbongkarn, supra note 21, at 111. Concerning the strength and acceptance of the military in Thailand see generally Samudavanija & Bunbongkarn, supra note 21, at 111-14.

51 Samudavanija & Bunbongkarn, supra note 21, at 79. This promise was never kept. Samudavanija notes: “[T]he irony is that soon after the success of the Westernized elites in their seizure of power from the monarchy [in 1932], constitutional idealism gradually eroded into formalistic constitutionalism.” Samudavanija, supra note 4, at 307.

52 Chantornvong & Chenvidyakarn, supra note 6, at 143.

53 McWhinney comments that constitution-making in some countries may be “in the nature of a public relations exercise, designed in considerable measure to impress governments and public opinion in foreign countries.” McWhinney, supra note 39, at 22.


Petchsiri comments:

Although no conclusive evidence is available to show why Thailand embraced the Western system, two major reasons emerge as apparent basic causes of this change. First, voluntary adoption preserved national autonomy and evaded colonial powers and their claims of extraterritorial jurisdiction. Second, Westernization would help Thailand reach developmental goals such as industrialization, national unification, and social welfare.

Id. at 10. The former reason is inevitably given more weight than the latter.

1976, the consequence of the political events of 1973, has been that the military has no longer been able to make the Thai public accept a constitution nakedly designed to assure the military dominant power and restrict the participation of other social forces. This outcome is clearly evidenced by the 1978 Constitution which deliberately set out to create power-sharing among competing forces and by the failure of the attempt made by the military in 1991, to create a constitution exclusively to their liking. Thus, the political aspects of the written constitutions of Thailand are increasingly subject to pressures outside the control of the dominant political force, representing the major shift that has taken place in sixty years of Thai constitutional history.

Given the transitory nature of Thai constitutional documents, it is reasonable to suggest that there are a number of 'constitutional imperatives' explicitly or implicitly existing within Thailand that are as important, or even more important, than the written constitutions. By their very nature, constitutional imperatives are flexible and not legally enforceable. Their

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56 See WRIGHT, supra note 55, at 243-61. See generally sources cited supra note 55.
57 Chantornvong & Chenvidyakarn, supra note 6, at 153; Neher, supra note 3, at 592.
58 See Chantornvong & Chenvidyakarn, supra note 6, at 156. Dhiravegin refers to the 1978 Constitution as having created "halfway democracy" as the Constitution sought to blend the newly emerged social forces with the entrenched civil and military bureaucrats. DHIRAVEGIN, supra note 4, at 209. Commenting on the objectives of the 1978 Constitution, one of the participants in the drafting stated that there were two objectives: legitimizing military participation in the political process and regulating political structures to support democratic development. Tongdhamzhart, supra note 34, at 56.
59 See infra text accompanying notes 87-104.
60 While not referring to constitutional imperatives as such, SHIN has commented:

[While written constitutions may not be venerated in Thailand in themselves, this constitutional instability is in certain respects more apparent than real. Thailand, in addition to the written constitution which is in force at any given time, may be said also to have substantial structure of law and custom as the basis upon which the government rests.

SHIN, supra note 34, at 61.

Section 30, para. 1 of the 1991 Interim Constitution makes explicit reference to "constitutional practices of Thailand." Section 30, para. 1 reads: "Whenever no provision of this Constitution is applicable to any case, it shall be decided in accordance with the constitutional practices of Thailand under the democratic form of government." RADTHATHAMMANGOON [Constitution] (B.E. 2534, Mar. 1, 1991) § 30, para. 1.

These constitutional imperatives are not unlike constitutional conventions which exist in countries which derive their constitutional heritage from the United Kingdom. Concerning constitutional conventions see generally GEOFFREY MARSHALL, CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY (1986); ANDREW HEARD, CANADIAN CONSTITUTIONAL CONVENTIONS (1991).
authority is derived from the willingness of the population and powerholders to accept and abide by them.

The primary constitutional imperative in Thailand is the unquestioned position of the current Monarch, King Bhumibol, as the Head of State.\textsuperscript{61} This position is regularly affirmed in the written constitutions.\textsuperscript{62} However, the King's authority goes beyond the ceremonial role of a constitutional monarch and the role assigned the Monarch by the formal constitution. "It has been overwhelmingly accepted, especially since 1973, that the king remains the final arbiter of a national crisis. The social stability of Thailand, despite its periodic coups d'état, can be explained by the existence and positive role of the monarchy."\textsuperscript{63} Hence, the King’s approval was sought for the 1991 Interim Constitution,\textsuperscript{64} and all the major protagonists accepted His intervention in the Spring of 1992.\textsuperscript{65} The full extent of the King's authority is unclear, but His constitutional position representing the interests of the general Thai population is increasingly accepted. King Bhumibol is clearly one of the pillars of the Thai constitution, irrespective of the content of the written constitution.\textsuperscript{66}

A second constitutional imperative concerns the relationship between the governing and the governed, and it directs that the dominant political force will not exercise its authority to unduly repress the freedoms of the Thai people. Historically, there is little experience in Thailand of widespread social, economic, religious or political repression,\textsuperscript{67} even in times of dictatorial, military rule.\textsuperscript{68}

\textsuperscript{61} Not surprisingly following the 1932 overthrow of the absolute monarchy, the significance of the Royalty was minimized. During the regime of military strong-man Sarit Thanarat, the Kingship was revitalized as a way of establishing legitimacy for the military government. See Chantomvong & Chenvidyakarn, \textit{supra} note 6, at 151. They conclude: "In the end the monarchy has come to exercise a much more important role in Thai politics than the military leaders originally had planned for." \textit{Id}. The military's espousal of their close connection with the Monarch has given King Bhumibol a degree of leverage over the military.

\textsuperscript{62} See \textit{RADTHATHAMMANOON} [Constitution] (B.E. 2534, Dec. 9, 1991) \S\ 3. \textit{See generally id.} chapter 2, \S\S\ 6-23. The historic position of the Monarch vis-à-vis the Thai people and in the written constitutions is summarized in \textit{SHIN}, \textit{supra} note 32, at 16-30.

\textsuperscript{63} Samudavanija, \textit{supra} note 4, at 337-38.


\textsuperscript{65} King Bhumibol's intervention in the Spring 1992 crisis has been referred to above. \textit{See supra} note 17.

\textsuperscript{66} The constitutional imperative associated with the Thai Monarch is related to King Bhumibol and not the institution of the Monarchy. Hence, a successor may not have anywhere near the same importance in Thai constitutional activity.

\textsuperscript{67} A number of exceptions to this bold statement exist, the most obvious being the position of women in Thai society. \textit{See generally Darunee Tantiwiramanond \\& Shashi Pandey, \textit{The Status and Role of Thai Women in the Pre-Modern Period: A Historical and Cultural Perspective}, 2 \textit{SOJOURN: SOCIAL}}
It should be pointed out that Thai authoritarianism is not very repressive. Authoritarian regimes that attempted to be too repressive usually met with strong opposition from various sections of society.

The existence of countervailing forces such as an independent judiciary, a free press, and some favourable social conditions such as relatively little class antagonism or ethnic or religious cleavage, are necessary but not sufficient conditions for a viable democracy in Thailand. These conditions do serve as important factors in preventing an authoritarian regime from becoming extreme in its rule.69

While Thais respect political power,70 they do not value political power exercised indiscriminately as this would be both inconsistent with the patron-client heritage in Thai society and with socio-cultural norms regarding individualism. The patron-client heritage directs that while clients will respect and obey a patron, the patron will not make unreasonable demands on the client and will assist the client materially or otherwise.71 The powerful (patron) will only receive respect, status and obedience where the power exercised is not unreasonable or arbitrary. Moreover, one of the most prevalent socio-cultural norms in Thailand is individualism and its associ-

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68 The Sarit regime, from 1958-63, was unquestionably one of absolute rule with little tolerance for political dissent. Yet, the regime did not exercise its authority totally arbitrarily and did seem to have as a goal the enhancing of the economic condition of the citizenry. Sarit was viewed as a benevolent patriarchal ruler and "was accepted by the general population." See Dhiravegin, supra note 4, at 159-65.

69 Samudavanija, supra note 4, at 337.

70 Dhiravegin comments: "The exercise of power is seen as being more effective than going through a long process of bargaining." Dhiravegin, supra note 4, at 151. He goes on to note that: "Power is not used as an ultimate ratio but as part of the process of getting things done." Id. See also Wongtrangan, supra note 35.

ated tolerance for non-conforming behavior. Equally important is the desire to avoid conflict situations. Together these socio-cultural norms reinforce a tolerance for a degree of non-conformity and an unwillingness to accept interference with the Thai population’s freedoms. Reasonable dissent, freedom of the press, freedom of religion, economic freedom and social freedoms, many of which existed to some degree prior to formal constitutional government, have generally been respected irrespective of a written constitution and appear to be widely accepted despite occasional violations. Political and labor freedoms, however, have been less widely recognized than these others.

