# EAJLG

# European-Asian Journal of Law and Governance

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**Henning Glaser**

*Levels of the Rule of Law: On the Possibility of Exporting a Western Achievement*
**Dieter Grimm**

*Looking Back Before the Election of 2011: Thailand's Constitutional Referendum the Election of 2007*
**Michael H. Nelson**

*Proceeding Principles and Guarantees in the Law of the European Union*
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*Principles of Fiscal and Monetary Legislation: A Preliminary Perspective*
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*"Property Entails Obligations": Land and Property Law in Germany*
**Fabian Thiel**

*Freedom of Expression in the German Basic Law*
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First Issue

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# Editorial

Henning Glaser

Welcome to the first issue of the European – Asian Journal of Law and Governance.[1] The European - Asian Journal of Law and Governance (EAJLG) is an initiative of the German-Southeast Asian Center of Excellence for Public Policy and Good Governance (CPG) at the Faculty of Law, Thammasat University (Bangkok) and leading academics and practitioners from all over the world. It is addressed to all those involved in the exchange of knowledge in law and governance in both Asia and the West.

This editorial may be embraced as an opportunity to explore some ideas that have provided the impetus for launching such an interregional and interdisciplinary journal. So far, at least four related themes define the scope of our interest for extended examination in forthcoming issues.

They are: firstly, a significant interest in how governance in Asia and Europe has evolved over time (overcoming a Kelsenian methodological dichotomy of 'is and ought'[2]). We feel that governance structures derive from a wide range of sources, namely law, anthropology, the social sciences and history among them, which each maintain and contribute to systems of governance. Thus, in this journal we seek to engage those immersed in the consolidation and practice of governance, private, state and institutional actors among them. The material provided by this Journal thus reflects upon all means of governance as they relate to paradigms of a political nature. In doing so, we aim to achieve a better understanding of the normative and empirical frames that both law – its practical and theoretical capacity - operates in and with. Therefore all contributions concerning aspects of the political order in Asia and the West are welcome.

A contribution to the first theme in this issue is the timely essay of Michael Nelson, "Looking Back before the Election of 2011: Thailand's Constitutional Referendum and the Election of 2007" coming directly before the 2011 July election in Thailand. Following this election, a next chapter in the ongoing struggle for dominance is expected to emerge: not only between two competing political blocs, but between two different concepts of governance in the Kingdom. Even if the vast majority in academia and bureaucracy considered the military led 2006 coup as a 'good coup' having been necessary to end a regime they found increasingly authoritarian and challenging the

[1] The journal is published in English as an internet based print media issued every three months. A final and moderate purchase price for the print version will be determined after an initial period in which the journal shall be provided for free. The internet version is and will remain an open access medium with a slightly different content. While in the first issue two essays are peer reviewed a peer review will be conducted with the second issue for all academically explorative essays and articles. Peer reviewed contributions will be marked as such. For details for submission, differences between print and internet version and contribution conditions please visit our webpage at www.eajlg.org.

[2] See Hans Kelsen, *Reine Rechtslehre* (1934).

fundamental understanding of good governance in the country, the first election after the 2006 coup d´état, the following verdict of the Constitutional Tribunal[3] on the dissolution of the TRT Party of ousted Prime Minister Thaksin Shinawatra including the imposition of a five year ban on 111 TRT party executives from participating in politics on 30 May 2007, and the constitutional referendum on 19 August 2007 were not leading to consolidation but to a deepening split of the society which continued after the election in December 2007 giving an overwhelming victory to the Thaksin-aligned PPP. After the first PPP government under Prime Minister Samak Sundaravej was ended on 19 September 2007 by the Constitutional Court ruling against him, due to a violation of the constitution – the verdict of which is published in this volume, thoroughly commented by Kittisak Prokati. On 2 December 2007 the Court dissolved the entire party and disqualified all members of the executive board from politics for five years. This lead to the present coalition; the government of Prime Minister Abhisit Vejjajiva which decided to hold early elections this July. Nelson's essay reflects the inevitable consequences of the fundamental conflict about basic questions how the nation should be governed and leads to a more skeptical conclusion about what the election will bring.

The second topic, the role and performance of law, public law in particular, as a source of governance evolves as a result of our initial theme, which deems law as only one system of ordering society and politics; an instrument and emanation of governance amongst others. Therefore, questions that both pertain to and evoke the interests of public law will be addressed. Thus, contributions to governance-related legal topics in this issue are the essays of Prachoom Chomchai who examines different principles of public finance under the title "Principles of Fiscal and Monetary Legislation: A Preliminary Perspective", and Fabian Thiel titled "'Property Entails Obligations': Land and Property Law in Germany", as well as the special article of Dieter Grimm on "Levels of the Rule of Law - On the Possibility of Exporting a Western Achievement", and the articles of Bartosz Makowicz on "Proceeding Principles and Guarantees in the Law of the European Union" and Gunnar Pohl on "Freedom of Expression in the German Basic Law".

Public law as a source of governance derives most all its political legitimacy from the realization of what is considered as good governance. Thus current discourses suggest that 'good governance' be accompanied by demand for the rule of law. This often seems to be the case in the development of non–Western states: law and a more active application of law is 'good' because it serves good governance, and governance is 'good' because it realizes the rule of law. Despite this seemingly self-evident correlation of law and governance, notions of what constitutes 'good governance' remain strikingly vague, indeed; this becomes clear whereby efforts are made to explain both concepts in relation to each other. As such, we intend to thoroughly examine different understandings of matters pertaining to law and governance – so too, the 'common good' – and the normative and cultural settings in which they are implemented.

Ensuing from this perspective the third focal point of the journal demands a greater awareness and analysis of similar and different notions of how the order of the political community is and can be, resulting in differing forms and functions of key institutions; inclusive of the law, parliaments, governments and courts, academia or the media, the military, political parties and civil society organizations. Contributions welcome to this third theme are those which reflect and analyze the different conditions

[3] The Constitutional Tribunal was replacing the former Constitutional Court which was abolished by the coup makers in 2006 and implemented as an institutional substitute by the Interim Constitution of 2006.

and concepts of law and governance. As Dieter Grimm noted in this first issue: "In sum, the rule of law proves to be full of conditions. This also answers the question of whether it is a cure–all for the world." In this respect we may recall the French sinologist François Jullien[4] who rhetorically asked if the West had yet begun to register the trauma caused in Asian cultures, forced to deal with Western norms and concepts; no less – on may add - the trauma of an ongoing demand for respect, given their 'difference'.

In this Journal, we intend to detract from Euro-centric narratives of law and governance, and in doing so challenge unilinear narratives of modernity. Just as we reject divisive categorizations based on those universalist notions of law and governance, that which is solely defined by the West, so too do we reject suggestions that common ground between academic disciplines and cultures is not possible. Against a background of different cultural conditions emerges a need to harness reflective, engaged means by which we may begin to see the 'Other' in a 'neither/nor' light.

From this perspective emerges our desire to publish contributions both from and on behalf of persons and projects playing a role in the exchange of knowledge and the practice of so called 'development cooperation' in law and governance. Thus we intend to include reflections and analysis of the conditions of such intercultural dialogue. A contribution to this theme in the first issue is a homage of Chien–Liang Lee to a great constitutional lawyer and bridge builder between Asia and Europe, his teacher Yueh-Sheng Weng under the title "The Advocate and Practitioner of the Idea of the Guardian of the Constitution (Hüter der Verfassung): Professor Yueh–Sheng Weng ´s Contribution to the Development of Democratic Constitutionalism in Taiwan".

In recognising that distinct historical experiences influence the realities of law and governance, we hold a particular interest in presenting analyses which move to construct normative, methodological narratives that may resonate in collegiate disciplines. In order to analyze these and other issues fully, the journal encourages inter- and multidisciplinary approaches which present and contextualize their topic within a historical or societal framework. Empirical analysis is especially welcome. In addition to reviewed academic essays and articles we will also publish articles, reports, cases and commentaries to profit from practical insights at the 'frontline': short pieces from academics, practical overviews or statements by legal practitioners and think tanks, NGOs and politicians. We also wish to include discussions of important institutions of law and governance in Asia and the West, both from historical and contemporary perspectives.

Given this, while perhaps, even this editorial may invoke dissenting opinions, we cordially invite diverse views on a range of topics. In this regard we find our view reflected in John Stuart Mill's famous statement:

> *The only way in which a human being can make some approach to knowing the whole of a subject is by hearing what can be said about it by persons of every variety of opinion and studying all modes in which it can be looked at by every character of mind. No wise man ever acquired his wisdom in any mode but this.*

In sum, it shall be our task to provide an attractive forum for discussion across the regional and cultural borders on the one hand, and on the other, those borders between law, political science and other related disciplines.

[4] See François Jullien, *De l'universel, de l'uniforme, du commun et du dialogue entre les cultures* (2008).

We hope that the viewpoints shared in these essays, articles, reports and commentary, serve to highlight additional aspects, experiences or interpretations than previously, and will continue in following editions. So too would we be more than happy, should we succeed in contributing to a web of mutual understanding and shared reflections between academics and practitioners in Asia and Europe, particularly those who may otherwise find it difficult to access alternative and original perspectives that challenge perceptions of one's 'own' and the 'other'.

It is with great enthusiasm that we launch this first issue of the European–Asian Journal of Law and Governance. We look forward to presenting new academic knowledge and practical relevant information, diverse debates and opposing viewpoints on public law and matters of governance. We hope that our efforts serve to enrich relationship between our readers and contributors in local, regional and international communities alike.

*Henning Glaser*

Bangkok, June 2011

# Levels of the Rules of Law on the Possibility of Exporting a Western Achievement

## Dieter Grimm*

The question of whether a state is governed by the rule of law plays an ever-increasing role for the cooperation between states and the work of international organisations. International financial assistance for states is conditioned upon whether the recipient state is governed by the rule of law. States develop a growing interest in the rule of law of other countries. Dialogues between constitutional states are aimed to promote the spread of the rule of law across the globe. These dialogues, however, often lack a sufficient awareness of the demanding nature of the rule of law. Additionally, there is a lack of understanding that rule of law is not a closed concept that can only be adopted in full or not at all. Rather, the idea of the rule of law is a continuum, which also in Germany has only been realised gradually. In the context of its rule of law initiative the State Department recently organised a conference on the topic *"The rule of law- a cure-all for the entire world?"* The text below is a revised version of the opening lecture held at that conference.

### Adherence of Governmental Action to the Law

At the core of the idea of the rule of law[1] is the requirement that the state exercises its power in the form of law. This means that the state governs according to, and confined by legal rules. Governing according to legal rules means that the state not only prescribes rules for its people but also submits to rules itself. Governing by legal rules means that what the state demands from the people is articulated through, and based in, law. It is in the nature of legal rules that they are not designed to address a particular case but rather that they apply to a wide range of future cases; that law will not be changed as a particular case is being decided; that the law treats everyone equally; and that it decides like cases alike. Governing under the rule of law is the antithesis of arbitrary rule.

The exercise of public power in the form of law prevents the state from converting power into orders or measures too easily. In a rule of law regime, the use of power is divided among many jurisdictions and procedures. Only the compliance to

* Prof. em. Dr. Dr. h.c. mult. Dieter Grimm, LL.M. (Harvard) is a former German Constitutional Court Judge.

[1] The literature on the rule of law is vast. See Katharina Sobota, *Das Prinzip Rechtsstaat* (1997); Edin Šarčević, *Der Rechtsstaat* (1996); Niklas Luhmann, *Das Recht der Gesellschaft* (1993), p. 422 ff.; Philip Kunig, *Das Rechtsstaatsprinzip* (1986); Ernst-Wolfgang Böckenförde, *Entstehung und Wandel des Rechtsstaatsbegriffs* (1969), in: idem, *Recht, Staat, Freiheit* (1991), p. 143; Konrad Hesse, *Der Rechtsstaat im Verfassungssystem des Grundgesetzes* (1962), in *Rechtsstaatlichkeit und Sozialstaatlichkeit* (1968), ed. Ernst Forsthoff, p. 557; Ulrich Scheuner, *Die neuere Entwicklung des Rechtsstaats in Deutschland* (1960), as well as in Forsthoff, p. 461.

them establishes the binding character of acts of power. A traffic guard may not divorce a couple; a registrar cannot control vehicles. In parliamentary proceedings, no one can be punished; in criminal proceedings the parliament cannot be dissolved. When the state lacks jurisdiction or violates its procedural requirements, the state is in the wrong if it still commands – not the citizen who refuses to comply. In sum, the core of the rule of law is that governmental action is bound by law. The state does not have the right to flout the law in a state governed by the rule of law.

The state is, however, the source of the law. The vast majority of the law owes its validity to an act of government. That means that the state can revoke or amend the law anytime. Yet, the right to amend does not include the power to ignore the law. It must be followed even if its compliance is inconvenient to the rulers or has implications that they find detrimental. Not only lower authorities have to comply with the law. Also the highest branches of government must comply with the law – that is the essence of the rule of law. To put it more concretely, the primary concern is that the executive power complies with the laws the legislature enacted. In this context, lawyers speak of the concept of legality of the administration.[2]

The regularity of government action, which is designed to reduce arbitrariness, is a value in itself – independent of the content of the law that comes into force. It is a value in itself because it makes government action predictable for those who are affected by it. To mention just two examples, the stability of laws allows citizens to organise their behaviour in such a way that they do not come into conflict with the law and it allows corporations to act rationally. Hence, an important part of any rule of law regime is the prohibition against retroactive[3] laws because retroactivity means that private behaviour entails legal consequences that were not part of the law at the time of the action so that it was impossible to foresee them and to organise one's behaviour accordingly. The benefits of the rule of law are absent in a system with retroactive laws.