72 See John F. Embree, Thailand - A Loosely Structured Social System, 52 AM. ANTHROPOLOGIST 3 (1950). Engel comments: “Most observers of traditional Thai society have been impressed with the relative weakness of organizational units that are prominent in other societies: caste, community groups, and even kinship. Individualism is mentioned again and again as an outstanding trait among Thai people . . . .” ENGEL, supra note 71, at 69. See also Han ten Brummelhuis, Abundance and Avoidance: An Interpretation of Thai Individualism, in STRATEGIES AND STRUCTURES IN THAI SOCIETY 39 (Han ten Brummelhuis & Jeremy H. Kemp eds. 1984).

73 One insightful observer has commented: “The Thai cultural bias is to avoid conflict and social confrontation. Thus, conflict resolution often takes the form of arbitration and compromise and voluntary restitution of wrongs based on the wise counsel of elders, be they monks, headmen, spirit doctors, or respected family and clan heads.” William J. Klausner, Law and Society, 3 CHULALONGKORN L. REV. 1, 7 (198.) Concerning mediation in legal disputes see ENGEL, supra note 71, at 75-99.

74 It is generally acknowledged that Thailand has the freest print media in Southeast Asia. See generally Pira Chirasopone, Thailand, in PRESS SYSTEMS IN ASEAN STATES 91 (Achal Mehra ed., 1989). While the print media has been beyond direct government control for some time, the broadcast media has been directly government controlled. This state of affairs is now in the process of being changed. See New Television Licences Herald Era of Access, BANGKOK POST WKLY. REV., Aug. 7, 1992, at 3; Cabinet Agrees to Overhaul Broadcasting Control Body, BANGKOK POST WKLY. REV., Sept. 4, 1992, at 20.

75 The attempt by the military to censor the print media in the Spring of 1992, was largely unsuccessful. MAISIRIKROD, supra note 13, at 29, 53-54, Paul Handley, Press and Pirates, FAR E. ECON. REV., June 11, 1992, at 10-11.

76 The state religion in Thailand is Buddhism with the government involved in the Sangha, or order of Buddhist monks. See PETER A. JACKSON, BUDDHISM, LEGITIMATION, AND CONFLICT 63-93 (1989) [hereinafter JACKSON]. For an interesting and provocative assessment of the relationship between the Thai state and Buddhism see Jim Taylor, Buddhist Revitalization, Modernization, and Social Change in Contemporary Thailand, 8 SOJOURN: SOCIAL ISSUES IN SOUTHEAST ASIA 62 (1993). However, acceptance of other religions has deep roots in Thailand and there exists a substantial Muslim population in Southern Thailand. See KEYES, supra note 55, at 126-35. Within the state-supported Sangha, there have been issues of defrocking and excommunication. See Cholthira Satyawadhna, The Defrocking of Phra Bodhiraksa: A Case Study of Human Rights Violations in Thailand, in HUMAN RIGHTS IN THE ASIA-PACIFIC REGION 75-91 (John Girling ed., 1991); see also JACKSON, supra, at 159-98. Generally concerning religious freedom in Thailand in its legal context, see Aakesson et al., supra note 46, at 674-75.

77 Concerning the abolition of slavery, the right to a fair and speedy trial, the right to legal aid, the right to free speech, the right to education, and the right of protection from the acts of corrupt officials see Aakesson et al., supra note 46, at 670-79.

78 Labor unions have been a frequent target of military repression. Following the February 1991 coup, the military junta announced its intent to remove the legal recognition of state enterprise unions.
While not a constitutional imperative, mention must be made of a constitutional practice which has existed because of the extra-constitutional means by which power has so frequently changed hands in Thailand. Courts and subsequent governments have accepted the notion that regardless of the illegality of the acquisition of authority, once in an unquestioned position of power, legislative action taken by the usurping authority is legally effective. This practice prevents having to re-enact laws made prior to a new constitution coming into force, and moreover, it is a pragmatic recognition of political reality unencumbered by legal formalism. Indeed, the 1991 Constitution specifically directs that laws, notifications and orders issued under the Interim Constitution are valid under the 1991 Constitution.

To a constitutional purist, however, such a practice constitutes the recognition of the legitimacy of the illegal means of acquiring power and the acceptance of the primacy of might over constitutional principles.

This pragmatic practice has been shaken by the March 1993, ruling of the Thai Supreme Court that an order issued by the National Peace-Keeping Council (the coup leaders) in February 1991, was inconsistent with Thai

Rodney Tasker, Ready and Waiting, FAR E. ECON. REV., Mar. 28, 1991, at 9 [hereinafter Tasker, Ready and Waiting]. Reportedly, this move by the military junta was viewed with favor in Thailand. Despite promises by the civilian government to restore the union rights of state enterprise employees, there has been reticence and delay on this issue. See Gordon Fairclough, Back to Work, FAR E. ECON. REV., Nov. 5, 1992, at 21-22. See generally Kelly A. Doelman, Thailand's State Enterprise Labor Relations Act: Denying Public Employees the Right of Association and the Right to Organize and Bargain Collectively, 2 PAC. RIM L. & POL'Y J. 63 (1993).


Contemporary Thai jurisprudence has now recognized the legitimacy of the military mechanisms which have toppled previous lawful governments. According to the precedent established by the present Supreme Court of Thailand, the (military) leader of any coup d'état who successfully takes over power from the lawful government is deemed the supreme ruler of the government. Therefore, any decrees or commands issued by him during his rule are now regarded as of equal status to the lawful actions of the Parliament. In the past 50 years in Thailand there have been numerous successful coups and revolutions, yet all legislation enacted by means of revolutionary decrees are considered valid laws. There is no doubt that almost all of these decrees, etc. were enacted in contradiction to the ideology of human rights; none the less, in the context of the current Thai Constitution, all are regarded as valid, as integral parts of 'the provisions of the laws.'

Id.


constitutional practices. The Supreme Court did not strike down the offending law because of the illegality of the seizure of power; rather they found the law to be inconsistent with the relevant provisions of the 1991 Interim Constitution. The Court rejected the argument that Section 32 of the Interim Constitution, which provided that all orders of the National Peace-Keeping Council were legally valid, insulated the order from constitutional attack. The Court's holding regarding unconstitutionality, however, was a narrow one, and it was only the particular nature of the facts which gave the Court the jurisdiction to examine the relevant order. Moreover, there is uncertainty over the legality of the Supreme Court's jurisdiction to pronounce on the constitutionality of laws. These elements of the case raise doubts about both its potential use in challenging other orders issued by the coup-leaders and its wider implications for Thai
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constituent practices. Thus, the decision is either a bold step toward undermining the legitimacy conferred upon coup-leaders by Thai practices or an anomaly that will be ignored as being inconsistent with the pragmatism necessary to maintain a coherent legal system faced with abrupt, illegal changes of government.

III. DRAFTING THE 1991 CONSTITUTION

In exploring national experiences in constitution-making, one authority noted the following "options as to arenas for constitutional drafting and enactment:" 1) the expert commission; 2) parliamentary enactment; 3) executive diplomacy; 4) constituent assembly; 5) popular initiative; and 6) the popular referendum to legitimate the new or revised constitution. The experience of Thailand in 1991, arguably involved the employment of an expert commission, parliamentary (a non-elected one) enactment, assent of the executive and to a limited extent, popular opinion. The involvement of the commission, the parliament and the executive (the King) were set out in the 1991 Interim Constitution. The participation of the general public was not provided for in the constitutional drafting process, but rather it arose spontaneously as a reaction to the direction the constitution was going in the formal process.

One of the tasks of the appointed National Legislative Assembly (NLA), established pursuant to the 1991 Interim Constitution, was the drafting of a new constitution. The Interim Constitution directed the NLA to appoint a twenty-person committee charged with the task of drafting a new constitution. The NLA was then to consider the work of the Drafting Committee in three readings with the final reading requiring a roll call vote and a two-thirds majority in favor for the constitution to be adopted. When the constitution received the necessary approval, it was to be presented to the King for signature before its promulgation as the new Constitution. If the NLA failed to approve the proposed constitution at the third reading, the NLA was to try and draft a new constitution that

87 MCWHINNEY, supra note 39, at 27-41.
88 RADTHATHAMMANOON [Constitution] (B.E. 2534, Mar. 1, 1991) §§ 10-1I.
89 Id § 6, para. 1.
90 Id § 10, para. 1. Members of the committee were not required to be members of the NLA. Id. § 10, para. 2.
91 Id. § 11, paras. 1-2.
92 Id. § 11, para. 3.
would obtain sufficient support.\textsuperscript{93} If, after two attempts, the NLA could not muster a two-thirds vote in favor of a constitution, the NLA was to be terminated and the cabinet and National Peace-Keeping Council\textsuperscript{94} were to sit jointly to complete, revise or redraft the constitution and submit it to the King.\textsuperscript{95} While the above process was followed, there were a few unexpected twists along the way.

A month after the February 1991 coup, 292 people were appointed to the NLA by the King pursuant to the advice of the National Peace-Keeping Council.\textsuperscript{96} Over half were active or former military personnel, and of the civilians, "there were few figures likely to stand in the way of the military."\textsuperscript{97} The twenty-person Drafting Committee started work in May and presented the product of its labors to the NLA in August.\textsuperscript{98} Although the NLA overwhelmingly supported the proposed constitution at its first reading in late August, they departed from the process set out in the Interim Constitution by establishing a twenty-five person Scrutiny Committee to review the proposed constitution.\textsuperscript{99} The Scrutiny Committee, announcing completion of its work in mid-November, recommended revisions of several key aspects of the proposed constitution.\textsuperscript{100} In response to the work

\textsuperscript{93} Id. § 12.
\textsuperscript{94} The National Peace-Keeping Council (NPKC), consisting of the February 1991 coup leaders, was established by § 18 of the 1991 Interim Constitution. Id. § 18.
\textsuperscript{95} Id. § 13, para. 1.
\textsuperscript{96} Id. § 7, para. 1.
\textsuperscript{97} Tasker, Ready and Waiting, supra note 77, at 8. The composition of the NLA met with criticism from political analysts, the media, and numerous politicians. Id. See also Military Dominates Legislative Assembly, BANGKOK POST WKLY. REV., Mar. 29, 1991, at 1.
\textsuperscript{98} For a review of the contents of the constitutional document completed by the Drafting Committee and some of the criticisms made of the document see Banyat Tasaneeyavej, Charter Draft Attacked as Political 'Time Bomb', BANGKOK POST WKLY. REV., Aug. 9, 1991, at 8 [hereinafter Tasaneeyavej]. In the opinion of one observer, the Committee had "enjoyed an unexpected freedom in drafting, as the NPKC refrained from imposing definite guidelines." Bumbongkarn, supra note 5, at 136.
\textsuperscript{99} Draft Constitution Wins Easy Approval, BANGKOK POST WKLY REV., Sept. 6, 1991, at 3. The Scrutiny Committee was composed of eight senior military officers and other members known to have close connections with the National Peace-Keeping Council (NPKC). See Sermsuk Kasitipradit, Power Play on the Charter Chessboard, BANGKOK POST WKLY. REV., Sept. 13, 1991, at 8 [hereinafter Kasitipradit, Power Play]; Rodney Tasker, The Power Game, FAR E. ECON. REV., Sept. 19, 1991, at 12 [hereinafter Tasker, Power Game]. Asked about the allegation of closeness of most of the members of the Scrutiny Committee and the NPKC, the chair is reported to have responded that he did not know what the NPKC was an abbreviation for! Constitutional Review Likely to Take 3-6 Months, BANGKOK POST WKLY. REV., Sept. 13, 1991, at 4.
\textsuperscript{100} The recommended revisions are noted in Bhuchongkul, supra note 5, at 319-20; Panel Unveils Controversial Draft Charter, BANGKOK POST WKLY. REV., Nov. 22, 1991, at 1 [hereinafter Panel Unveils Controversial Draft Charter].

Commenting on the revisions made by the Scrutiny Committee, a newspaper editorial stated: "[T]he revised draft charter has made the original draft drawn up by the NPKC-appointed Constitution Drafting
of the Scrutiny Committee and while the NLA passed the constitution through the second reading, the public became directly involved in the process, staging massive protests against the proposed constitution. The key points of contention were the ability of government and military officials to be in the cabinet and the authority of the appointed Senate to have an equal voice with the elected House of Representatives in nominating the prime minister and voting to replace a sitting government. The Scrutiny Committee withdrew several of their amendments, and the NLA hastily made further changes in the face of the criticism. In another unexpected move, King Bhumibol called for compromise, stating that if the draft constitution proved unacceptable in practice it could be amended. Following this intervention, the proposed constitution passed the third and final reading by the NLA, and the King approved it as the new Constitution of Thailand.

IV. THE 1991 THAI CONSTITUTION

Considering Thailand’s extensive experience with written constitutions, it is not surprising that the 1991 model has striking facial similarities to its predecessors. The Chair of the Constitutional Drafting Committee stated that they used the 1978 Constitution as the basis for deliberations. The 1991 and 1978 constitutions are similarly structured with eleven chapters and a set of transitory provisions; the title and arrangements of the chapters are virtually the same; and a large percentage...
of the provisions of the 1978 document have been incorporated with minimal change into the 1991 Constitution.

One difference between the 1978 and 1991 documents is in Chapter Eleven, Amending the Constitution. Amending the 1978 Thai Constitution involved the passage of the revisions by a majority vote of the Senate and House of Representatives sitting in joint session. This requirement has been retained in the 1991 Constitution. The distinguishing feature of the amending process in the 1991 Constitution is that not only can the Council of Ministers or one-third of the members of the House of Representatives commence the process, as was the case in the 1978 Constitution, but now one-third of the full membership of the House of Representatives and Senate can also start the process. This provision gives the Senate a possible avenue for commencing constitutional change which did not previously exist. Despite the apparent ease of operation of the amending process under the 1978 Constitution, only two amendments were made to the 1978 Constitution. Within a few months of completion of the 1991 Constitution and following the bloodshed and violence of May 1992, however, four constitutional amendments were quickly made in order to assist resolution of the unrest.

106 See RADTHATHAMMANOON [Constitution] (B.E. 2521, Dec. 22, 1978) § 194(2)-(6); see also Tongdhamazhart, supra note 34, at 60.
107 RADTHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) § 211(2)-(6).
109 RADTHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) § 211(1).
110 Assuming that the appointed Senate is military-dominated, the new proactive role in constitutional amendments can be criticized as being undemocratic and permitting the possibility of further constitutional manipulation. It can also be argued that the ability to institute constitutional change may work to allow adaptation of the existing constitutional framework to new political realities without the necessity to suspend or revoke the 1991 Constitution.
A. The Balance of Power

As between the American constitutional model of a strict division between the legislative and executive levels of government and the British model of the executive being drawn from and directly responsible to the legislature, the 1991 Thai Constitution follows its 1978 predecessor in siding with the British model, albeit with variations. Pressure had existed to adopt the full separation of powers approach; it being argued that prohibiting legislators from being in the cabinet (Council of Ministers) would reduce vote-buying, a perceived prevalent practice in Thai elections. This view was considered but rejected in favor of the system now in the 1991 Constitution which stipulates that ministers can be, but are not required to be, from the elected House of Representatives and that the ministers are responsible to the Parliament (House of Representatives and Senate).

1. The Council of Ministers

The executive level of government in Thailand, the Council of Ministers set out in Chapter Seven of the 1991 Constitution, is the most powerful of the traditional three levels of government - executive, legislative, judicial. Contributing to the power of the executive vis-à-vis the legislative branch has been the discontinuity of parliaments over the last few decades.

Although not required by the 1991 Constitution, an amendment made in 1992, following the silent coup by General Suchinda and subsequent disturbances, requires that the prime minister be a member of the elected

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113 For a brief discussion of the American model and the British model as viewed in Thailand see Tongdhamazhart, supra note 34, at 56-58.
115 See in particular the comments of former Parliamentary President Ukrit Mongkolnavin noted in Meechai: Power Separation Deserves Widespread Debate, BANGKOK POST WKLY. REV., Mar. 29, 1991, at 3. Numerous division of powers proposals were considered. See Nattaya Chetchotiros & Banyat Tasaneeyavej, Constitution Drafters Aim to Satisfy All Sides, BANGKOK POST WKLY. REV., May 31, 1991, at 8 [hereinafter Chetchotiros & Tasaneeyavej, Constitution Drafters].
117 Samudavanija, supra note 4, at 325.
House of Representatives. Other ministers need not be members of the House of Representatives but, as is the case with the prime minister, a minister may not be a government (or military) official.

2. The Senate

The 1991 Constitution calls for the King to appoint 270 senators. In contrast to the House of Representatives, there is no prohibition against senators being government or military officials. Although Section 94 does not explicitly indicate who is to advise the King on Senate appointments, this function belongs to the prime minister. However, the first group of senators to be appointed under the 1991 Constitution were appointed pursuant to Section 217, part of the Transition Chapter, which directs that the King is to be advised on these selections by the President of the National Peace-Keeping Council. These Senators are to be in office for four years before the Senate-appointment provisions of the 1991 Constitution become operational. Pursuant to the Constitution, on the March 1992, election day, the King appointed 270 senators. Of these,

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118 Amendment of the Constitution of the Kingdom of Thailand No. 4.
119 RADTHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) § 162. The restriction on a Minister from simultaneously being a military or government official was one of the significant tension points in the drafting of the Constitution. Pursuant to this provision, when General Suchinda became Prime Minister in April 1992 he resigned from the military. Rodney Tasker, Premier of Last Resort, FAR E. ECON. REV., Apr. 16, 1992, at 10-11; Gen Suchinda Becomes PM, BANGKOK POST WKLY. REV., Apr. 17, 1992, at 1.
120 RADTHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) § 94. This figure represents three-quarters of the number of elected members of the House of Representatives which has 360 members. See id. § 99.
121 Id. § 97.
122 The issue of who would advise the King on Senate appointments was, not surprisingly, a controversial issue in the drafting of the 1991 Constitution. The Drafting Committee’s original text created a nine-person Constitutional Committee charged with the task of nominating 1,350 senatorial candidates who would amongst themselves select the 270 senators. Tasaneeyavej, supra note 98, at 8. The Scrutiny Committee scrapped the Constitutional Committee’s proposal following heavy criticism. The Scrutiny Committee accepted that, regarding Senate appointments, the King was to be advised by the Prime Minister. Panel Unveils Controversial Draft Charter, supra note 100, at 100; see also Charter Panel Still Undecided on Many Key Issues, BANGKOK POST WKLY. REV., Nov. 8, 1991, at 3.
124 Id. § 217, para. 3.
154 were military or police officers and 116 civilians. The number of civilians in the Senate is greater than in the pre-coup Senate (116 as compared to 105), and only fifty-one people retained their Senate positions. Of the civilians, Thailand’s economic elite are well-represented. Only seven women were appointed.\textsuperscript{126}