## Legal Certainty as an Intrinsic Value

As plausible as the postulate of the law abiding capacity of the state may be, achieving it is just as precarious. Compliance to the law can hinder politicians from pursuing certain goals or taking certain actions which are important to them. Compliance with legal norms by the authorities may have undesirable consequences. Criminal suspects may be set free because the evidence against them is not sufficient. Other times evidence may not be used because it was obtained illegally. In these kinds of situations, obedience to the law can appear to be empty formalism which thwarts the achievement of substantive justice. A state, which then overrides these legal requirements, frequently has public opinion on its side. But it would not be a rule of law state if it did not have the willingness to comply with the law, even when it is unpopular, inconvenient, or annoying.

If the state wants to remedy an unsatisfactory arrangement, it has to change the law for the future, but it cannot disregard it now. Once it becomes accepted that there may be reasons to ignore the law under exceptional circumstances, it is only a small step away from disregarding the law for all kinds of illegitimate purposes: because it does not correspond to one's subjective sense of justice; because the outcome in this particular case does not appear desirable; because there are benefits in disregarding the

[2] See Dietrich Jesch, *Gesetz und Verwaltung* (2nd edition 1968).
[3] See Bodo Pieroth, *Rückwirkung und Übergangsrecht* (1981).

law; to avoid trouble with those in power; because political opponents or rivals may be harmed by doing so, etc. If a rule of law state wants to succeed, it needs to appreciate legal certainty as an intrinsic value regardless of whether one believes that the outcome of legal protection is good, bad, useful or harmful.[4]

Requirements for this are not equally favourable everywhere. The reason lies in a fundamental difference whose importance will come up more than once. There are states that see themselves in the service of a predetermined absolute truth. This might be prove a religious or secular truth. In this case, political authority derives its legitimacy from that truth. It is legitimate insofar as it helps to enforce the truth. But there are also states that do not identify themselves with a particular truth but acknowledge a plurality of truth claims. They do not derive their legitimacy to rule from one sole truth that is binding for all, but from the consensus of its citizens as to the conditions of peaceful coexistence despite disagreement about the good and just.

For the rule of law state this difference is significant, because states that see themselves in the service of an absolute truth have greater difficulties adhering to rule of law principles than pluralistic ones. They do not view the law as autonomous and develop a purely instrumental relationship to positive law. When truth claims conflict with legal duties, they usually give preference to the truth without much second thought. Pluralistic societies, with competing ideas of the common good and justice, are more prone to accept the rule of law because the law is the product of a political decision that followed established rules and can be changed at any time.

## Reservation and Binding Force of Laws

Making the law obligatory on state power as a core value of the rule of law assumes another aspect. The binding character, which the rule of law demands, is derived from legislation. Consequently it extends only as far as legislation exists. Where there is no law there can also be no legal constraints. Since the state is also the legislator, it therefore has the extent of the binding character of its law in its own hands. Insofar as the state refrains from establishing laws, it is not submitted to rules. Under these circumstances, the rule of law shows gaps. The state can exploit these legal gaps for all kinds of purposes. Therefore, rule of law is only achieved if the state can pursue certain goals only on the basis of a statutory authorisation to do so, the so-called reservation of the law.[5]

Traditionally, the area, in which the state may not act without statutory authorisation, is demarcated by fundamental rights. The state may not infringe upon one's fundamental rights without statutory authorisation. Obviously, these statutory authorisations must also have a regulatory content capable of binding state authorities in order to function effectively. This is particularly important in areas where the individual is intensely affected by state actions, such as in criminal or police law. Blank checks to government power cannot result in binding force. Neither do laws consisting of vague and open-ended phrases produce sufficient binding effects. It should not be inferred from this, however, that the binding force of the law increases, the more detailed a law gets. The more casuistically a legislature tries to regulate an issue, the more loopholes it will leave behind.

[4] See Andreas von Arnauld, *Rechtssicherheit* (2006).

[5] See Jesch, *Gesetz und Verwaltung*, p. 30 ff.; Wolfgang Hoffman-Riem, "Gesetz und Gesetzesvorbehalt im Umbruch" in *AöR 130* (2005), p. 5.

Yet, the degree to which a law is binding is not only dependent on the willingness of the politicians to formulate binding norms. It is also influenced by the subject matter the law seeks to regulate. As long as the task of the state was largely confined to maintaining an existing social order that was regarded as just, an effective regulation of government activity was rather easy. Maintaining order is a retroactive, narrowly defined and predictable activity. It can be captured in legal norms that follow the "if-then" pattern, clearly define what counts as a violation of the order, and indicate what legal consequences the relevant authorities may take to prevent disorder or to restore order.

By contrast, the tasks of the modern regulatory and welfare state are prospective, comprehensive, and less predictable. The norm type tailored towards maintaining a given order does not apply here. Therefore, in these areas a norm type prevails, which, in contrast to the traditional conditional programs, is identified as a purposive programme. The legislature in the modern regulatory and welfare state can only set certain policy goals and name a number of viewpoints, which have to be considered in the pursuit of the goals by the administration. But *how* agencies achieve these goals in practice is largely left up to them in the process of implementing these norms. I described this situation several years ago in my book *Wachsende Staatsaufgaben – sinkende Steuerungsfähigkeit des Rechts*.[6] This is a problem of the rule of law in developed countries with a commitment to rule of law principles.

## Material Rule of Law Through Binding Fundamental Rights

When previously it was suggested that the submission of the state to law is a value in itself it must be added now, that it is only a limited value. A rule of law state that would exhaust itself in submitting the executive to laws remains purely formal. The binding character would only extend to the form of the law, while the content of the law would be unimportant. Rule of law in a purely formal sense is compatible with oppressive, exploitative and discriminatory legislation. Such a formal view of the rule of law developed in Germany in the second half of the 19th century.[7] Yet, at that time the underlying foundation of a liberal legal culture was always tacitly assumed. The consequences of this narrowed conception of the rule of law only came to light through the decay of the legal culture during the Nazi regime. Experiencing first hand that the law can also become a tool for injustice led to a return to the original, material understanding of the rule of law.

A state devoted to the rule of law in a substantive sense is therefore not only one, in which the state is submitted to the law, whatever its content may be, but one, in which law reflects certain notions of justice. Obviously everything then depends on the question of what notions of justice are decisive in the legislative process. If it is about a notion of justice based in an absolute truth, from which no one can be exempt, then the rule of law will have a hard time being achieved. As mentioned earlier, when truth claims and legal duties conflict, the latter generally yields to the former. The rule of law

[6] See Dieter Grimm, *Wachsende Staatsaufgaben – sinkende Steuerungsfähigkeit des Rechts* (1990); idem, "Der Wandel der Staatsaufgaben und die Krise des Rechtsstaats" in idem, *Die Zukunft der Verfassung* (3rd edition 2002), p. 159; Helge Rossen, *Vollzug und Verhandlung* (1990).

[7] See Olivier Jouanjan, *Figures de l'Etat de droit. Le Rechtsstaat dans l'histoire intellectuelle et constitutionnelle de l' Allemagne* (2001).

state, in contrast, rests on ideas of justice which recognise the intrinsic value, the freedom, and equality of every individual.

The attempt to achieve the justice of a social order through a structure of fundamental rights is not without its demands. Fundamental rights are primarily designed to limit government power in the interest of individual self-determination. As the experience of the 19th century shows, this goal can only be attained if the state is not blind to the actual conditions for the enjoyment of freedom. Otherwise, freedom is either useless for those without the necessary means or coercive, because it drives people into conditions of dependence. It is because of this experience that the rule of law state gradually evolved into a welfare state, in which the government is committed to provide for the basic needs of the citizens, to care for the sick, the unemployed and elderly, and to eliminate the exploitation of its weakest members.

Furthermore, the rule of law state as understood in a substantive sense would also be incomplete if it did not address the dangers for fundamental rights that emanate, not from the government, but from third parties and other social forces. These dangers have increased considerably with the unparalleled progress in science and technology and the commercial use of its results. It is true that the state possesses means to mitigate these risks. But as they grow out of activities that are themselves protected by fundamental rights, laws are needed to address the risks. If the legislature were permitted to remain passive in this conflict of constitutional rights, the most assertive interests would tend to prevail over the interests of those in need of protection. It therefore is an essential element of a substantive rule of law concept today that fundamental rights not merely serve as checks on government power, but also incorporate a duty to protect its citizens against the dangers that result from the constitutionally protected activities of third parties.[8]

## Legal Protection Against State Actions and Judicial Review

Following these remarks, it is not to be expected that the idea of the rule of law will sell itself. This holds true not only for autocratic or theocratic regimes, but also for pluralistic societies and democratic states. Therefore, it is of paramount importance to ask what threatens a state, when it chooses to ignore its submission to the law. If individuals act illegally the state may intervene with its police powers. But if the state itself breaks the law, there is no higher authority to enforce the law. The rule of law state is therefore dependent on the existence of devices within its own structure, which monitor the lawfulness of state action. In common law countries, these devices have always existed. The executive could be sued in court. In countries with an absolutist past, the state was able to evade this kind of judicial scrutiny.

Generally speaking, it took enormous efforts until the judiciary regained the power to review the legality of governmental acts. In Germany, the legal protection against the state became the most important demand after the attempt to democratise it had failed in 1849. The result of these efforts was the establishment of special administrative courts, not the competence expansion of ordinary courts as in the common law model.[9] There are, however, still countless countries, in which citizens

[8] See Dieter Grimm, "Rückkehr zum liberalen Grundrechtsverständnis?" in idem, *Zukunft*, p. 221.

[9] See Regina Ogorek, "Individueller Rechtsschutz gegenüber der Staatsgewalt. Zur Entwicklung der Verwaltungsgerichtsbarkeit im 19. Jahrhundert" in *Bürgertum im 19. Jahrhundert* (1988), ed. Jürgen Kocka, Band 1, p. 372.

cannot hold public authorities accountable – neither on the highest nor on the lowest level. In states, which derive their legitimacy from an absolute truth rather than from consensus, the lack of judicial review tends to be the rule. As all experience teaches us, the rule of law is on shaky ground without judicial review.

If the rule of law is not only defined in formal but material terms, then it does not exhaust itself in the legality of the administration. The legislature is also submitted to the legal constraints that are laid down in the Constitution. However, the adherence of the legislature to the constitution cannot be determined by administrative courts. If the legislature should not be allowed to ignore the Constitution with impunity, then its actions must also be subject to judicial review. This is the conclusion to which the United States was already drawn at the time when its Constitution was adopted. In the rest of the world, this insight has only found gradual acceptance after bitter experiences with blatantly unjust regimes. The second half of the twentieth century saw the triumph of constitutional adjudication, with judicial review of legislation at its core.[10] Today, judicial review is widely regarded as an integral component of the rule of law.

The existence of judicial review alone means very little, however, if courts are not independent, but remain bound by the political chain of command. It is an essential part of the rule of law that laws, once they are enacted, are shielded from political control and obtain an autonomous status, i.e.: that they will be interpreted and applied according to legal, not political criteria. This is the only way to guarantee that the political branches are bound by law. The guarantee for this is the separation of powers.[11] This is why the rule of law is not only weak where there is no judicial review but also where there is no separation of powers. Separation of powers is more than the exercise of public functions by various departments. It adds to this division the independence of powers within its functional areas. Again, that is difficult to accept for countries that are committed to an absolute truth. Absolute truths demand hierarchy; separation of powers prevents hierarchy.

## Conditions of the Rule of Law

In sum, the rule of law proves to be full of conditions. This also answers the question of whether it is a cure-all for the entire world. It is not because the conditions for its realisation are lacking in many parts of the world. They also cannot be brought about that easily. Only at first glance does the rule of law seem to be a merely technical legal device, which could be established anywhere if only the political will was there. In truth, it is a cultural achievement, which does not necessarily take roots in other cultural contexts. In the Western world it helped to bridge the tension between political power and individual self-development by imposing legal boundaries on governance in the interest of individual liberties. The rule of law does not find favourable ground in cultures, in which self-development has no worth and law is not associated with the protection of freedom.

However, this does not mean that the spread of the rule of law outside of the cultural context, from which the concept emerged, presents an insurmountable obstacle.

[10] See C. Neal Tate/Torbjörn Vallinder, *The Global Expansion of Judicial Power* (1995).

[11] See Christoph Möllers, *Gewaltengliederung*, (2005); idem, *Die drei Gewalten* (2008). For judicial independence see Karl August Bettermann, *Die Unabhängigkeit des Richters* (1969); Kurt Eichenberger, *Die richterliche Unabhängigkeit als staatsrechtliches Problem* (1960); Dieter Grimm, *Politik und Recht*, in idem, *Die Verfassung und die Politik* (2001), p. 13.