An indication of the extent to which constitutional reform is being contemplated in Thailand is the consideration being given the elimination of the Senate by the House Constitutional Amendments Committee.\textsuperscript{127} At a minimum, the Committee is considering recommending a reduction in the size of the Senate and an alteration of the process by which senators are appointed.\textsuperscript{128} The Senate could not unilaterally block the adoption of such an amendment since a constitutional amendment requires a majority vote of the Senate (270 members) and House of Representatives (360 members) sitting together.\textsuperscript{129}

3. The House of Representatives

The 1991 Constitution stipulates that the elected House of Representatives is to have 360 members.\textsuperscript{130} The creation of election areas or constituencies is to be by province. Provinces shall be assigned the proportionate number of representatives their population dictates,\textsuperscript{131} with each being entitled to at least one representative.\textsuperscript{132} Where the population of a province entitles it to more than three representatives, the province shall be divided so that an election area or constituency has a maximum of three representatives.\textsuperscript{133} Voters are to directly elect representatives by secret ballot.\textsuperscript{134} At one stage in the drafting of the 1991 Constitution, direct voting for candidates was to have been replaced with party slate voting by which voters would choose parties rather than individuals. Despite its adoption by the Constitutional Scrutiny Committee, however, the party slate

\textsuperscript{126} Id.
\textsuperscript{127} New Look at Axing Senate, supra note 43, at 4.
\textsuperscript{128} Id.
\textsuperscript{129} RADTHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) § 21. See supra text accompanying notes 106-09.
\textsuperscript{130} RADTHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) § 99, para. 1.
\textsuperscript{131} Id. § 100, para. 1.
\textsuperscript{132} Id. § 100, para. 2.
\textsuperscript{133} Id. § 101, para. 1.
\textsuperscript{134} Id. § 102, para. 1.
voting system was quickly withdrawn following massive criticism.\textsuperscript{135} Thus, in its constitutionally-dictated form, the House of Representatives appears to be representative of the general Thai population.

A certain House membership provision regarding party affiliation, however, has the potential to reduce this representative tendency. Candidates for the House of Representatives must not be military or government officials.\textsuperscript{136} Yet they must be members of a political party which has at least 120 candidates in the election.\textsuperscript{137} Hence, there is no such thing as an independent candidate or small, regional parties which is problematic.

The idea that only a few large parties can finance their elections, thus automatically eliminating small parties which could become a destabilizing force in parliament, also has the unintended effect of making money a very important factor in electoral and party politics, and of strengthening the position of businessmen - politicians who are the sponsors of leaders of the parties.\textsuperscript{138}

In sum, the requirement that candidates be members of large political parties presents business elites with the opportunity to exert a disproportionate amount of political power.

4. \textit{No-Confidence Motions}

The key to the balance of power between the legislative and executive levels of government, as well as between the elected House of

\textsuperscript{135} The party slate voting system was strongly favored by certain political parties and some vocal members of the military establishment since it was seen as favoring well-financed and high profile candidates. \textit{See} Kasitipradit, \textit{Power Play}, supra note 99, at 8; Tasker, \textit{Power Game}, supra note 99, at 12.

The party slate voting system was rejected by the Drafting Committee because of the possible undue influence of big money. \textit{See} Banyat Tasaneeyavej, \textit{Senators to Have More Clout in New Charter}, BANGKOK POST WKLY. REV., July 5, 1991, at 3; Chetchotiros & Tasaneeyavej, \textit{Constitution Drafters}, supra note 115, at 8. The Scrutiny Committee sought to incorporate the party slate voting system into the Constitution but almost immediately reversed itself. \textit{Panel Unveils Controversial Draft Charter}, supra note 100, at 1. The party slate voting system was initially in the 1978 Constitution but was removed and replaced by a direct voting system by Constitutional Amendment in 1985. \textit{See} Samudavanija, \textit{supra} note 4, at 326.

\textsuperscript{136} \textit{See} RADTHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) \S 107(9).

\textsuperscript{137} \textit{See id.} \S\S 105(3), 106.

\textsuperscript{138} Chantorvong & Chenvidyakarn, \textit{supra} note 6, at 158.
Representatives and the non-elected Senate is the ability to use and control no-confidence motions. An individual minister or the entire Council of Ministers must step aside if a no-confidence motion is approved. Following an amendment made to the 1991 Constitution in June 1992, the no-confidence apparatus is totally within the hands of the elected House of Representatives. The June 1992 amendment repealed a provision in the Transition Chapter which allowed the Senate, for the first four years following the adoption of the 1991 Constitution, to participate in and vote on no-confidence motions. Thus, as between the House of Representatives and Senate, the House is clearly the dominant body, and the Council of Ministers is directly responsible to the elected House.

B. The Legislative Process

The pre-eminence of the executive branch of government vis-à-vis the elected House of Representatives and the appointed Senate is constitutionally entrenched by the process that has been established for enacting bills into law. Three categories of bills have been created: regular bills; finance bills; and, as a subset of finance bills, budget bills. The Constitution clearly states that it is the function of the Council of Ministers to prepare bills and submit them to the House of Representatives. Bills may only originate in the House of

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139 The term no-confidence is not specifically used in the translation of § 150 of the 1991 Constitution, although it is used in § 137 of the 1978 Constitution, the model for the 1991 provision. See RADTHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) § 150; RADTHATHAMMANOON [Constitution] (B.E. 2521, Dec. 22, 1978) § 137.


141 Id § 221, repealed by Amendment of the Constitution of the Kingdom of Thailand No. 3 (Int'l Translations Office trans., Thail., June 29, 1992).


143 Finance bills are bills not covered by § 146 of the 1991 Constitution (see infra notes 159-63) but which involve: establishing or changing taxes or duties; expenditure of state funds; establishment of an agency which results in increased government expenditure; borrowing; or the currency. RADTHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) § 137, para. 3. The determination of whether a bill is a finance bill is to be made by the Speaker of the House of Representatives. Id. § 137, para. 4.

144 The bills that have been labeled as budget bills are those listed in § 146 of the 1991 Constitution: the Annual Expenditure Budget Bill; the Bill on Additional Budget, and the Bill on Transfer of Expenditures. Id. § 146.

145 Id. § 137, para. 1.
Representatives if the political party of the bill’s proponent has agreed to support it and there are at least twenty members of that political party in the House to certify their support. Moreover, if the proposed bill is a finance bill, the bill must be ratified by the prime minister.

1. Finance and Regular Bills

The House of Representatives is responsible for considering finance and regular bills and, if approved, they are sent to the Senate. The Senate has sixty days in the case of regular bills or thirty days in the case of finance bills for deliberation. If a bill is approved by the Senate, it will become law when presented by the prime minister to and signed by the King. If the Senate makes no determination on the bill by the end of the applicable time period, the bill is deemed to have been approved. Where a bill is rejected by the Senate, the bill is considered withheld, and it is returned to the House of Representatives for reconsideration following a 180-day period. If a withheld bill is a finance bill, it can be reconsidered by the House immediately. If, upon reconsideration of a withheld bill, the bill is reaffirmed by the House of Representatives, Senate approval is dispensed with, and the bill is to be forwarded to the King for signature. During the period that a bill is withheld, no bill having the same or similar contents may be proposed. Where a bill is amended by the Senate and the amendment is approved by the House, the bill shall proceed to the King for signature. Alternatively, if the amendment is not accepted, a joint commission of the House and Senate shall consider the bill, and propose a single bill to the House and Senate. Again the bill is considered a

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146 Id. § 137, paras. 1-2.
147 Id. § 137, para. 1.
148 Id. § 140, para. 1.
149 Id. § 140, para. 1.
150 Id. § 88.
151 Id. § 140, para. 3.
152 Id. §§ 141, para. 1, 142, para. 1.
153 Id. § 142, para. 2.
154 Id. § 142, paras. 1-2.
155 Id. § 143, para. 1. If doubt arises whether a submitted bill is the same as or similar to a withheld bill, the President of the Senate or Speaker of the House of Representatives is to submit the bills to the Constitutional Judicial Council (Constitutional Tribunal) for a ruling. Id. § 143, para. 2. The Constitutional Tribunal is described below. See infra text accompanying notes 20-33.
156 RADTHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) § 141, para. 1(3).
157 The size and composition of the Joint Commission is not set out in the 1991 Constitution. There is, however, no requirement for its members to be members of the House or Senate. Clearly, the task

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withheld bill and subject to the same rules as noted above, including the requirement that only the House need approve the bill proposed by the Joint Commission.158

2. Budget Bills

Regarding budget bills, the House of Representatives has ninety days to dispose of the bill or it is considered to have been approved,159 whereas the Senate has fifteen days.160 The House of Representatives has no ability to amend a budget bill as it is restricted to using non-binding motions regarding minor amendments.161 Although the Constitution is not explicit on this point, a vote by the House of Representatives to reject a budget bill could be taken as a no-confidence vote in the executive and lead to the resignation of all or some of the Council of Ministers. In contrast, a negative vote by the Senate on a budget bill simply returns the bill to the House of Representatives and hence would not amount to a direct no-confidence vote.162 Thus, although the Parliament has less power over budget bills, the House clearly appears to be able to exert some influence on the executive level of government with regard to the process of passing such bills.

3. Final Approval of Bills

As noted, all bills approved by Parliament are to be presented by the prime minister to the King for signature.163 Where a bill remains unsigned by the King, the House of Representatives and Senate sitting in joint session shall reconsider the bill, and if a two-thirds vote of the joint sitting approves, the bill shall be resubmitted to the King. If the King still does not sign the bill, after thirty days the prime minister shall publish the bill as a law.164

of the Joint Commission is to reconcile the versions of a bill supported by the House and Senate. Id. § 141(5).

See id. §§ 142-43.
Id. § 146, para. 2.
Id. § 146, para. 3.
Id. § 146, para. 5.
Id. § 146, para. 4.
Id. § 88.
Id. § 89.
4. Emergency or Executive Decrees and Royal Proclamations

Emergency or Executive Decrees and Royal Proclamations are to be enforced as acts of law. They can be issued by the King upon advice of the Council of Ministers regarding 1) tax and monetary matters, and 2) emergency situations which require action to maintain national security, public safety, national economic well-being or to avert public disasters. In the latter case, an Emergency or Executive Decree is only to be used when the Council of Ministers has considered the emergency situation unavoidable. This paragraph is not found in the relevant provision in the 1978 Constitution, Section 157. The requirement that the Council of Ministers consider the situation an unavoidable emergency raises the threshold of when an Emergency Decree can be issued. Thus, it appears to be designed to confine use of the Decrees to true emergencies and not just for executive convenience.

All Emergency or Executive Decrees and Royal Proclamations must be considered by Parliament at the first opportunity and either formally accepted as laws or rejected. The Transition provisions of the 1991 Constitution indicated that during the first four years acceptance or rejection of Emergency or Executive Decrees was to be based on approval of the House of Representatives and Senate sitting together. One of the June 1992 Constitutional Amendments removed this requirement. Under the amendment, an Emergency Decree rejected by the House of Representatives alone ceases to have the force of law, although rejection does not affect the legality of any action taken while the Decree was in effect. The operation of this provision came under scrutiny in the aftermath of the May 1992 crackdown. By Emergency Decree, an amnesty was granted to all those involved in the bloodshed including those who ordered the use of

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165 Id. § 174, para. 1.
166 Id. § 172, para. 1. Although described as Emergency Decrees in the Constitution, they are commonly referred to as Executive Decrees.
167 Id. § 172, para. 2.
168 See id. § 172, paras. 3, 5, 6.
169 Id. §§ 219, para. 1(2), 221.
170 Amendment of the Constitution of the Kingdom of Thailand No. 3 (Int'l Translations Office trans., Thail., June 29, 1992). This amendment repealed § 221 of the 1991 Constitution.
171 RADTHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) § 172, para. 3. Section 172, para. 4 indicates that in the case of a rejected executive decree the pre-existing law comes back into effect. Id. § 172, para. 4.
Although the House of Representatives overwhelmingly rejected acceptance of the amnesty decree, the amnesty granted by the decree is considered to still be valid. Although the House of Representatives overwhelmingly rejected acceptance of the amnesty decree, the amnesty granted by the decree is considered to still be valid.

5. **Royal Decrees**

In addition to legislation enacted through the above processes, the 1991 Constitution grants the King the authority to issue Royal Decrees. These acts are not subject to parliamentary approval and have an equal standing to legislation passed by parliament. The only qualification imposed by the Constitution is that Royal Decrees are not to be contradictory to existing laws. Presumably, if such a contradiction exists, the Royal Decree would be inoperative to the extent of the contradiction. Royal Decrees are issued by the King upon the advice of the Council of Ministers, although this practice is not explicitly provided for in the Constitution. Again, this power to grant Royal Decrees indicates the extent to which the executive level of government clearly has the upper hand in its relationship with the Parliament.

C. **The Judiciary**

The independence of the Thai judiciary, while provided for in the 1991 Constitution, can be considered as another constitutional imperative in Thailand. Traditionally, the Thai King was the final arbiter of disputes, and the Courts inherited both the role of decision-maker and the prestige of the King.

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174 This was the finding of the Constitutional Judicial Council (Constitutional Tribunal) which was examining the constitutionality and legal effect of the Amnesty Decree. *Tribunal Rules in Support of May Amnesty*, BANGKOK POST WKLY. REV., Nov. 20, 1992, at 3 [hereinafter *Tribunal Rules in Support of May Amnesty*]; Paul Handley, *Amnesty Upheld*, FAR E. ECON. REV., Nov. 26, 1992, at 18 [hereinafter Handley, *Amnesty Upheld*]. The work of the Constitutional Tribunal on this case and more generally is discussed below. See infra text accompanying notes 201-33.

175 RADTHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) § 175.

176 Id.

177 Regarding Royal Decrees and the types and hierarchy of laws in Thailand see MONTRI HONGSKRAILERS, COMMERCIAL, BUSINESS AND TRADE LAWS - THAILAND 8-11 (1984).
being an agent of the Monarch.\textsuperscript{178} In 1908, the court structure was established in its current form with the adoption of a professional judiciary, and its independence from political and bureaucratic interference was one of its most important features.\textsuperscript{179} As one commentator has noted, despite the political change in this century, “the centralized judicial system emerged intact from the political mold in which it was formed, with a permanent shape and legitimacy of its own.”\textsuperscript{180} This legitimacy and independence of the judiciary has been credited as a factor in assuring that authoritarian leaders in Thailand have not exercised their power in an unduly repressive manner.\textsuperscript{181} In the past, interference with the independence of the judiciary, even during periods of military rule, led to wide-scale protests and the ultimate removal of the offending measure.\textsuperscript{182}

The principal mechanism in the 1991 Constitution for maintaining the arms-length relationship between the judiciary and executive levels of government is the Judicial Service Commission. The Judicial Service Commission is constitutionally charged with the responsibility for appointing, promoting, penalizing, and dismissing judges.\textsuperscript{183} The Commission has twelve members: four elected by senior judges; four elected by retired judges; and four ex-officio members including the President of the Supreme Court who assumes the Chair.\textsuperscript{184} The Constitution further protects judicial independence by: 1) preventing political officials from being judges;\textsuperscript{185} 2) prohibiting the establishment of

\begin{thebibliography}{99}
\bibitem{178} For a brief history of the judiciary in Thailand see \textit{YEARBOOK}, \textit{supra} note 54, at 262-67; \textit{see also} \textit{ENGEL}, \textit{supra} note 71, at 18-24; \textit{DAVID M. ENGEL, LAW AND KINGSHIP IN THAILAND DURING THE REIGN OF KING CHULALONGKORN 59-93} (1975).
\bibitem{179} \textit{YEARBOOK}, \textit{supra} note 54, at 265-66.
\bibitem{180} \textit{ENGEL}, \textit{supra} note 71, at 25.
\bibitem{181} \textit{Samudavanija, supra} note 4, at 337. “An independent and long-standing judiciary is another institution that has always been safeguarding the encroachment of civil liberties. It is an autonomous body not subjected to the control of the military and the bureaucracy, but has its own independent recruitment and appointment procedures.” \textit{Id}.
\bibitem{182} For example, in late 1972, the military-led National Executive Council under Field Marshall Thanom Kittikachorn, decreed that the Minister of Justice would become more involved in the administration of the judiciary. This action was seen as an attack on the independence of the judiciary and, following wide-scale protests, the decree was withdrawn. \textit{See} \textit{R.H. Hickling, Recent Constitutional and Legal Developments in Thailand, 3 H.K. L. J. 215, 219-22} (1973). It should also be noted that the 1991 Interim Thai Constitution explicitly protected the independence of the judiciary. \textit{See RADTHATHAMMANOON [Constitution]} (B.E. 2534, Mar. 1, 1991) \textsection{} 29.
\bibitem{183} \textit{RADTHATHAMMANOON [Constitution]} (B.E. 2534, Dec. 9, 1991) \textsection{} 193.
\bibitem{185} \textit{RADTHATHAMMANOON [Constitution]} (B.E. 2534, Dec. 9, 1991) \textsection{} 191.
\end{thebibliography}
special courts to replace existing courts to hear specific cases;\(^\text{186}\) 3) prohibiting the enactment of a law to deprive a court of its jurisdiction for any specific case;\(^\text{187}\) and 4) explicitly stating that judges shall be independent in deliberating on cases.\(^\text{188}\)

The operation of the Judicial Service Commission has been hampered by factionalism. Intense factional fighting within the Thai judiciary led the Commission, dominated by one faction, to take questionable actions against senior judges of a rival faction.\(^\text{189}\) Consequently, the government of Prime Minister Anand issued an Executive Decree in September 1992, abolishing the twelve-member Commission and replacing it with a twenty-eight-member panel which would include only six elected members.\(^\text{190}\) The Executive Decree was criticized as an assault on the independence of the judiciary and questioned because it was issued by a caretaker government on the eve of the September 1992 election.\(^\text{191}\) When the Executive Decree was presented to the House of Representatives as required by the Constitution,\(^\text{192}\) the House voted against its adoption, and a twelve-member Judicial Services Commission was reinstated.\(^\text{193}\) While the internal

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\(^{186}\) Id. § 188.