In order to export the idea of the rule of law, it is rather of crucial importance to realise that there are different levels of the rule of law. Rule of law is not a matter of all or nothing, but of more or less. In fact, rule of law is not a process, as it is often claimed; it is a state of affairs. However, the realisation of the rule of law can take the form of a process, level by level. Even in the Western world, not all levels were achieved at the outset. Many were only won after bitter setbacks and hard struggles. Still today these levels differ from country to country.

Each new step means a step forward compared to the previous level. Even the minimum concept of making the law binding on the administration – irrespective of the content of the law – is progress compared to arbitrary rule. The more elementary the level embarked upon, the greater the demand for it. This demand to be subjected to a rule-based rather than arbitrary government can be expected to meet universal approval. For the fulfillment of such a demand, one can easily mobilise popular support. Other levels of the rule of law may be in the interest of the political leaders themselves – albeit the interest will often be a pragmatic, not necessarily a principled, interest in the rule of law. For example, a state that relies on economic growth will accept that rule of law elements, which are conducive to economic growth.

However, the realisation of the rule of law becomes more demanding with each additional level. This not only affects the prospects of success but even the mere willingness to try it out. Not every progress in the realisation of the rule of law can count on popular support. Anyone who is convinced of the existence of a God-given order, over which human beings are not allowed to dispose, will have a hard time seeing the benefits that religious freedom and freedom of expression bring. Without acceptance of freedom as a human right, there can be no rule of law in the substantive sense described above. Where all public power is in the service of an absolute truth, it would appear contradictory if the supreme power could be prevented from enforcement of such truth by an independent body of judicial review.

## Rule of Law Democracy

That brings us finally to the relationship between the rule of law and democracy. Does one only go with the other? This question is obviously of great significance for the global spread of the rule of law. From a historical perspective, the question can be answered in the negative. Before it became a democracy, Germany had been a rule of law state for more than one hundred years. As early as in the enlightened absolutism of the 18th century, the rule of law became increasingly accepted. This was the time when the great codifications began. The rulers gave up using their prerogative to repeal court judgments and replace them with mere authoritative decisions. In the constitutional monarchy of the 19th century, princes bound themselves in the exercise of public power by constitutions, which granted fundamental rights to its citizens and allowed elected representatives to participate in the legislative process.

However, these pre-democratic states did not reach all the levels, which we would associate with the rule of law idea today. Even if the enlightened monarchs were willing to treat their subjects in accordance with the laws, which they had unilaterally enacted, they were not prepared to subordinate their power to the law. They were bound by the law only to the extent that they were willing to comply with it. They could depart from it at any time. The subjects lacked the means to enforce the law against the ruler. The constitutional monarchs did not derive their power from the constitution. They had granted the constitutions voluntarily by way of self-binding, but were no longer free to

unilaterally take them back. The binding force of the constitution did not extend further than as granted by the monarch, and judicial review was considered incompatible with monarchical principles. Only administrative courts were permitted later.

Thus, by today's standards the rule of law is not fully realised in non-democratic states. On the other hand, it is not the case that democracies are always accompanied by a fully developed rule of law regime. Just as there are many different political regimes that could be called "non-democratic," so too are there countless forms of governance that could be called "democratic". Where democracy is identified with majority rule and protection of minorities and a guarantee for free political competition and communication is lacking, democracy can easily turn into a tyranny of the majority. This notion of a dictatorship of the majority alone should suffice to demonstrate that a democracy without rule of law appears contradictory and develops a tendency toward self-destruction.

Just as a democracy without rule of law is not immune to the disfranchisement of minorities, so too is the rule of law without democracy not immune to particularism. When those who are affected by laws cannot participate in the creation of said laws, it is unlikely that a reasonable balance of interests between all sectors of the population will be achieved. Those who are not involved in the formation of states may easily be neglected in the political decision-making process. They will become mere objects of governmental power, no matter how well-meaning this power may be. For these reasons, left on its own, both the rule of law and democracy are in danger of failing the common good. Only in conjunction do they constitute the achievement that ultimately secures the common interest.[12]

[12] See Jürgen Habermas, *Faktizität und Geltung* (1992), esp. p. 166 ff.; idem, "Inklusion – Einbeziehen oder Einschließen? Zum Verhältnis von Nation, Rechtsstaat und Demokratie" in idem, *Die Einbeziehung des Anderen* (1996), p. 154; idem, "Über den internen Zusammenhang von Rechtsstaat und Demokratie", in ibid., p. 293.

# Principles of Fiscal and Monetary Legislation: A Preliminary Perspective[*]

**Prachoom Chomchai**[**]

## Introduction

As a matter of course, in a purportedly law-driven and law-abiding society such as Thailand, dominated as it is by a legalistic *mentalité*, legislation serves, *inter alia*, as an indispensable tool for the government's pursuit of fiscal and monetary policies which can in no way be contemplated without the appropriate enabling legislation. However, unless care is taken to ensure that fiscal and monetary legislation are enacted in conformity with first principles, they cannot be expected to achieve fiscal and monetary goals set by the government, and could even turn out to be counterproductive. In this series of articles fundamental principles underpinning fiscal and monetary policies first formulated then analysed with view to demonstrating their relevance to a 'teleological' evaluation of actual fiscal and monetary statutes; and reference is made to legislation not only in Thailand, but in developing economies in general.

Such an evaluation could usually be made either *ex ante* or *ex post facto.* The following array of questions illustrates the sort of *ex ante* enquiries upon which the underlying first principles of fiscal and monetary legislation are intended to address. How might the performance of the public sector be improved, and might a balanced-budget law do the trick? Will market outcomes become more socially acceptable with the possible institution of regulation in natural-monopoly situations, and enactment of competition legislation in other monopolistic circumstances? Is it possible so as to design public-finance policies *vis-à-vis* the environment, thus contributing to sustainable growth and development (attaining the best of both worlds)? Will a particular Budget Act coupled with subsequent amendments have the intended expansionary or dampening effect? Will the Act of phasing out the government's guarantee of bank deposits lead bankers, through moral hazard, to take more risks, or will it reinforce the local capital market or induce the private sector to resort to investment in precious stones, land and gold or to taking its funds abroad? If it is true that the inheritance tax helps to inject more equality into social relations but serves as a drag on long-run economic growth, is this trade-off known by and acceptable to society at large? Finally, will a particular privatising Act dealing with an existing public enterprise generally deemed to be inefficient serve the public interest as envisaged, the experience of the United Kingdom in denationalising the rail transport in mind? *Ex post facto* enquiries

[*] This article is the first in a series.

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may also, *mutatis mutandis*, be attempted. Of course, the evaluation exercise especially of the *ex ante* kind has to be undertaken with the help not only of fiscal and monetary principles but also of the law of unintended consequences, the rest being dependent upon one's prediction of the private sector's response to the government's stimuli provided through fiscal and monetary legislation. While evaluation of fiscal and monetary laws may be said to constitute an art rather than an exact science, any jurist worth his or her salt should encounter no particular difficulty with this as it is his or her lot essentially to scrutinize and observe human behaviour in matters of public finance and monetary affairs as well as in all other walks of life.

The series having long been in gestation, this first article is something in the nature of a *tour d'horizon*. Their genesis needs to be pinpointed. The 'reader' approach has been adopted to reflect the multiplicity of viewpoints on topics being addressed. After a thoroughgoing survey, the author has come to the conclusion that, there being in the literature, little of the kind of rigorous analysis and critical review at a level appropriate to the needs of lawyers seriously concerned with fiscal and monetary questions, there emerges a need for in-depth reappraisal.

The extracts under examination have been taken from various classical sources in fiscal and monetary policies the author has done his best to surmise the gist of the material. Thus, extracts are not quoted in full. Rather they are summarised in the hope that no distortion incidentally creep in, and that the emerging elements be synthesized. It is to be noted that the sources vary greatly in their approach and viewpoint, thus their inclusion in this essay; the synthesis intends to serve pedagogic purposes only and need not necessarily reflect the author's own views. Thus where the emphasis is placed on the process rather than the outcome, conclusions are arrived at *argumenti causa*.

While some of the selected materials may appear dated, this in no way detracts from their validity as raw materials for further enquiry. What is more important to bear in mind is the perennial nature of issues raised and the thinking imminent in the way they have been addressed. Moreover, it is the author's conviction that the chosen extracts have the great merit of putting their finger on crucial issues. Indeed, such issues as the equitable state of distribution of income and wealth for all seasons may take a lifetime to address adequately as social values and indeed society itself continue to evolve in what is admittedly a state of flux.

## Traditional and Modern-Day Public Finance in Evolution

In societies where orthodox or traditional public finance is employed by the government as a straightforward tool for securing revenue to meet its day-to-day needs, little thought is given to the possible repercussions of taxation and government expenditure on the economy and society. In such a context, while it is not unusual to identify the most efficient way of raising revenue and a fair distribution of the tax burden and the benefit to be derived from the contemplated expenditure, there is a complete neglect of the possible fallout of taxation and government outlays financed out of it (Brixi et. al.[1])Today, such traditional public finance is generally, in developed and developing alike, largely a relic of the past, though its irresistibly tempting no-nonsense approach has the habit of dying hard; this hangover from the past can still be found alive and well

[1] Hana Polackova Brixi et. al. (eds), *Tax Expenditures—Shedding Light on Government Spending through the Tax System: Lessons from Developed and Transition Economies* (2004), p.2.

in such things as the government's tobacco and lottery monopolies and spirits concessions.

Undoubtedly, orthodox, more traditional public finance has been closely associated with the minimal or minimalist conception of the government whose role is confined to serving as a night watchman or an arbiter to ensure that, with *laisser faire* in mind, the private sector can transact its business largely undisturbed. For example, Nozick[2] alleges that the government can justifiably perform such a minimal role and that for a government to go beyond this would definitely be *ultra vires*. Nevertheless, no matter whether or not a government has a deliberate fiscal policy, raising and spending its revenue inevitably has as much impact on the country's income distribution as on overall production, employment, incomes, price levels, economic growth and public welfare. In other words, an aggregate fiscal policy is in existence regardless of whether or not the government is conscious of it.[3] In a similar vein, enactment of a fiscal statute for the simple purpose of raising revenue without heeding its possible negative impact or planning for its other benefit is tantamount to letting an opportunity to minimize harm and to maximise welfare slip through our fingers. Political theory and philosophy apart, the *raison d'être* for simplistic, orthodox public finance has been provided by the European classical school which had its beginnings in the late 1700s. Names of such celebrities as Smith, Say, Ricardo, Mill, and Marshall come to mind. According to these economists, market forces at work in the pure market economy will enable those who are prepared to work to find employment at all times, thereby ensuring that the economy is perennially at its full-employment equilibrium. If, however, by chance their crops up unemployment, it is said to be only a short-lived, temporary state of affairs and confined to specific sectors, to boot; for there will be, it is claimed, automatic adjustment such that full-employment equilibrium be soon restored. According to Say's law, supply serves to create its own demand: owners of factors or production provide entrepreneurs with their services for the sole purpose of increasing consumption out of incomes thereby earned. Moreover, with full flexibility of wage rates and price levels the pure market economy serves, it is asserted, to assure us of continuing full employment such that any involuntary unemployment becomes only a temporary phenomenon. In other words, it is contended that aggregate supply is equal aggregate demand at full employment, and any such deficiency in demand as to induce unemployment will cause real wages to fall, thereby automatically eliminating any unemployment. With the credo that full employment comes about naturally in a pure market economy, there is no scope for any fiscal policy to generate it, thereby buttressing the minimal role of government propounded by political scientists and philosophers.

In fact, Say's law was derived from Jeremy Bentham and James Mill and given full backing by Ricardo.[4] For his part, Jean Baptiste Say was a French businessman turned economist who in 1803 penned his book on *Treatise on Political Economy* (*Traité d' économie politique*) wherein he put forward the law of markets (*la loi des débouchés*), underpinning the conviction that general and permanent unemployment was ruled out as an impossibility.

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[2] See Robert Nozick, *Anarchy, State and Utopia* (1974).

[3] See Bernard P. Herber, *Modern Public Finance: The Study of Public Sector Economics*, (3rd ed., 1975), p. 534.

[4] See Roger E. Backhouse, *The Penguin History of Economics* (2002), p. 142.

According to one plausible view[5], Say, having based his theory on the simple concept that exchange between two parties involves both a purchase and a sale, extended such interdependency of supply and demand from the barter economy where every sale involves a demand of equal value and no excess demand or supply can exist and no commodity will be produced without a corresponding level of demand for its consumption, to a general theory of markets where money serves as the medium of exchange.

As it so happened, Say's law enable certain economic phenomena during the late seventeenth and early eighteenth centuries to be explained. Given Western economies were still in their pre-industrial or early industrial stages, production was then limited to a modest scale and the industrial sector nascent. With the monetized distinct from the non-monetised, and the subsistence sector only just rising to prominence against the background of humble public sector, governments in the West were not well-placed to intervene in the economy (even if they wanted to). However, since the West began the process of gaining industrial maturity, far-reaching changes have taken place in such a manner as to invalidate Say's law. For example, economies of scale have contributed to a dramatic growth in the magnitude of production. This coupled with developments in the labour market and trade unionism have injected monopoly elements into markets for factors as well as for goods and made for wage-rate and price-level rigidities particularly in the downward direction. In the emerging circumstances, the in-built mechanism of wage-rate changes could obviously not function properly. Thus during the Great Depression which began in 1929, even though there arose a 20% unemployment, the theoretically expected substantial fall in wage rates did not come about.[6] Faced with this predicament, people had reason to cast doubt on the utility and relevance of Say's law.