\(^{187}\) Id. § 189.

\(^{188}\) Id. § 190.


\(^{191}\) Vitit Muntarbhorn, Independence Very Important in Judiciary, THE NATION, Sept. 22, 1992. While public protest of the Decree was limited, within the legal community the reaction was much stronger. Petitions from judges, lawyers and students were presented to the government. See Govt Agrees to Postpone Reshuffle, supra note 190, at 5; Judicial Panel Reshuffles Top Judges, BANGKOK POST WKLY. REV., Oct. 2, 1992, at 5 [hereinafter Judicial Panel Reshuffles Top Judges].


\(^{193}\) Pursuant to the September 1992 Executive Decree, the sitting Judicial Services Commission was disbanded and the enlarged Commission began operation. Despite clear indications that the Executive Decree establishing the new Commission would be rescinded by the House, that the Justice Minister felt any action by the Commission was unwarranted, and that there existed widespread disapproval within the legal community, the enlarged Commission appointed a new President of the Supreme Court and promoted numerous other judges. These new appointments were not acted upon by either the Minister of Justice or the King.

Following rejection of the Executive Decree, a new 12-member Judicial Services Commission was established under the pre-decree legislation. This Commission recommended a different President of the Supreme Court who, although initially vetoed by the Justice Minister, was reaffirmed by the Commission and received the assent of the King. See Govt Agrees to Postpone Reshuffle, supra note 190, at 5; Judicial Panel Reshuffles Top Judges, supra note 191, at 5; Pramarn Faction Wins Judicial Panel Election,
squabbles were bringing discredit to the Thai judiciary, the maneuver by the executive level of government was seen as a possible assault on the independence of the Thai judiciary. As a result, both the Justice Ministry and the Special House Committee on Judiciary Affairs are looking at possible changes to the Judicial Service Commission to make it more open and to reduce the potential for factionalism.\footnote{1}

While the 1991 Thai Constitution reaffirms the constitutional imperative of judicial independence, it also reaffirms the inability of the courts to rule on the constitutionality of government measures.\footnote{2} In short, Thai courts do not have the authority to judicially review the constitutionality of government action. In the past, it has been only on the rarest of occasions that a Thai court has used the law or the Constitution to restrain actions taken by the government.\footnote{3} Yet in a potential landmark decision in March 1993, the Thai Supreme Court found an order issued by the coup leaders unconstitutional.\footnote{4} The Court based their jurisdiction to review the measure's constitutionality on "general legal principles under which the courts have the authority to decide if any particular laws are constitutional or not in relation to cases under deliberation."\footnote{5} However, the 1991 Constitution was determined not to be applicable to the decision.\footnote{6} Under the 1991 Constitution, the authority to review the constitutionality of government measures is vested in the Constitutional Judicial Council, better known as the Constitutional Tribunal.\footnote{7}

\footnote{1} Minister Suvit Calls Meeting of Judges over Judicial Reform Plan, BANGKOK POST WKLY. REV., Nov. 6, 1992, at 20; Battle Shapes Up over Key Charter Changes, BANGKOK POST WKLY. REV., Apr. 23, 1993, at 4 [hereinafter Battle Shapes Up].


\footnote{3} One clear example was in 1952, when a court ruled that a government official had gone beyond the limits of the law in imposing censorship on a newspaper. Noted in DHIRAVEGIN, supra note 4, at 139.

\footnote{4} Chetchotiros & Rojanalak, Pandora’s Box, supra note 41, at 4. See supra text accompanying notes 80-86.

\footnote{5} Chetchotiros & Rojanalak, Pandora’s Box, supra note 41, at 4.

\footnote{6} See commentary supra note 84.

D. The Constitutional Tribunal

The Constitutional Tribunal, as established by the 1991 Constitution, has ten members: the President of the Parliament (the Speaker of the House of Representatives);\textsuperscript{201} the President of the Senate; the President of the Dika Court (the Supreme Court of Thailand); the Chief of the Department of Public Prosecutions;\textsuperscript{202} and six appointed persons, three appointed by the House of Representatives and three by the Senate.\textsuperscript{203} The six appointees, who hold their positions for four years, are required to be qualified in jurisprudence or political science, and they are prohibited from being members of Parliament or government (military) officials.\textsuperscript{204} This composition of the Tribunal indicates its political, rather than legal, function.

Under the 1991 Constitution, when the constitutionality of a government measure is raised, courts are to suspend the case and refer the constitutional issue to the Constitutional Tribunal for decision.\textsuperscript{205} The Constitutional Tribunal can also be requested to review the constitutionality of a bill by the Prime Minister,\textsuperscript{206} or by the House of Representatives or Senate if one-fifth of the members of the two houses request review of a bill.\textsuperscript{207} In addition, the Constitutional Tribunal can be requested to interpret the Constitution by the Council of Ministers or pursuant to a resolution of either the House of Representatives or Senate.\textsuperscript{208} The final explicit function regarding constitutionality that the Tribunal can be asked to perform is to

\textsuperscript{201} One of the June 1992 amendments to the 1991 Constitution made the Speaker of the House of Representatives, rather than the President of the Senate, the President of Parliament. See Amendment of the Constitution of the Kingdom of Thailand No. 1 (Int’l Translations Office trans., Thail., June 29, 1992). This amendment repealed §§ 86, 200 of the 1991 Constitution and replaced them with new provisions.

\textsuperscript{202} The June 1992 amended version of § 200 of the 1991 Constitution refers to this person as the Attorney General, while the pre-amended version uses the term Chief Public Prosecutor. See RADTHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) § 200; Amendment of the Constitution of the Kingdom of Thailand No. 1 (Int’l Translations Office trans., Thail., June 29, 1992).


\textsuperscript{204} See id. § 200; RADTHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) §§ 201, 202, para. 1. The four year term for the appointees is a change from the 1978 Constitution. 

\textsuperscript{205} RADTHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) § 206, para. 1.

\textsuperscript{206} Id. § 205, para. 1(2).

\textsuperscript{207} Id. § 205, para. 1(1).

\textsuperscript{208} Id. § 207.
determine whether a regulation regarding the conducting of business in either the House of Representatives or Senate is consistent with the Constitution.\(^{209}\)

The Constitutional Tribunal has other tasks assigned to it by the 1991 Constitution which do not, strictly speaking, involve determination of the constitutionality of a measure. For example, where a question arises regarding one court's jurisdiction to deal with a matter as against another court, the issue is to be referred to the Constitutional Tribunal.\(^{210}\) As previously noted, if there is uncertainty whether a newly-introduced bill is similar to a withheld bill, the question is to be referred to the Constitutional Tribunal.\(^{211}\) The Tribunal can also be requested to examine whether a member of either the Senate or House of Representatives is to be removed because the requirements for termination of the member's position have been met.\(^{212}\) This provision has been carried over from the 1978 Constitution\(^ {213}\) with one interesting additional element. Membership in the House of Representatives can be terminated by the Constitutional Tribunal if there is reliable evidence that the member was elected through corruption.\(^ {214}\) The purpose of this new provision is to eliminate the perceived, widespread vote-buying at elections.\(^ {215}\) Finally, the Constitutional Tribunal can be requested by the Prime Minister to determine whether a cabinet minister has met the criteria for termination, the most important being that a Minister is in a conflict of interest position regarding their portfolio.\(^ {216}\) This provision, new to the 1991 Constitution, is designed to deal with potential executive level conflict of interest situations.

\(^{209}\) Id. § 155.

\(^{210}\) Id. § 195.

\(^{211}\) Id. § 143, para. 2. See supra note 155.

\(^{212}\) RADTHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) § 91, para. 1. The Constitutional Tribunal only gets involved if the request is supported by one-third of the members of the House of Representatives or Senate, as the case may be. Membership in the Senate is to be terminated if any of the events listed in § 97 occur. Id. § 97. For membership in the House of Representatives, the list is in § 114. Id. § 114.