In fact, such doubts had been raised even by Say's contemporaries. Thomas Robert Malthus--of the explosive population growth fame—affirmed that '**general** gluts' of goods were possible as businessmen went out of their way to attempt to supply things in excess of buyers' needs. By contrast, Ricardo and Say each regarded such prospects as purely fanciful; for in their view labourers, landowners and capitalists were in receipt of wages, rent and interest which between them went to make up the prices of goods offered for sale, thereby transforming production costs into incomes out of which purchases of goods were made. Of course, both Say and Ricardo conceded the point that gluts, albeit **partial** as opposed to **general**, of goods could come about in the event that consumers for one reason or another suddenly decided to buy a smaller amount of certain things, though Say and Ricardo were convinced that such partial gluts could be eliminated with a fall in the relevant prices. In other words, in the eyes of the European classical economists including Say, Smith, Hume and Ricardo such general gluts as were envisaged by Malthus could be ruled out as consumers were definitely out to meet their unlimited wants (cf. the neoclassical economic man to be taken up later).

As things turned out, Malthus found this reasoning problematic. He himself was a eyewitness to the recession of 1818 following, as it was, in the wake of the Napoleonic Wars: to Malthus such substantial unemployment as cropped up could by no means be explained away by Say's law. In his view, consumers might not be prepared to allow their spending to exhaust their income, the remainder being saved or hoarded. This would lead, as a matter of course, to unsold supplies. To this Ricardo countered

[5] See David W. Pearce (ed.), *Macmillan Dictionary of Modern Economics*, (revised ed., 1983), p. 394.

[6] See Backhouse, History of Economics, p. 293.

that, as consumers would deposit their unspent income at commercial banks, borrowers would expend such savings on behalf of bank depositors. One plausible theory surmises that, according to the classicists, capitalists taken as a class are typically involved, in one breadth, in saving and investing.[7] Of course, Malthus found no cold comfort in such responses; for it was his article of faith that savings need not necessarily end up in investment. Instead he suggested that, faced with the problem of general gluts, the government resort to public works. Unlike John Maynard Keynes (later Lord Keynes of Tilton and himself one of Marshall's pupils at Cambridge), who viewed public investment as a means of stimulating sales of goods, Malthus urged public works to slow down and indeed crowd out investment undertaken by the private sector.[8] Had it been otherwise, one could justly argue that herein lay the genesis of modern, functional public finance properly so-called. The New Deal programme launched in the United States during the Great Depression was getting at what Keynes was to recommend subsequently as a means of spending one's way out of a depression. Significantly, the Tennessee Valley Authority (TVA), which was to serve as a role model for the Mekong Committee set up in 1957, was inaugurated in 1933 to develop the entire basin of the Tennessee River through colossal public works in the form of dams and reservoirs.

Despite a touch of exaggeration, Keynes was right in recognizing the significance of Malthus's objection to Say's law. Malthus was thereby treated as a forerunner of the 'general gluts' theory. In the former's view, had Malthus, instead of his overwhelming contemporary Ricardo, been afforded an opportunity to lay the foundation-stone of macro-economics in the nineteenth century, the world would be a far cry from the tumultuous one of the 1930s.[9]

Perhaps Keynes's most influential work was the *General Theory of Employment, Interest and Money* (1936), from which the apparent 'Keynesian Revolution' emerged, would later be justly regarded by many as mere myth. According to more recent research[10] Keynes himself had a not inconsiderable role in propagating this said myth. Its quintessence amounts to Keynes's overthrowing classical economics: Keynes is portrayed as having demonstrated, for the first time in the history of economic thought that changes in the government's revenue and expenditure could bring about stability in the level of employment, thereby paving the way for modern-day macroeconomics.

By contrast, Backhouse rightly points out that the propagation of such a myth boils down to a distortion of history. In fact, academic literature in the 1920s and 1930s, especially in the United States, Britain and Sweden, was replete with the expression of a similarly forward-looking stance. Attention was focused on expectations and account was also taken of linkages existing between saving, investment and aggregate demand, the thrust being the deployment of monetary and fiscal policies to alleviate the burden of unemployment, thereby giving birth to modern, functional public finance and providing the theoretical underpinning to the likes of New Deal. When they were viewed in perspective, Keynes's writings thus constituted no more than part of the contemporary stream of economic thought, thereby giving the lie to the assertion that his

[7] See Mathew Forstater, *Economics* (2007), p. 52.

[8] See Todd G. Buchholz, *New Ideas Form Dead Economists—An Introduction to Modern Economic Thought*, (2nd revised ed., 2007), p. 89.

[9] See Backhouse, History of Economics, pp. 87-89.

[10] See Backhouse, History of Economics, pp. 234-235.

*General Theory* overthrew all that had preceded it. Marc Linder[11] hits the nail on the head when he maintains that Keynes merely conceptualized an 'already existing practice', though he could have added that Keynes was merely climbing on the bandwagon. Hence it came as no complete surprise that what were to be known as Keynesian-type policies had been pursued in a number of countries even before publication of his famous book in 1936. In fact, President Roosevelt's New Deal, encompassing as it was the government's investment in gigantic public works, destined to be expansionary through generation of people's income had its beginnings in 1932.

Indeed, Backhouse[12] points out that Roosevelt's New Deal was the brainchild of a certain Rexford Tugwell, (1891-1979) a propagandist for 'American' planning *qua* something of a democratic counterpart to that being practised in Soviet Russia or Nazi Germany. In a similar vein, the Second World War was to witness the extent to which economic planning could be put to use to enable the United States and Britain to attain national wartime targets. For their part, economists played crucial roles in the collective war effort, not least in working on crucial statistics, quality control in munitions production and the design of gun-sights. For instance, the author's tutor and supervisor at Oxford, Sir Donald MacDougall, must have rubbed shoulders with fellow economists like Richard Stone and James Meade in Britain's war secretariat. In fact, the techniques developed and the attitudes acquired in the process were to have a definitely positive influence on their economic discipline after the war.

To say that the 'Keynesian Revolution' was a myth is not to deny the influence Keynes had on the teaching of economics as distinct from its practical application at the government level. Backhouse[13] rightly points out that an introductory textbook by Paul A. Samuelson, one of the most successful of its kind, is Keynesian and capitalistic in approach, thereby incurring the wrath of the Marxist economist, Marc Linder[14], whose aim is to tear it to pieces. Samuelson, a graduate student at Harvard when the *General Theory* came out, is said to have likened Keynesian economics to a disease that infected everyone under forty but to which almost everyone over forty was immune (Backhouse[15]). Again, according to Backhouse[16], by the end of the 1940s, in a survey of contemporary economics organised by the American Economic Association (A.E.A.) to help with training returning U.S. servicemen, Keynes is said to have been far and away the most frequently cited author. It might perhaps be maintained that what was novel in Keynes's approach to deal with a depression was deficit spending, his contribution being termed the 'Keynesian Breakthrough' rather than the 'Keynesian Revolution' by Lewis.[17] Semantics apart, Lewis argues that, while the idea of deficit spending seems simple and even mundane today after decades of government budgets that casually run up huge deficits, it sounded like anathema to economists and government bureaucrats in Keynes's day. This is said to have been partly because it called for government to spend vast amounts of money that it did not have and partly because it expected the government to get more involved in managing the economy at a time when laissez-faire

[11] See Marc Linder, *Anti-Samuelson* (1977), p. 245.
[12] See Backhouse, History of Economics, pp. 290-291.
[13] See Backhouse, *History of Economics*, p. 232.
[14] See Linder, *Anti-Samuelson*.
[15] See Backhouse, *History of Economics*, p. 232.
[16] See Backhouse, *History of Economics*, p.234.
[17] See Michael Lewis (ed.), *The Real Price of Everything: Rediscovering the Six Classics of Economics* (2007), pp. 1231-1232.

was the first and only commandment of 'political economics'. Moreover, so argues Lewis, Keynes's remedy sounded ludicrous and dangerous, since it was tantamount to the fiscal equivalent of 'lighting a patient's bed on fire to cure his fever'. The advantage, according to Lewis, was that Keynes had tried unsuccessfully to persuade his fellow economists and high government officials, including Roosevelt of the validity and value of his approach.

While all this does not tally at all with the prevailing preoccupation with 'American planning', Lewis concedes that debate still lingers whether Keynes's ideas were, as Backhouse in his book[18] referred to above painstakingly points out, all his own. After all, it is known as historical facts that both Hitler and Hoover had earlier on employed similar methods to varying degrees and levels of success. Lewis also invokes the historical fact that Roosevelt did not test deficit spending until 1938 and that Roosevelt did not fully embrace the practice until World War II forced is hand. What Lewis may have missed in his argument, however, is that, apart from the prevailing obsession with 'American planning', the deficit finance idea could have been implicit in New Deal embarked upon by Roosevelt even before the advent of Keynes's book and that, owing to the obvious soundness of American public finances, a budget deficit, despite the huge government investment in New Deal, did not emerge until much later. In other words, an *ex ante* budget deficit need not necessarily entail an *ex post* one.

While in the 1930s economic stabilization coupled with theorizing on the role of the state in achieving it may be said to have brought functional public finance or discretionary fiscal policy into being, other functions were soon to attract theorists' attention. While such public goods (christened 'social goods' by Musgrave) as public highways and dams have been provided by governments for centuries, systematic theorizing underpinning them had to wait in the wings. It is true that Hume[19], who had a great deal of influence on later economists like Adam Smith, discussed the free-rider problem affecting public goods as early as the mid-eighteenth century when he found that gaining the cooperation of a thousand citizens jointly to work for the common good would fail in the face of an individual's incentive to 'free himself of the trouble and expense'.

Again, some thirty years later Smith was to concentrate his attention on the role of the state in providing such public goods as maintenance of the money supply, enforcing of property rights, promotion of competitive markets, provision of national defence and administration of justice.

In the absence of theoretical underpinnings, governments were blindly grappling with day-to-day problems of free ridership and provision of traditional public goods—tasks which were quite in line with the prevailing minimalist conception of their role. An in-depth appreciation of the quintessence of such goods were to await Samuelson's proposition in 1951, that saw a comprehensive theory of **pure** public goods whereby if they were to be provided at all, they would have to be provided for all without exception. Samuelson pointed to their two defining characteristics: the fact that people cannot physically be excluded from benefiting from them and that one person's partaking of the benefit in no way detracts from that enjoyed by anyone else. It also became clear that the term 'pure' is used to characterize ideal conditions and that, in actual fact, if there arose congestion in their use, such public goods would become

[18] See Backhouse, *History of Economics.*

[19] See David Hume, *A Treatise on Human Nature*, (Garden City: N.J :Dolphin Books 1739) quoted by Inge Paul *et al.*, *Global Public Goods; International Cooperation in the 21st Century* (Oxford 1999).

**impure**. In particular, Samuelson demonstrated the significance of pure public goods in the fact that, if the market provides them, the amount supplied would be less than what is socially desirable: as nobody can be excluded from partaking of the benefit, no one has an incentive to pay. It boiled down to the 'free-rider' problem David Hume identified earlier, as well as on market failure—necessary consequences of the inapplicability of exclusion--from which the *raison d'être* of a government's allocation role emerged.

If the market could fail, would not the government, itself tainted with proneness to failure as it is, similarly let us down in its remedial effort? This was exactly the question that exercised the minds of James Buchanan, Gordon Tullock, Mancur Olson and Anthony Downs, adherents of the public choice theory, who could not accept the proposition that the government is a disinterested organisation which constantly has the public interest at heart.

Such an optimistic model of government is usually adopted as a framework of reference. Characterised by despotic benevolence, the model is abstracted from complicated reality. In its eyes, the government is constantly in search of public interest and typically allocates resources in such a manner as to rectify market failure. Regarded by the model as omniscient and benevolent, the government is held to make critical choices on behalf and for the benefit of the people who may not as fully appreciate their own best interests. This is why the government's intervention is regarded as equally justified where people underestimate the value of such goods and services as healthy food and insurance, thereby giving rise to the *raison d'être* of the government 's role in the promotion of the consumption of merit goods, theoretical underpinnings of which were discovered in 1959 by Musgrave. Again, as in the case of public choice theory, this went against the grain, the prevailing tenet being that an individual is the best judge of his or her own welfare.[20]

Reverting to the public choice theory put forward by Buchanan, Tullock, Olson and Downs, one could well see that it considers the despotic benevolent government model not to be quite in accord with reality, where the government is seen to be crammed with self-seeking instead of selfless individuals. In particular, in the eyes of the public choice theorists, politicians, far from seeking public interest, typically proffer policies destined to gain popular support destined to perpetuate their grip on power.

In thus pointing to government failure alongside market failure, Downs (in 1957) and Tullock (in 1970), in particular, invoked a fundamental flaw in the electorate's behaviour that served to exacerbate governmental aberration. In their view the impoverished, who vastly outnumber the well-heeled, manage to exploit their numerical preponderance at the polls to impose redistribution of income on the latter, thereby affording self-seeking politicians a golden opportunity to make the most of their populism. The certainty of popular backing stems from the glaring inequities of income distribution: it is usually skewed in favour of the few extremely affluent, the vast majority being relegated to positions on much lower income scales.

In fact, distributive justice as a fiscal target has had a considerably more gradual and lengthy evolution than other goals of functional as opposed to traditional public finance. With its modest beginnings in the English Poor Law of 1563, destined, as it was, to alleviate the onerous burden on the underprivileged of the worst excesses of distributional inequities, redistribution has grown from strength to strength. At the root

[20] See Stephen J. Bailey, *Public Sector Economics: Theory, Policy and Practice*, (2nd ed., 2002), p.113.

of such effort there have lain notions of equity broached by Rousseau in the eighteenth and taken up again by Marx in the nineteenth century. Today as a sequel of such developments, a substantial segment of the population, particularly in Britain, are in receipt of their benefit, income being construed liberally to include what is received in kind as well as in cash such that merit goods including education and public health have also been brought into the fold. Nor has there been any dearth of novelties in the realm of such goods: cheap butter (in 1973-1974) and beef (in 1974) were thus offered as part of the redistributive package to old-age pensioners in Britain.[21] Of course, the brunt of the *onus* of the exercise in terms of taxation has inevitably been borne by those in the high-income brackets.

The relentless evolution of modern, functional finance did not, however, come to a halt with innovations in the realm of merit goods, since emergence of fresh aspects of the multiple-faceted and 'reversible' goal of stabilization was soon to usher in a state of flux. Thus, while in the United Kingdom four immediate post-war decades were devoted to using macroeconomic policy of the Keynesian type to control output and employment and microeconomic policy to control inflation, the trend was reversed during the 1980s and 1990s when the former was directed at the control of inflation and the latter at the removal of supply constraints. Control of inflation and improvements on the supply side of the economy became the two main objectives of governments both of Conservative and Labour persuasions. Indeed, control of inflation turned out not to be so much a faithful application of monetarist rules to control money supply as a refusal to apply Keynesian reflation policies in response to unemployment. In particular, supply-side measures involved the removal of impediments preventing people and firms from responding promptly to changing market conditions.[22]

Quite apart from the dispute over whether Keynesian policies of demand management had been a disaster since their inception and whether monetary control was the answer to the problem of inflation[23], such a shift in the fiscal strategy and paradigm, which amounted to an anti-Keynesian "revolution" of sorts, reflected, in a way, the upshot of another long-running dispute over whether stagnant or falling output and rising unemployment stemmed from restrictive fiscal and monetary policies or to such supply constraints as labour market rigidities.[24]

In the United Kingdom frequent references were made, in this regard, during the early 1980s to the large amount of spare capacity that existed in British industry and hence the apparent potential for expansionary fiscal policy to stimulate output and employment. There was, however, the possibility that aggregate supply might be so inelastic that expansionary fiscal policy would have little or no impact on the level of unemployment but would instead make itself felt in the form of inflationary pressure. This may be said to be a mirror image of prevailing conditions in most developing countries, though their typical supply inelasticity reflects the dearth of factors complementary to labour generally found in abundance. In this perspective, unemployment is viewed as the outcome of deficiencies in aggregate supply rather than, as a true-blue Keynesian would argue, a deficiency of aggregate demand. It can thus be plausibly argued that the British policy makers of the 1950s, 1960s and 1970s tended to

[21] See Derek Morris (ed.), *The Economic System in the U.K.*, (3rd ed., Oxford 1985), p.280.

[22] See Bailey, *Public Sector Economics*, pp. 132-133.

[23] See William Keegan, *Mrs Thatcher's Economic Experiment* (1984), p.59.

[24] See Bailey, *Public Sector Economics*, pp. 132-133.

overestimate the elasticity of aggregate supply and that this explains the apparently increasing impotence of Keynesian demand management as a cure for unemployment.[25]

In retrospect, the mutation of traditional public finance serving, as it was, as the straightforward, no-nonsense tool for raising revenue for minimal functions of government including national defence and the administration of justice regardless of its economic and social impact into its more modern, functional guise may be seen to be largely an *ad hoc*, piecemeal and possibly an unplanned process. This has been, at best, a successful outcome of crisis management, as was the case with redistribution under the English Poor Law of the 1560s and stabilisation under the American New Deal; and, at worst, a fruitful upshot of a gamble, as was the case with the short-lived experiments with fresh merit goods like inexpensive butter and beef for old-age pensioners in the United Kingdom in the 1970s. Typically, practice has had the habit of preceding theory, leaving the government to grope around in the gap in the darkness. Of course, the notable exception was the stabilisation effort during the Great Depression and during the post-war years coping with which considerable thinking had gone into.

In any case, a fairly lengthy gestation period has been called for to make consolidation of practice and theory a reality. Thus, such goods (and services) as national defence and the administration of justice had been long provided before Samuelson discovered the principle of pure public goods in 1951. In a similar vein, fiscal practice in the form of Poor Law dates at least as far back as 1563 in England though a fully-fledged theory of merit goods did not see the light of day, courtesy of Musgrave, until 1959. Again, redistributive efforts, launched as they were by means of the Poor Law, had not had a good press until the advent of the theory of public choice in the late 1960s. Finally, market failure with regard to economic stabilization had not been uncovered until the outbreak of the Great Depression in 1929. Fortunately, the American New Deal was able to cope with it as a sequel of the timely preoccupation with 'democratic' planning in the United States. Of course, Keynes was a latecomer onto the scene, and, though his effort in putting together the various pieces of the stabilization jigsaw was crowned with success, it could not justly be claimed to be the 'Keynesian Revolution'.

Of the various strands of functional public finance, perhaps stabilisation has attracted the lion's share of academic attention. Thus Greffe[26] identifies *finance fonctionnelle* with maintenance of *l'équilibre macro-économique* which need not necessarily be the case. It is, however, more usual to envisage all the goals already elaborated: allocation of resources, redistribution and economic stabilisation.

## Need for and the Proper Role of the Public Sector
## Need for Public Sector: The Musgraves' View

The Musgraves[27] pose the question as to why, from the normative viewpoint, the public sector, engaged as it is in the subjection of a substantial part of the free-enterprise economy to its direction, is called for, given the prevailing acceptance of the premises that (i) the composition of national output should be in keeping with individual consumers' preferences and (ii) there is preference for decentralized economic decision-

[25] See Bailey, *Public Sector Economics*, p.133.

[26] See Xavier Greffe, *Economie des politiques publiques*, (2e éd., 1997), p. 438.

[27] Richard A. Musgrave, Peggy B. Musgrave, *Public Finance in Theory and Practice*, (5th ed., 1989), pp. 5-6 and 13-14.

making. Their answer is twofold. On the one hand, the prevalence of government may reflect the presence of political and social ideologies which depart from the generally-accepted premises already stated: those of consumer sovereignty and decentralized economic decision-making. On the other, governmental intervention reflects the fact that the market mechanism, sometimes known as the 'invisible hand', on it own, is unable to perform all economic functions properly. In their view the second factor is more important such that public policy is required to 'guide, correct and supplement' the market mechanism in some respects. According to them, the answer has profound practical implications: the proper size of the public sector is, to a significant degree, said to be a technical rather than an ideological issue.

Apart from the night watchman's function of provision of a legal structure to protect contractual arrangements and voluntary exchanges, the Musgraves illustrate their market failure thesis with 6 following examples.

(1) The claim that the market mechanism leads to efficient resource use in the sense that it produces goods and services that consumers want most and does so in the cheapest possible way is based on perfect competition in both factor and product markets. Such conditions are highly exacting. For instance, for them to obtain, there must be no obstacles to free entry [and exit] and consumers and producers need to have full market knowledge. In actual fact, it is claimed that such conditions of perfect competition may be difficult to come by naturally, and government regulation or other measures may thus be called for to secure them.

(2) Such measures on the part of the government may also be in order to cope with cases where competition is inefficient owing to decreasing (average) cost (giving rise to 'natural monopolies').

(3) The production or consumption characteristics of certain goods are such that they cannot be provided for through the market: problems of 'externalities' arise and require correction by the public sector, either by way of budgetary provisions, subsidy or penalty tax.

(4) Prevailing social values may demand adjustments in the market-determined distribution of income and wealth which stems from the operation of the market system and the transmission of property rights through inheritance.

(5) The market system, particularly in a financially developed and open economy, subject as it is to international repercussions, does not necessarily bring about high employment, price-level stability and the socially desired rate of economic growth.

(6) Public and private points of view on the rate of discount used in the valuation of future (relative to present) consumption may differ (such that the private savings are not adequate for investment with a view to economic growth, thereby making it imperative for the public sector to save more).

Of course, the Musgraves concede that calling for corrective or compensating measures of public policy to address market failure does not *ipso facto* necessarily imply that any policy measure that is taken will improve the performance of the economic system. As public policy, no less than private policy, can errand be inefficient, the basic purpose of the study of public finance is precisely that of exploring ways and means of improving the effectiveness of policy formulation and application.

## Major Public Finance Functions and their Possible Coordination

The six examples of market failure point to three major following functions of public finance: (a) the **allocation** function of budget policy to provide the desirable mix of

social goods and determine the process whereby total resource use is divided between social and private goods[example 3], (b) the **distribution** function to effect the adjustment of the distribution of income and wealth to ensure conformity with what society considers a' fair' or 'just' state of distribution (example 4), and (c) the **stabilization** function whereby the budget policy is used as a means of maintaining high employment, a reasonable degree of price-level stability, allowances being duly made for 'knock-on' effects on trade and the balance of payments (examples 5 and 6). Of course, while the Musgraves feel that regulatory policies which could address problems raised in examples 1 and 2 could be subsumed under (a), they are left out since they are held not to be essentially a 'problem of budget policy'.

The Musgraves point to one major difficulty of designing an efficient budget policy that does justice to its diverse goals: while such goals are distinct, they overlap in practice. To this end, they cite three examples.

First, it is supposed that society desires an increase in the supply of public services to be paid for out of increased taxes. Whatever tax is used inevitably affects the distribution of income in kind as well as net income in cash after tax. If this is submitted to the electorate, the Musgraves claim that some voters may favour/reject the proposed change in the public services because they like/dislike the associated change in distribution rather than because they like/dislike the public services. Ideally, the two issues should be kept separate such that society would provide for what is considered a fair state of distribution first and then adjust the financing of public services in line with the benefits that taxpayers derive therefrom, thereby holding the distribution of income in cash and in kind intact. However, as the two-step procedure is difficult to accomplish in practice, decisions on the provisions of public services tend to be mingled with and distorted by distributional considerations. Similar reasoning also applies to the reduced supply of public services and taxes.

Secondly, it is supposed that society wishes to shift distribution in favour of greater/lesser equality. Such a shift may be effected by using progressive/regressive (income or wealth) taxes to finance transfers to lower/higher income recipients or, alternatively, by increasing/reducing the supply of public services of particular value to low/high income groups. However, the latter approach interferes with the pattern of public services that consumers wish to secure at a given distribution of income. As is the case in the first example, one policy objective may thus be pursued such that it interferes with the pursuit of another.

Finally, it is supposed that a more/less expansionary policy is desired. This could be brought about by raising/lowering expenditures on public services or by reducing/raising the taxation level. In the former case the allocation objective of fiscal policy is interfered with; in the latter it is not, though there arises the further question of how changes in the taxation level are to be effected. For stabilisation measures to be neutral with regard to both allocation and distribution goals, the Musgraves suggest the use of proportional changes in tax rates.

The Musgraves conclude their discussion of possible coordination of major buget functions by saying that, while there may be exceptional cases where the given rule of thumb may have to be qualified, every effort should be made to minimize possible conflicts among the diverse policy objectives.

## Bailey's View on Publicness

In Bailey's view[28], the public sector is scrutinized by a number of disciplines including economics, and their perspectives differ widely. Disciplines other than economics (such as political science and sociology) take a pre-theoretical, commonsense or pragmatic view, the public sector being regarded as the outcome of historical processes and political compromise. For, in these fields, political parties are seen as evolving organic institutions that respond to the imperatives of both national security ('commanding heights' are invoked in nationalisation of basic industries in the U.K) and changing social expectations with regard to the welfare state (particularly in the U.K. whereby welfare services were provided by the state as far back as 1563).

By contrast, according to Bailey, neoclassical economic theory (of the kind preached by the likes of the Musgraves) determines the nature of the public sector on purely theoretical grounds, it being seen as an accidental residual of the "perceived" failings of the market mechanism to achieve economic efficiency in the allocation of resources, thereby giving the government's intervention an essentially negative role as distinct from the more positive approach of other social science disciplines. Within such an essentially negative framework, application of technical criteria yields the quintessence of the public sector as the sum total of actions called for to correct private distortions, so it is contended, though economists' obsession with allocative efficiency renders their rationale for government intervention partial such that it is unable to explain much of what governments and the public sector do or even fully justify increased public use of service charges.