It should be noted that § 92 of the 1991 Constitution allows for termination of membership in the House of Representatives or Senate if three-quarters of the members in the relevant body votes to terminate membership. Id. § 92. To trigger § 92, the act of a member must be either detrimental to the dignity of the Parliament or one of its members; constitute malfeasance in office; or be an offense against officials of the State Legislative Assembly. Id. This provision does not require recourse to the Constitutional Tribunal.

\(^{214}\) See id. §§ 107(12), 114, para. 1(5), 91, para. 1(1); MPs Who Bribe Face Ouster from House, BANGKOK POST WKLY. REV., June 28, 1991, at 4 [hereinafter MPs Who Bribe].

\(^{215}\) MPs Who Bribe, supra note 214, at 4.

\(^{216}\) RADTHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) §§ 170, 169, para. 1(6), 163.
Reference has already been made to Emergency or Executive Decrees that can be issued where there is an emergency requiring action to be taken to maintain national security, public safety, national economic well-being or to avert public disasters. The 1991 Constitution, in a departure from its 1978 predecessor, provides an opportunity for the Constitutional Tribunal to examine whether a Decree issued as an Emergency Decree in fact complies with the relevant Constitutional provisions. The purpose of this new procedure is apparently to ensure that Decrees are used for true emergencies and not merely to temporarily avoid the elected House of Representatives.

One-fifth of the members of either the House of Representatives or the Senate can request that the Constitutional Tribunal examine an alleged Emergency Decree prior to the Decree being approved or disapproved by Parliament. As previously noted, rejection of an Emergency Decree by the House of Representatives does not affect the legal validity of the Decree from the time of its issuance to the time of disapproval. However, if the Constitutional Tribunal decides that a decree is invalid, the decree is invalid ab initio. A narrow reading of the relevant provisions suggests that the Constitutional Tribunal can only examine whether a decree was issued for the specific purposes listed in Section 172(1) of the Constitution. A decision that a decree does not comply with the constitutional requirements for an Emergency Decree must be made by two-thirds of the members of the Constitutional Tribunal.

In one of the most important cases concerning the political events surrounding the 1991 Constitution, the Constitutional Tribunal was requested by the House of Representatives to examine the Executive Decree

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217 *Id.* § 172, para. 1. See *supra* notes 165-74.
219 Emergency or Executive Decrees must be brought before the House of Representatives for approval at the first opportunity. *Id.* § 172, para. 3. See *supra* notes 164-67.
221 *Id.* § 172, para. 3. See *supra* notes 168-71.
223 These purposes have already been noted:- maintenance of national security, public safety, national economic well-being or to avert public disasters. The narrow reading is based upon § 173, para. 1 of the 1991 Constitution which explicitly directs that the Constitutional Tribunal is to examine whether a decree has been issued in accordance with § 172, paragraph one. *Id.* §§ 172-173. Specific reference to § 172, paragraph one is reiterated in § 173, paras. 3 and 4. *Id.* The effect of this is that the Constitutional Tribunal may not be able to examine the surrounding circumstances of the issuance of the decree and whether the Council of Ministers, as required in § 172, para. 2, considered there to be an unavoidable emergency. *Id.* § 172.
224 *Id.* § 173, para. 4.
which provided amnesty for those involved in the May 1992, crackdown on
pro-democracy protesters. The first challenge to the Decree was that it
was not in keeping with the requirement that the Council of Ministers can
only issue an Emergency Decree in an emergency because no emergency
existed. The Tribunal rejected this challenge. The Chair of the Tribunal
reportedly explained that it was not open for anyone to challenge a decision
of the Council of Ministers as to whether or not an emergency existed.
The House of Representatives then asked the Tribunal to examine if the
Amnesty Decree was issued in accordance with the relevant Constitutional
provision (Section 172, paragraph 1), arguing that there did not exist a
situation requiring the Decree in order to maintain national security, public
safety or avert public disasters. The Constitutional Tribunal rejected this
challenge as well. The Chair of the panel reportedly explained that the
Decree was issued following loss of life, and the situation being volatile, it
was determined that the issuing of the Decree was justified. Following
rejection of the Amnesty Decree by the House of Representatives, the
Council of Ministers requested the Constitutional Tribunal to determine
whether the Constitution provided that the amnesty granted by the
discredited Decree was still legally effective. The Tribunal ruled that
despite the disapproval of the Amnesty Decree by the House of
Representatives, the Decree was legally effective according to the
Constitution. Thus, the Constitutional Tribunal squarely faced the issues
presented rather than hiding behind legal technicalities, such as lack of
jurisdiction. In this regard, the Tribunal showed a pragmatism that may
courage future recourse in cases where the government is considered to
have strayed from the Constitution.

225 Emergency Decree on Amnesty, supra note 172. The details of the Decree are noted in
Tribunal Discusses Amnesty Decree, supra note 172, at 3.
226 The thrust of the first challenge is noted in Amnesty Accepted as Constitutional, BANGKOK POST
WKLY. REV., June 12, 1992, at 20 [hereinafter Amnesty Accepted as Constitutional]. The provision being
challenged was § 172, para. 2 of the 1991 Constitution. It apparently was not suggested that the
Constitutional Tribunal was barred by the Constitution from examining the validity of an Emergency
Decree by looking at § 172, para. 2. See RADTHATHAMMANON [Constitution] (B.E. 2534, Dec. 9, 1991) §
173, para. 1.
227 Amnesty Accepted as Constitutional, supra note 226, at 20.
228 Tribunal Upholds Controversial Amnesty Decree, BANGKOK POST WKLY. REV., July 31, 1992,
at 1.
229 Amnesty Fears, supra note 173.
230 Tribunal Rules in Support of May Amnesty, supra note 174, at 3; Handley, Amnesty Upheld,
supra note 174, at 18. The Constitutional provision in question was § 172, para. 3 of the 1991
Constitution.
231 See supra note 226.
The outcome of the Constitutional Tribunal decisions, however, can be criticized since the result is that the Amnesty Decree remains valid which is contrary to justice and arguably creates disrespect for the Constitutional Tribunal and the Constitution more generally. These issues and the political impartiality of the Tribunal were brought into question following the Supreme Court’s willingness to find that one of the orders issued by the coup leaders was unconstitutional. Moreover, the legitimacy of the Constitutional Tribunal has been further undermined by the government’s proposals to amend the 1991 Constitution and eliminate the Constitutional Tribunal which would leave constitutional issues to be decided by the courts or possibly a constitutional court independent of the political process.

E. The Citizenry: Rights; Responsibilities; and State Policy

Three chapters of the 1991 Constitution directly or indirectly relate to the citizens of Thailand: Chapter Three, Rights and Freedoms of the Thai People; Chapter Four, Responsibilities of the Thai People; and Chapter Five, State Policy. The latter chapter deals only indirectly with the Thai citizenry as it sets out guidelines for state action, but much of its contents relates to citizens and like the other two chapters, is hortatory.

Amongst other things, Chapter Five of the 1991 Constitution provides that the state is to:

- maintain, promote and develop equality between the sexes;
- maintain the environment and protect against pollution;
- provide social welfare and assist and provide social welfare to the aged and disabled;
- protect laborers, especially women and children, and provide for fair wages;
- promote standard public health and provide health assistance to the poor free of charge.

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232 This decision is commented upon above. See supra notes 80-86.
233 Battle Shapes Up, supra note 194, at 4.
234 RADTHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) § 68.
235 Id. § 74.
236 Id. § 80-81.
237 Id. § 82.
238 Id. § 83.
let farmers have possession of lands through land reform, allocation or other means;\textsuperscript{239}

- preserve and maintain the arts and culture of the nation;\textsuperscript{240}
- promote understanding of and belief in the kingship democratic system;\textsuperscript{241} and
- support the private sector to play its role in the economy.\textsuperscript{242}

Despite its imposition on the state of numerous duties towards the citizenry, however, Chapter Five includes a provision that none of the objectives contained in it give rise to a right to sue the state.\textsuperscript{243}

Some of the responsibilities placed on the Thai people by Chapter Four of the 1991 Constitution are the duties to:

- exercise the right to vote;\textsuperscript{244}
- comply with the law;\textsuperscript{245}
- pay tax as prescribed by law;\textsuperscript{246} and
- conserve natural resources and the environment as prescribed by law.\textsuperscript{247}

Thus, just as it imposes duties on the state towards the people, the 1991 Constitution makes several demands on the people with respect to the state.