Despite its restrictive *Weltanschauung*, economics is said by Bailey to yield two interdependent conditions serving as the efficiency justification for government intervention: markets fail to achieve an efficient allocation of resources and government intervention corrects rather than exacerbates the degree of allocative distortion. Justification, so it is argued, requires both conditions to be fulfilled: failure in just one rules it out altogether. Apart from giving a partial perspective, economic theory is said by Bailey to expect that public sector decisions mimic those of private markets after allowance has duly been made for such technical measures as taxes and subsidies called for to address market failure. However, here the collective action as seen by economic theory is said to be confronted with the issue of legitimacy in the face of failure in the voting systems ending up in government failure adequately to reflect private wants. Bailey invokes as well the findings of the economics of public choice and public provision whereby [fiscal] opportunism and the relentless pursuit of self-interest[on the part of taxpayers as well as bureaucrats] are revealed to prevail at the expense of the collective interest, the upshot being the inefficient and excessive provision of public services that are of low value relative to their costs—failings seen to be exacerbated by the largely random decisions derived from the defective voting systems. Economic analysis is thus alleged to stack the odds against public provision, the overriding preference being for the market where competition and prices, it is believed, could be depended upon to avoid or minimize distortions inherent in public provision.

It is argued by Bailey, however, that such preference for the market is irrational. The conclusion that the market provides the most efficient framework for the

[28] See Bailey, *Public Sector Economics*, pp. 8-13.

growth/welfare-maximizing allocation of resources is said to be predicated upon two unrealistic assumptions of man's constant struggle to maximize economic materialism and the pervasive scarcity of resources serving as an inevitable constraint upon such human behaviour. In fact, Bailey considers that psychological and relational (distributional) factors are more important determinants of welfare than mere ownership of resources (or property rights) and that scarcity, being the social, political and philosophical construct of classical liberal man, is a cultural rather than a natural notion.

The conventional economic approach is seen by Bailey to yield merely a partial rationale of government's intervention and unjustly to praise the perfectly competitive market. It is suggested that the approach be inverted such that the intrinsic nature of the public sector is first defined in the light of *a priori* normative criteria, thereby making the market, for a change, a residual. However, this alternative, inverted perspective is alleged by Bailey to be equally futile (so long as remains within the narrow confines of economic efficiency of allocation), it is neither possible to define or theorise about the essential nature of either of the sectors nor to draw a clear-cut dividing line between them.

Casting aside the strait-jacket of achievement of allocative efficiency derived from economic theory, one can well see, so contends Bailey, that, apart from the provision of services that has obsessed economic theorists, government (as seen particularly by political theory) exists to promote pluralism, participation and public choices as well, the entire panoply consisting of the '4Ps'. In particular, J.S. Mill and others are alleged to have argued that government is essentially concerned with deliberation such that common interests are identified and developed with a view to civilizing the masses, constraining selfishness and promoting the public interest. Such all-encompassing perspective of the public sector's role has, unfortunately been superseded, so argues Bailey, by its minimal instrumental conception as a necessary sequel of the Scottish Enlightenment in which the 'invisible hand' of market forces has been demonstrated to be more effective in promoting the public interest than deliberation.

Bailey finds that economic theory is not only obsessed with the provision of public services but also takes a very narrow, mechanistic and distorted view of the public interest seen by it as an aggregate of self-seeking private interests to be identified by the public sector in order for it to maximise public welfare. While it is true from the findings of public choice theory that the defective voting systems do not accurately represent the aggregate of individual choices, constituting the basis of collective welfare maximisation, Bailey contends that (for economic theorists) to view government as merely a vote-counting system is tantamount to misrepresenting its essentially deliberative role whereby the decisions made by those entrusted by the electorate to take the right decisions need not necessarily correspond to the aggregate or even the majority of private decisions.

Diverse disciplinary perspectives apart, time and place (with varying socioeconomic circumstances and morals) are alleged by Bailey to be important influences on the nature of the public and private sectors, thereby making the boundary between them fluid and hazy, in terms of ownership as well as of interest. Many free services provided by government in the U.K. are Victorian in origin but are predicated, so argues Bailey, by the set of socioeconomic circumstances and morals that they no longer obtain. Again, many of the changes made to the scope and financing of the public sector in the 1980s and early 1990s are said by Bailey to reflect a different moral view of the rights and responsibilities of the individual, from those of Victorian times, with an

emphasis on the equality of opportunity rather than of outcome. The privatisation debate reflects changes in the balance of, so implies Bailey, the fluid and hazy nature of the public/private sectors divide, especially in terms of ownership. It is related, so argues Bailey, not so much to the narrow economic allocation concerns of public versus market provision but to the comparative efficiency of diverse institutional forms. While Bailey parades such an argument against the public sector as the decision-making and the policing mechanism being distorted by political interference, and that for the private sector as management incentives and the policing function provided by the threat of bankruptcy through competition or inefficiency being severely distorted or nullified by the public sector. Bailey does not feel that privatisation will necessarily reinstate such private-sector incentives and imperatives (since privatized industries, like public utilities, are typically natural monopolies either at the regional or the national level. Hence there is a need for regulation of privatized industries). However, the debate brings out, in Bailey's view, the essence of "publicness": the felt need for a regulatory framework even after privatisation implies the continuing public nature of a privatised monopolistic industry that is expected to meet minimum all-round standards encompassing such things as safety, availability of service, quality of output and acceptability of the tariff structure. In other words, Bailey believes that a change in the nature of ownership need not necessarily entail loss of "publicness".

Bailey argues that, abstract ideas on "publicness" and "privateness" apart, even such a radical change in the nature of ownership as privatised public utilities do undergo in no way detracts from their "publicness", whose essence consists in their being crucial to the wellbeing of citizens. This being the case, the same is true, so contends Bailey, of other such services as leisure, recreation, education and health, whereby there exists, as already noted, a concern for access and quality that goes beyond the purely selfish needs of the individual. Once there is such a concern, so Bailey alleges, the more comprehensive role of government as a forum for deliberation and public participation on what is proper becomes highly pertinent. This, urges Bailey, is a far cry from the simplistic, restrictive approach of economic theory simply bent discovering what consumers demand through the voting systems.

In Bailey's view, "publicness" as expounded cannot be defined in terms of a particular set of technical or service characteristics or of security imperatives. Thus, though the industries, being the 'commanding heights' of the economy, was used by the British government to justify nationalisation. Bailey asserts that such consideration does not correspond to his conception of "publicness" which, he argues, implies deliberation and reconsideration of both the appropriateness of uncontrolled outcomes and of the extent and nature of government intervention. As people's ideas on what needs to be deliberated on may change with the passage of time or, in other words, things are in a state of flux, there is, so he contends, no static dividing line between public and private sectors that remains constant over time. Besides, Bailey claims that there is such a large degree of overlap between the two sectors that it is invalid to consider them as mutually exclusive. Thus many private companies are said by Bailey to depend for their existence on government contracts (for instance, for armaments or for domestic refuse disposal in the United Kingdom), Such dependence perhaps makes their characterisation as being in the public sector especially apt.

Perhaps labouring the point, Bailey affirms that the nature of the public sector is, on the one hand, conceptual and abstract and crucially dependent on the particular set of socioeconomic conditions and moral values obtaining at any one point in time and, on the other, pragmatic and institutional and dependent on technological and

organisational imperatives (thereby bringing to bear both conceptual and institutional factors on the nature of the public sector). Again, Bailey emphasizes the point that the two sectors are not mutually exclusive: local government (in the U.K) is said to provide many such services as leisure and recreation that could be and indeed are provided by the private sector. Again, that the two sectors famously overlap is said to be illustrated by the public sector's use of the market system, through compulsory competitive tendering, such that public sector provision is said not necessarily to imply a complete rejection of the market system. Nor is "publicness" said to require public ownership as distinct from control: regulation of privatised, formerly state-owned public utilities is alleged to be increasingly common.

While confirming that the use of (user) charges in no way detracts from the essentially public nature of a service, Bailey concludes the seminal fragment of his introductory chapter, which is something of a *tractatus philosophicus*, by dispelling popular misconceptions about their use for public services. To begin with, the belief that public services, being distinctive in nature as they are, should be free at the point of consumption is said to have no objective analytical basis. Continued payment of subsidy is also said to be erroneously justified in terms of initial endowments such that those who have received free services in the past should continue to do so in the future. Alternatively, in Bailey's view, it could be fallaciously argued that services which have been provided free in the past should continue to be provided free in the future, even where different groups of people use them in different time periods. Bailey points out that the circumstances of future users may be radically different from those of previous ones. Nor can it be justly claimed, so argues Bailey, that charging for services would in some way destroy their "publicness" or collective nature. It is equally invalid, so contends Bailey, to claim that free services promote democratic decision-making (for example in respect of local government functions).

By contrast, Bailey finds that the real objection to the increased use of (user) charges for public-sector services is based on the time-hallowed custom and practice of giving tax-financed support. On the other hand, if there is a legitimate concern for the welfare of user of public services, Bailey asserts that this does not preclude consideration of (user) charges where they are seen to promote rather than detract from the achievement of service objectives (including, for instance, equality of access and adequacy of provision against maximisation of profit and utility for private goods). It is such objectives, so contends Bailey, that certainly neither the form in which the service is organized nor the means by which it is financed, that truly encapsulate the nature of "publicness".

## Towards a Synthesis: Commentary on the Musgraves' and Bailey's Views Conception of Fiscal Policy as Part of Overall Public Policy

The Musgraves raise the normative question why, given the consumer sovereignty tenet and preference for decentralized economic decision-making of the free-enterprise system, there should be any economic role for the public sector to play. Unfortunately, their answer to the effect that the proper size of the public sector is, to a significant degree, a technical rather than an ideological issue, apart from their restrictive construction of 'technical' to be taken up later in the light of Bailey's commentary, is fundamentally flawed in that it overlooks the fact that the two basic premises of the free enterprise system are not **absolute** but **conditional** principles.

In other words, for such principles to apply, certain conditions need to be met. These generally include the requirements that the decision-making has to do with individual rather than collective welfare, that the individual consumer must have, as is said in Roman law, *iudicium* as well as *intellectus* such that he or she can be regarded as the best judge of his or her own welfare and that the person must have complete information to permit intelligent decision-making. Where such conditions are not satisfied, it behoves the state to intervene, thereby replacing individual with public choice. At least three clear-cut cases, as the Musgraves[29] themselves admit, spring to mind. First, the state's interference is needed to guide children and the mentally retarded understood in the broadest sense of the term, *iudicium* as well as *intellectus* being obviously wanted. In such cases the state intervenes by providing legal guardianship and curatorship respectively since children and the mentally retarded are considered *incapables*.[30] Secondly, where consumer choice may be distorted by false advertising the state intervenes by providing accurate information which the consumer is free to reject. Thirdly, where information on available options may be judged to be inadequate, the state intervenes by imposing certain levels of education to expand such information, the state's interference coming to a close once the information has been gained.

In reality, however, the situation may be more complicated such that the conditions already referred to may simply be first-order in nature, such second-order conditions as an absence of overriding concerns transcending individual freedom of choice being also called for. In the face of such concerns, either the state will impose its will or the individuals themselves feel obliged, at the expense of their freedom to choose, to support them. Thus, in cases of merit goods like insurance and the safety helmet—and possibly education--, a combination of *iudicium, intellectus* and complete information by itself may not lead people who undervalue them to consume them adequately or at all, state compulsion being needed. Moreover, by virtue of sustained association and mutual sympathy, individuals come to develop 'common concerns' giving rise to 'common wants' that they feel obliged to support as members of a community: they will not only defend their home but will join others in defending their territory or in protecting their countryside. These obligations may thus be accepted as falling outside the freedom of individual choice which usually applies.[31] Another possible second-order condition is that uncontrolled outcome has to be socially acceptable. If this condition is not satisfied either, government could intervene, sometimes by eliminating individual freedom to choose altogether (as in the case of narcotics), but sometimes by altering the setting of choice with the help of subsidies (as in the case of consumption of goods with positive externalities) or taxes and transfer payments (as in the case of a highly-skewed distribution of income and wealth leading to social neglect of such essential services as health care for the impoverished). It is to be noted that the use of subsidies, taxes and transfer payments in these cases virtually transforms imperfect individual choice into more socially acceptable public choice.

## Practical Implications of Functional Public Finance

Public finance as seen by the Musgraves, no less than fiscal legislation, has its distinct economic objectives. It is clear from their *exposé* that government's adoption of

[29] See Richard A. Musgrave, Peggy B. Musgrave**,** *Public Finance in Theory and Practice***,** p.57.

[30] See Jean Gaudemet, *Droit privé romain*, (2e éd., 2000), pp. 83-86.

[31] See Musgrave, Musgrave**,** *Public Finance in Theory and Practice***,** p.57.

traditional public finance, destined, as it has been, to bring in revenue without bothering about the possible repercussions on the economy and society of taxation and government expenditure exposes it to the risk of forgoing possible benefit and avoiding harm, thereby entailing inefficiencies and waste.

Today, in an ideal world, functional public finance, which is something of an antidote to such traditional public finance, should underpin fiscal legislation such that all foreseeable repercussions of taxation and government expenditure on the economy and society are carefully weighed before deciding on any given option. In particular, such diverse fiscal objectives of resource allocation, redistribution of income and wealth and economic stabilisation stressed by the Musgraves may come into conflict.

While much is made of 'allocative efficiency' by the Musgraves, the concept does not, as Bailey points out, encompass the totality of efficiency that could be attained. [32] Allocative efficiency is an aggregative, macro or economy-wide concept that requires inputs and outputs to be allocated in conformity with the preferences and income constraints of consumers such that allocative inefficiency occurs if the distribution of particular public-sector outputs is not in accordance with consumers' preferences, as, for instance, in cases where a planner or monopolist distorts that allocation. On the other hand, X-efficiency or technical efficiency (Pearce) is an organization-specific concept denoting managerial and technological efficiency, at the micro level, *id est*, at the level of the firm, bureau or organisation resulting in least-cost production such that X-inefficiency may occur if organisations are insulated from competition by monopolies.[33]

Apart from the possible conflict among the divergent fiscal objectives, there is constantly in operation the relentless law of unintended consequences. It thus behoves the government, as is argued by the Musgraves, carefully to coordinate such objectives so as to reduce any possible conflict to a minimum. That there is such a possibility of conflict among fiscal objectives also affords government an opportunity to take advantage of possible trade-off among them.

The United Kingdom's fiscal experience between 1960 and 1982 proves rather enlightening in this respect. As a result of inflation, house prices in the United Kingdom increased by leaps and bounds, the price index going up from 100 in1960 to 955 in 1982. In this country over 50 % of households live in owner-occupied houses, and for people with relatively modest holdings of wealth, a house is their most valuable asset. At the same time, inflation led to a drop in the value of many stocks and shares as interest rates rose, and some companies got into financial difficulties because of the development. Since it is people who are relatively better off that are more likely to invest in stocks and shares, inflation to some extent may have narrowed the gap between the richer and the poorer in the United Kingdom during the 1960-1982-period.[34] Failure of stabilisation measures to control inflation has thus surprisingly brought about more equality in the distribution of wealth such that failure to achieve one fiscal goal led to accidental, unplanned-for success in attaining another.

More recently, the experience of France in this regard is no less enlightening than that of the United Kingdom. Italy as well as France is known to have incurred a fiscal deficit for the last 30 years or so. In particular, with a view to practising expansionary public finance through what is known as the *Tepa* (*travail, emploi, and*

[32] See Bailey, *Public Sector Economics*, p. 119.

[33] See Pearce (ed.), *Macmillan Dictionary of Modern Economics*, p. 479.

[34] See D.I. Trotman-Dickenson, *Public Sector Economics Made Simple* (1983), p. 270.

*pouvoir d'achat*) Act, the incumbent French President, Sarkozy, is believed to be pinning his hopes on generating growth with the statute's expected positive impact on consumption, government revenue and the long-run bridging of the fiscal gap. However, Peyrelevade feels that such hopes are likely to be frustrated, since domestic demand in France, so it argued, is outstripping domestic supply whose growth is lagging behind, thereby entailing a chronic trade deficit to enable excess domestic demand to be satisfied by imports.[35] All in all, Peyrelervade fails, so it is contended, to see any *ex post facto* stimulus to growth. What is recommended is, of course, application of *l'economie de l'offre* or supply-side economics of the kind successfully practised in Britain.[36] It can be seen that the French government's pampering of consumers at the expense of producers and its failure to use fiscal policy to stimulate growth between them have made for a more equal distribution of welfare between consumers consisting largely of wage-earners on the one hand and industrial capitalists on the other.

The experience of the United Kingdom from the 1960s up to the early 1980s and the more recent record of France, in demonstrating that failure to achieve one fiscal goal could end up in attaining another, are thus enlightening for another reason: they open up the academic possibility that there could be a resource-saving, passive or permissive, as opposed to an active fiscal policy that is precariously dependent upon the use of scarce resources. However, the desirability of the approach hinges on the outcome of a cost-and-benefit calculus of gaining a degree of equality at the expense of stability and growth. Moreover, in being attracted to the possibility, one is in danger of backtracking to non-functional, traditional public finance without knowing exactly when and where it is appropriate. It also smacks of functional public finance in default that appears to be an oxymoron.

In any case, the exercise from two developed economies in the West could not be facilely replicated in developing countries: in particular, the United Kingdom as a whole is so well-heeled that even the poorer classes manage to own key assets in the form of houses, while it is not the case in developing countries such that uncontrolled inflation could exacerbate rather than alleviate the degree of inequality there. Besides, the peculiar situation of developing countries does bear out the point that, contrary to the Musgraves' thesis, the goals of distributive justice and stability need not necessarily collide: if the balance could be tilted more in favour of the impoverished by controlling the prices of such substantial form of wealth as land held largely by the well-to-do, then both objectives of equity and stability would be served at the same time.

In the same vein, it is argued that policy conflicts or trade-offs as seen by the Musgraves, particularly between objectives of stable growth and equity, need not necessarily come about in practice. If price inflation can be reduced to a low and stable rate, it is contended, low unemployment, faster economic growth and a favourable balance of payments then will follow. Rising national income and employment, it is further argued, also means that people will become better off thereby helping to reduce poverty and foster more equity. Rising incomes will also mean, it is alleged, that tax revenues collected by the government from wages and profits will be increasing and can be used to fund higher social security payments, investments in such new infrastructure as roads and schools and other public expenditures that benefit the economy and the impoverished in particular. Reducing inflation is also seen to lead to making

[35] See Jean Peyrelevade in *Le nouvel observateur*, no. 2287, 4-10 septembre, pp.26-27.

[36] See Anthony Seldon (ed.), *Blair's Britain 1997-2007* (Cambridge 2007), p. 274.

domestically-produced goods and services more competitive and improvement in the balance of payments. Finally, it is said that successful control of inflation will lead people to expect price inflation to remain low and stable and will thus not push for high wage rises that would otherwise increase production costs and reduce profits.[37] In an ideal world with such a fortunate *conjuncture*, it is claimed that stability and growth could be fostered not at the expense of but at the same time as equity. In the actual world, inflation-prone and stagflation-prone as it admittedly is, however, bringing about the rosy scenario is easier said than done, eventual success being precariously dependent upon numerous *imponderabilia*.

## Non-Economic Goals and Perspectives of Functional Public Finance

It does not suffice, as Bailey is at pains to point out, to put a straitjacket on functional public finance, non-economic objectives as well as perspectives being also called for. A prominent example is provided by the sumptuary or excise tax which is primarily destined to lower the public consumption of alcohol and tobacco. Apart from the somewhat paternalistic motive of protecting its citizens against intoxication with demerit goods that could also impede development, the state typically appreciates the merit of the sumptuary tax in its outstanding capacity for generating an ample revenue yield. It is also seen to be simple to collect provided that tax evasion and smuggling can be prevented. However, the tax has the demerit of possessing, because of the absence of close substitutes at comparable prices, relatively low price-elasticity of demand such that its social and moral targets are difficult to attain in practice. There are also grave misgivings on its negative impact on the health of the young as well as the productive members of a poor family: post-tax expenditure on the unchanged level of consumption of alcohol and tobacco, jacked up as it is because of the tax, could mean a radical curtailment of nutrition and health care, thereby going counter to its purported aim of social improvement. Moreover, the tax is highly regressive such that the poor pay a more substantial proportion of their income than the more affluent. Faced with this, some governments are compelled to remedy such handicap by levying a lower rate on domestic products than on its imported counterparts which are normally consumed by the more opulent members of society. Of course, the negative impact would be much worse if an impoverished family prefers the imported equivalents which could constitute a status symbol particularly in developing economies. Finally, the tax cannot be relied upon as a growing source of revenue in the long run, since demand for alcohol and tobacco exhibits relatively low income elasticity such that it will increase at a slower rate than long-run national income growth.[38]

The fact that the sumptuary tax is a principal source of government revenue does bear out the point that its primary purpose of discouraging consumption of socially undesirable intoxicants is typically not met, thereby illustrating the Musgraves' thesis of conflicting fiscal objectives. This is done, however, with a difference: it is a conflict not between the Musgraves' stated economic objectives of allocative efficiency, distributive equity and economic stabilization, as they painstakingly point out, but between the obsession of traditional public finance's idea of raising as much revenue as possible and the non-economic objective of improving the quality of life.

[37] See Dan Moynihan, Brian Titley, *Economics* (2007), p. 264.

[38] See Roy W. Bahl, Johannes F. Linn, *Urban Public Finance in Developing Countries* (1992), pp. 229-230.

It is within his rights for Bailey to assert that public finance that is up to speed cannot be constrained within the narrow confines of economic theory, as is the case with the Musgraves, but has inevitably to be interdisciplinary in nature and approach. Again, Bailey is equally right in demonstrating that different disciplines have diverse *modi cogitandi*. In particular, that Bailey should take economic theory and especially the neoclassical school to task for its narrow *Weltanschauung* leading to its limited, partial ability to explain what the public sector typically does and calling for collaboration on the part of other disciplines is fair enough. This, coming from an outstanding economist that Bailey is, is a realistic, impartial appraisal of what economic theory can and cannot do for public finance. Of course, superficially, economic theory, apart from its preoccupation with explaining phenomena and prediction, may deal only with normative rather than positive issues, as is made clear by the Musgraves' treatment of the **proper** size of the public sector.

In a way, economic theory may be said to be no less pragmatic in its interest than, as is implied by Bailey, politics. In particular, the theory of public choice, as is made clear in the introduction to this article, in being something of a cross between the two disciplines, is highly pragmatic in its concerns. Economists and political scientists who espouse the public-choice view are known to argue, as is made clear by Bailey, that macroeconomic policymakers as well as bureaucrats in general so act as to maximise their own welfare or utility rather than the social good or the public interest. Moreover, where elected officials making fiscal policy decisions are concerned, it is believed that votes constitute the central goal variable motivating them. Thus to gain votes, while elected politicians are said to be bent on spending public monies that yield some demonstrable benefits to their constituents, they are alleged to avoid imposing taxes on the same constituents. Of course, the pre-Keynesian norm of budget balance used to serve to constrain spending proclivities within the revenue limits imposed by collected taxes; but destruction of the norm, without an adequate replacement, effectively has removed the constraint. Thus predictably politicians are believed to respond to the newly-found freedom or indeed licence by increasing spending more than tax revenue, thereby creating budget deficits as a normal course of events.[39] If the public-choice characterisation of politicians' fiscal behaviour is an accurate portrayal of reality, functional public finance is thus confronted with the thankless task of combating the tendency towards the deficit bias inherent in the political process. No matter what one may think about the dependability of its findings, the public choice perspective does bring to bear a refreshing realism on the study of political behaviour. Of course, while this is not matched by the highly theoretical economics in its study of market behaviour, there remains an open question whether, for the purpose at hand of scrutinizing the public/private sectors divide, which of the two alternative approaches of pragmatism and theorizing proves more functional.

Economic theory's involvement in public choice theory apart, it is concerned with the welfare of economic agents including producers as well as consumers who are seen against the background of *homines oeconomici* who, when viewed from an academic viewpoint, play the same role as reasonable men (or *boni patres familiarum* in private Roman law ) in law. There is, however, a significant difference in that, while a reasonable man as a technical construct in law does serve its purpose in a variety of

[39] See Richard T. Froyen, Linda Low, *Macroeconomics; An Asian Perspective* (2001), pp. 401-402; James Buchanan, Richard E. Wagner, *Democracy in Deficit* (1977), pp. 93-94.

situations, a *homo oeconomicus* is tied down, as Bailey is at pains to point out, to maximizing his or her economic materialism within the constraint of scarce resources. While in one sense scarcity may be, as Bailey asserts, a cultural rather than a natural phenomenon, in another sense scarcity truly imposes serious constraints on man's economic activities, as available resources are finite—a hard fact which has to be juxtaposed with neoclassical economics' infinite array of wants hailing from its *homo oeconomicus.* Admittedly, economic materialism comprising profit and utility does not exhaust the whole range of determinants of welfare which, as Bailey rightly claims, encompasses spiritual and other variables as well.

Whatever one's view of the constituents of human welfare may be, the *homo oeconomicus* construct is deployed by classical and neoclassical economics to demonstrate the market as the ideal institutional arrangement for organizing economic activities: maximization of individual welfare is seen to lead naturally to collective welfare. Of course, for this to hold, a number of restrictive conditions need to be present. These include, as the Musgraves rightly point out, free entry into and exit out of the market, perfect knowledge on the part of participants in market activities and absence of decreasing costs in production—conditions that only obtain in an ideal world.

By contrast, politics, with the kind of pragmatism practised by economic theory in its analysis of political behaviour, is more concerned with the institutional aspects of public finance. In particular, it has, as is emphasized by Bailey, a more comprehensive focus on the '4Ps': pluralism and participation as well as public choice and provision of services that have, for some time, exercised the minds of economic theorists. Moreover, following Mill and others, the discipline conceives of the public sector's crucial role in providing the unique forum for deliberation on such issues of public interest as social equity and moral and ethical issues—a role which implies an inclusive, open-ended process and admits of a plurality of views and continuing participation rather than the perspective of the public choice approach that is obsessed with occasional voting and decisions by the exclusive majority only. Such role for the public sector as is perceived by politics is unique, inasmuch as it is something which cannot be expected from the market mechanism so dear to the hearts of some economic theorists.