The constitutional rights of the Thai people are set out in Chapter Three,\textsuperscript{248} and they include most of the universally recognized rights, for example:

\begin{itemize}
\item \textsuperscript{239} Id. § 76, para. 1.
\item \textsuperscript{240} Id. § 72.
\item \textsuperscript{241} Id. § 70.
\item \textsuperscript{242} Id. § 77, para. 1.
\item \textsuperscript{243} Id. § 59.
\item \textsuperscript{244} Id. § 51.
\item \textsuperscript{245} Id. § 54.
\item \textsuperscript{246} Id. § 55.
\item \textsuperscript{247} Id. § 58.
\item \textsuperscript{248} For a brief history of the rights of Thai people in the various constitutions see SHIN, \textit{supra} note 32, at 40-51. Aakesson, Bunnag and Bunnag comment: "[A] number of rights and privileges enjoyed by the Thai people now . . . are guaranteed by the Constitution. However, many such rights have their roots and beginnings in the days of the early absolute monarchs." Aakesson et al., \textit{supra} note 46, at 670. They go on to discuss many of those rights. \textit{Id.} at 670-80.
\end{itemize}
• equality under and equal protection of the law;\textsuperscript{249}
• freedom of religion;\textsuperscript{250}
• presumption of innocence in criminal cases;\textsuperscript{251}
• freedom from arbitrary arrest, detention or search;\textsuperscript{252}
• freedom of speech, including freedom of the press;\textsuperscript{253}
• freedom of assembly;\textsuperscript{254}
• freedom of association;\textsuperscript{255}
• freedom of movement within Thailand;\textsuperscript{256}
• the right to sue government officials;\textsuperscript{257}
• the right of criminally accused indigents to legal aid;\textsuperscript{258}
• the right to property;\textsuperscript{259} and
• the right to conduct business or engage in the occupation of choice.\textsuperscript{260}

The Thai people's ability to exercise and enforce these rights, however, is also somewhat limited by the Constitution.

\textsuperscript{249} RADDHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) § 25. Section 4 affirms that all Thai people are equally protected under the Constitution. \textit{Id.} § 4. Concerning the position of women in Thailand see the materials cited supra note 67.

\textsuperscript{250} RADDHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) § 27. The right is qualified by the requirement that religious beliefs are not to be in conflict with one's duty as a citizen or be against the peace, order or morals of the people. \textit{Id.} See also text accompanying and materials cited supra note 75.

\textsuperscript{251} RADDHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) § 29.

\textsuperscript{252} Id. § 30. Arrest, detention or searches may be conducted in accordance with the law. \textit{Id.}

\textsuperscript{253} Id. § 37, para. 1. Restrictions on freedom of speech may be employed under provisions of national security law, to maintain peace, order and public morality, and to protect the freedom, honor and good name of individuals. \textit{Id.} § 37, para. 2. Regarding freedom of the press see the materials cited supra note 74.

\textsuperscript{254} RADDHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) § 39, para. 1. Limitations on this freedom may exist under special laws regarding public meetings, to protect use of public places, or during times of emergency or martial law. \textit{Id.} § 39, para. 2.

\textsuperscript{255} Id. § 40, para. 1. Paragraph 2, however, indicates that the establishment, operation or dissolution of associations, unions, federations, and cooperatives shall be in accordance with the law. \textit{Id.} § 40, para. 2.

\textsuperscript{256} Id. § 43, para. 1. Limitations on this freedom may be imposed by laws for public security, laws for peace, order or public welfare, or laws of town planning. \textit{Id.} § 43, para. 2.

\textsuperscript{257} Id. § 46. Concerning the history of this right see Aakesson, et al., \textit{supra} note 46, at 678-79.


\textsuperscript{259} RADDHATHAMMANOON [Constitution] (B.E. 2534, Dec. 9, 1991) § 35, para. 1. This paragraph also indicates that the limitation of property rights shall be in accordance with law. \textit{Id.} Section 36 deals specifically with expropriation. \textit{See id.} § 36.

\textsuperscript{260} Id. § 48, para. 1. This is a new provision not found in previous Thai constitutions. \textit{See New Charter to Protect Rights}, \textit{BANGKOK POST WKLY. REV.}, June 21, 1991, at 1. The numerous limitations on the new rights are noted in § 48, para. 2 of the 1991 Constitution.
Many of the provisions recognizing these rights also severely limit the rights by indicating that they exist only to the extent they are not governed by other laws. One commentator has noted that: "To grant a right yet immediately qualify that its exercise must be 'in accordance with the provisions of the law' is to create ambiguity, leaving that 'right' subject to interpretations of transient governmental majorities." Moreover, Section 49 of the 1991 Constitution provides a broad limitation on the use of the rights provisions of the Constitution: "Persons may not exercise the rights and freedoms as prescribed under this Chapter against the country, religion, the King, and the Constitution." Finally, there is no direct avenue for judicial review on constitutionality questions except through the Constitutional Tribunal. Thus, it can be argued that there is no effective means for the enforcement of rights, or since the Constitutional Tribunal can only determine constitutionality of legislation, of obtaining a remedy. In sum, while theoretically the highest law of the land, the Thai Constitution limits its own power and ability to protect the rights of the Thai people.

V. CONCLUSION

Of the numerous questions that can be raised regarding the 1991 Thai Constitution, two seem to be of most importance: 1) Does the Constitution matter in Thailand?; and 2) Will the 1991 Constitution survive?

The Constitution does matter in Thailand. Questions about the content and workings of the Constitution were prominent during the political crisis of 1991-92. The Constitution was one means of defusing the tensions created by shifting power balances. Large demonstrations and vociferous criticism erupted concerning certain aspects of the Constitution. All of these happenings indicate that the Constitution does matter, but one is required to ask to whom it matters. In the past, the military has shown a disregard for existing constitutions coupled with an intense interest in the next constitution. The functional level of government, the bureaucracy, The overwhelming dominance of the government bureaucracy in Thai politics and policy-making has led one authority to refer to Thailand as a "bureaucratic polity." See FRED RIGGS, THAILAND: THE MODERNIZATION OF A BUREAUCRATIC POLITY (1966). For a summary of the meaning of the term bureaucratic polity see ANEK LAOTHAMATAS, BUSINESS ASSOCIATIONS AND THE NEW POLITICAL
appears to have been little constrained by any of the constitutions that have existed in Thailand, and the 1991 model is similar in this respect. Elected representatives must rely on the Constitution for authority, but it is not unreasonable to question their commitment to any particular constitutional framework. The educated elite and growing middle class of Bangkok, supported by much of the Bangkok print media, appear increasingly committed to Thailand having a bona fide constitutional government. However, outside Bangkok and amongst the vast majority of the population the Constitution is foreign and of little concern. In contrast to courts in some countries which view themselves as the protectors of the constitution, the Thai judiciary, irrespective of its prestige and independence, has in the past and is now only indirectly involved with the constitution. While the evidence indicates the constitution does matter in Thailand, it is not easy to identify precisely to whom it matters sufficiently for there to develop a strong sense that the written constitution should constrain or direct their actions.

Given this ambiguity, it must be asked whether the 1991 Constitution will survive. Most problematic is that transitions of power pursuant to a constitution have been rare, and even when they do occur, they are frequently followed by unconstitutional usurpations of power. Most notable was the 1988 transition to power of the Chatichai administration pursuant to elections and the 1978 Constitution which ended in military overthrow in 1991. The 1991 coup has been described as "a shocking assault on the notion that Thailand had successfully institutionalized democratic and

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ECONOMY OF THAILAND 1-4 (1992). In his book, Laothamatas argues that there has been a decline of the bureaucratic polity and the emergence of "liberal corporatism," i.e., private sector business. Id. at 4-15, 149-63. Also, on the importance of bureaucracy in Thailand see GIRLING, supra note 55, at 135-39, 7-153. More generally on the history and operation of the Thai bureaucracy see Chai-anan Samudavanija, The Bureaucracy, in GOVERNMENT AND POLITICS OF THAILAND 75-109 (Somsakdi Xuto ed., 1987).

267 The basis of this questioning is the fickle nature of many Thai politicians. The elected leaders overthrown by military coup in 1991, supported the military following the post-1992 elections. A principal opposition leader against the coup leaders, himself a former military supreme commander, was the mentor of the coup leader General Suchinda. See Neher, supra note 3, at 600. Pragmatic politics might be said to be taken to extremes in Thailand. A recent outburst in the House of Representatives by an opposition member who commented, "[I]t might be better to ask the military to take it [democracy] back", is an indication of the view of civilian, democratic rule even within the elected chamber. Rodney Tasker, Sounds of Silence, FAR.E. ECON. REV., Mar. 18, 1993, at 13.

268 Tongdhamazhart gives three reasons for the lack of interest by the general Thai population in the constitution: 1) the constitution was not written by the people and has no importance in their daily life; 2) there is little understanding of the constitution or what it is; and 3) the people have not grown up with the constitution - they "believe that the monarchy, and not the constitution, is the fountain of justice and law." Tongdhamazhart, supra note 34, at 63.
civilian government.”²⁶⁹ Thus, it is simply too difficult to assess whether the 1991 Constitution could survive political turmoil, weak leadership, indecision, economic malaise, a reassertion of military bravado and prestige, a new monarch, or any of the other events that could transpire in the next decade.

Yet, it is also difficult not to be optimistic about the 1991 Constitution and the attention being given constitutional reform. Thailand of the 1990s is not Thailand of the 1970s or earlier periods. There is unquestionable interest in constitutional government and in making operational written constitutional practices. One authority asserts that “constitutionalism is where national history, custom, religion, social values and assumptions about government meet positive law, economic force, and power politics.”²⁷⁰ With so many complex variables involved, it is therefore not surprising that the future of the 1991 Constitution and constitutionalism in Thailand is less than clear.

²⁶⁹ Neher, supra note 3, at 595.
²⁷⁰ Beer, supra note 29, at 2.