Voting behaviour and majority rule apart, the public choice approach, however, finds that the public sector is beset with serious defects as to make it virtually unworkable. These include political interference in the decision-making process and fiscal opportunism on the part of bureaucrats entrusted with providing public goods as well as their users and absence of management incentives and pressures from threats of bankcruptcy (through failure to compete) and hostile takeover of the kind prevalent in the private sector. On the other hand, failure of the voting system faithfully to reflect the electorate's likes and dislikes should not be taken to be inherent in public choice, for the defect can be eliminated with technological advances. What is more crucial is that the government is rightly given responsibility for making such decisions as serve the citizens' best interest, regardless of what they may feel about certain public goods that essentially possess merit-good characteristics. In any case, the government is in a unique position to organize public deliberation as an input to its decision-making.

The economic theorists' overwhelming preference for the market as the ideal institutional form of providing services has, however, to be viewed with extreme caution. For one thing, the market is unable to provide the '4Ps' which are deemed by political scientists to be indispensable for arriving at the public interest. For another,

privatisation *per se* does not necessarily ensure restoration of management incentives and policing characteristic of the private sector, since the privatised industries, being usually public utilities as they are, are generally natural monopolies. Moreover, as Bailey is at pains to point out, the perceived superiority of the market as an instrument is a function of the theoretical construct of *homo economicus* whose behaviour in the face of market realities need not necessarily end up in the maximisation of public welfare.

In view of the pros and cons of using the market instead of the public sector, the answer to the question as to which is the better institutional form of providing services seems to revolve around their intrinsic nature. Where purely private interest is at issue, the market, particularly in its ideal conception, can do the trick. On the other hand, where the public interest is at stake, the public sector is eminently qualified to function provided that government failure is kept in check and the public sector's role is construed to encompass regulation of the market to ensure attainment of public ends as well.

## Nature of the Public /Private Sector Divide

As has been shown by Bailey, adoption of an interdisciplinary approach is indispensable to ensure that our assessment of the comparative efficiency of the market and the public sector in the provision of services is non-partial and holistic. Moreover, the approach is also highly pertinent to the question of determining where exactly the boundary between the two sectors lies. Indeed, the two issues of efficiency and demarcation are intertwined such that the precise line to draw hinges on our assessment of their relative potential, treatment of either sector in isolation being necessitated by expediency rather than principle.

One way of looking at the divide is to perform logical abstraction. According to Bailey, neoclassical economic theory of the kind practised by the Musgraves views the public sector as a residual: the market is allowed to perform what it is best at doing, leaving the rest to be taken up by the public sector. It is, however, not all too clear whether Bailey's perspective is not distorted. According to the Musgraves, existence of the public sector is called for to 'guide, correct and supplement' the market mechanism 'in certain respects'. [40] This is a highly positive role and there seems to be no such negative implications as would arise from Bailey's interpretation. Equally, Bailey is right in asserting that if we revert the process by scrutinizing the public sector first and treating the market as a residual, we are similarly bogged down, the crux of the matter being that we are confined to the straitjacket of neoclassical economic theory.

It appears to be the case that the nature of the sectors' divide is dependent on one's reference framework. In the context of a Western-style free-enterprise economy it is natural for us first to take a careful look at the market before assessing the public sector's potential without necessarily relegating the latter to an inferior, subsidiary role. On the other hand, in a totalitarian regime, the public sector's role is inevitably that of a *prima donna*, the remainder of the economy (if any) being reserved for the market that truly knows the meaning of 'residual'. The divide in the latter case, unlike that of the former, is ideological rather than, as is confirmed by the Musgraves, technical in nature.

[40] See Musgrave, Musgrave**,** *Public Finance in Theory and Practice*, p.5.

It is imperative to bear in mind such discrepancy in the social and economic framework. When, for instance, the Musgraves assert that the proper size of the public sector is largely a technical rather than an ideological issue, they have in mind a free-enterprise system operated generally in the West, as in a totalitarian regime it is not possible to invoke either consumer sovereignty or decentralized decision-making--features taken for granted in the former. In the latter type of society, the divide between the sectors is thus entirely an ideological issue.

In an ideal world, there should be close interdependence and indeed collaboration between the two sectors, which constitute, as they should, an integrated unit. The norm is reflected in the actual world. Contractual arrangements and exchanges called for in market operation cannot, as the Musgraves painstakingly demonstrate, exist without the protection and enforcement of a governmentally-provided legal structure. For instance, it was the sanctity of the rule of law that contributed to the much-vaunted *pax Romana* supposedly enjoyed throughout the Roman Empire particularly during the period from 27 B.C to AD 180. Nor can a substantial part of private-sector production of goods and services survive without governmentally-awarded contracts, as is the case in the armament industries in the United States and the United Kingdom and the provision of security services for the coalition forces in Iraq. For its part, the government is dependent on a vibrant private sector for the provision of certain goods and services and for the revenue indispensable for the financing of its operations. This brings us to the conclusion that neither the public nor the private sector can be viewed in isolation or *in vacuo*.

In a way, the exact line to be drawn hinges on the particular disciplinary perspective. Economic theorists concentrate, as is argued with justice by Bailey, on economic activities of the government. On the other hand, political scientists, pure and simple, or in tandem with economists engaged in the pursuit of public choice theory, have a much broader *Weltanshauung* in the sense that they envisage not only the '4Ps' but also regulation of the likes of public utilities to ensure that their services meet such public goals of minimum safety standards, adequate availability, quality of output and acceptability of the tariff structure. Once the device of regulation, which is a leaf taken out of the totalitarian's book, is invoked, the sectors' divide becomes hazy. As Bailey rightly argues, the perceived need for continuing control of a privatised or a confirmed private industry through a regulatory framework admits its continuing public nature, regardless of the form of ownership. Obviously, such persistent publicness can be seen, as Bailey cogently contends, to be dependent upon its being crucial to the well-being of a nation's citizens, thereby necessitating appropriate regulation to assure that certain minimum standards elaborated through public deliberations are attained. Regulation being a key element in the situation, it is not all too clear where exactly a regulated industry belongs.

Regardless of the nature of ownership, the continuing publicness of certain services calls for, as Bailey cogently argues, regulation: to take uncontrolled outcomes lying down poses a risk of passively accepting undesirable consequences. While to accept the market-dictated state of distribution of income and wealth un-amended is no longer socially acceptable, man has also to realise that he is, however, not omnipotent. One may thus content oneself with giving income earners and wealth accumulators equality of opportunity at the start and let nature take its course. While reliance on equal access to education and inheritance tax could do the trick, there is thus no guarantee that equality of outcome can be assured.

There is a fundamental difference between the Musgraves and Bailey in the treatment of regulation that partly reflects the former's adoption of a purely economic approach and the latter's interdisciplinary stance. The Musgraves assert that, while regulatory policies may be considered a part of the allocation function of fiscal policy, they are not dealt with by them simply because they are not primarily a problem of budgetary policy. [41] On the other hand, Bailey regards the regulatory role, including legislation and enforcement of such laws as those of consumer protection and justice, as part and parcel of government's economic policy. [42] Of course, it is not true, as the Musgraves argue, that regulation does not involve budgetary policy. Take, for instance, the experience of the United Kingdom where a great deal of fiscal resources is devoted to organizing such regulatory bodies as OFGM (Office of Gas and Electricity Markets) for electricity and OFWAT (Office of Water Services) for water.

Failure of the Musgraves to take into account regulatory activities of government not only leaves out the important role of regulatory taxation but also measures taken by most governments to cope with the fallout from the likes of the American credit crunch crisis of 2008. There is no doubt that this has a direct bearing on the private/public sectors divide. As the *Economist* cogently argues, the freeing of international trade and capital flows and the deregulation of domestic industry and finance have both spurred globalisation and come to symbolize it. [43] According to the report, while global integration, in large part, has been about the triumph of markets over governments, the process is now being reversed in two relevant respects.

First, Western finance will be re-regulated, argues the said special report of the *Economist*, the extent of control to be imposed depending less on ideology than on the severity of the economic downturn. Past crises are said to serve as a rough guide to what is called for. The 1980s' savings-and-loan crisis, despite its having amounted to a sizeable banking 'bust', did not entail an economic catastrophe and the regulatory consequences are said to have been modest. In contrast, the Great Depression of the 1930s, devastating in its consequences as it has been, is said to have not only refashioned the structure of American finance but also brought regulation to whole swathes of the economy.

Secondly, the balance between state and market is said to be changing in areas other than finance. For a number of countries a more momentous shock over the past couple of years, so argues the special report of the *Economist*, has been the soaring price of commodities which politicians are said to have also blamed on financial speculation. In response to the food-price 'spike' in late 2007 and early 2008 which caused riots in some 30 countries, governments across the emerging world are said to have extended their reach, increasing subsidies, fixing prices, banning exports of key commodities and, in the case of India, restricting futures trading. Concern about food security is said to have been one of the main reasons why the WTO' Doha round of trade negotiations collapsed in the summer of 2008.

While the special report of the *Economist* foresees a definite shift towards government both in the real and the money economies, it feels that only **some** rebalancing is called for particularly in the money economy where innovation is said to have outpaced a 'sclerotic' supervisory regime. It asserts, however, that it would be a blunder to blame today's mess only or even mainly, on modern finance and 'free-market

[41] See Musgrave, Musgrave**,** *Public Finance in Theory and Practice*, p. 6.

[42] See Bailey, *Public Sector Economics*, p. 18.

[43] See Special report on the World Economy in *Economist*, October 11th-17th 2008, p. 6.

fundamentalism'. It invokes the fact that speculative excesses had existed before invention of securitisation. Moreover, governments, through their misguided subsidies on a whole gamut of things ranging from biofuels to mortgage interest are said to have distorted markets and that loose monetary policy is said to have helped to inflate a global credit bubble. The special report of the *Economist* is aware, of course, of the thesis that financial markets are inherently unstable. [44] According to this view, periods of stability always lead to excess and financial crisis, and freer financial markets only lead to greater damage. The view actually originated from Minsky, who argued that economic stability encouraged ever greater leverage [the amount of borrowing that a company undertakes in relation to its share capital] and ambitious debt structures, thereby making stable finance an illusion. [45] While recurrence of speculative financial excesses alluded to by the special report of the *Economist* may vindicate Minsky's thesis, it insists, in one of its major conclusions, that 'freer and more flexible markets' will still do more for the world economy than the 'heavy hand' of government. [46]

Regulatory concerns apart, the private/public sectors' line of demarcation, by its very nature, cannot be expected to be static but is, as Bailey affirms, a function of time and place, which, between them, conspire to make the line both fluid and hazy, not only in terms of interest but even in terms of ownership. Indeed, as Bailey pertinently points out, there is thus such a large degree of overlap between the two sectors that it may be futile to attempt to draw the line. Leisure and recreation services, concurrently provided by government and the private sector in the United Kingdom, readily spring to mind, their interrelationship being seen to be either competitive or mutually reinforcing. Where services provided by government are found to be wanting, the private sector may go out of its way to cough up its own counterparts. This can be seen to be the case in the provision of private security services for such vulnerable areas as diplomatic residences and millionaires' quarters, thereby reinforcing what is forthcoming from government. On the other hand, government could 'crowd out' market activities, as is the case when state social insurance, instead of supplementing existing private, kinship arrangements , which is generally the intention, end up by replacing them entirely. Thus Greffe hits the nail on the head when he invokes <*les effets d'éviction*>. Of course, government would prefer mutual reinforcement to competition, not least because of the desire to save fiscal resources and to encourage voluntary self-help, especially of the matching variety. [47]

Whatever the interrelationship of such government and private activities, they add to the blurring of the sectors' line of demarcation, thereby, as Bailey painstakingly demonstrates, making the nature of their interest or ownership irrelevant. One is thus tempted so to amend the ancient jurisconsult Ulpianus's celebrated *ius civile* maxim on ownership and possession (*nihil commune habet proprietas cum posessione*) to read *nihil commune habet proprietas cum publicitate* (ownership has nothing in common with publicness).

As to the influence of place and time, according to a pragmatic, common-sense and pre-theoretical view of the public sector hailing from disciplines other than economics and basing itself on the experience of the United Kingdom, as is confirmed by Bailey, it is, in one particular place or country (the United Kingdom), the outcome of

[44] See Special report on the World Economy, p. 8.

[45] See Hyman Minsky, *Stabilizing an Unstable Economy* (1986).

[46] See Minsky, *Stabilizing*, p. 6.

[47] See Greffe, *Economie*, p. 447.

historical processes and political compromise and can also be seen to be an organic institution constantly evolving in response to the imperatives of national security and the changing social expectations with regard to the welfare state, the influences of time and place being thus seen to be inseparable. The impact of time taken in isolation is, however, uncertain. Some services manage to stand the test of time. Thus in the United Kingdom, many services predicated by the sets of socioeconomic circumstances and morals of Victorian times that originated them are still being provided despite the sea change of circumstances and morals since then. On the other hand, the scope and financing of the public sector as a whole in the United Kingdom during the 1980s and 1990s, despite the persistence of such diehard services, have, as is confirmed by Bailey, undergone transformation in response to the emergence of a different moral view of the rights and responsibilities of the individual and an emphasis on equality of opportunity rather than of outcome already discussed.

## The Sectors Taken as Ends and Means and Rationale for Intervention

Bailey appears ambiguously to use the term 'public sector' as an end as well as a means of attaining certain desirable ends. Thus Adam Smith and others involved in the Scottish Enlightenment of the 18th century are said to have employed government as an instrument for controlling the abuse of market power. At the same time, government is implicitly said to be desirable as an end itself because of its essentially deliberative nature, yielding the famous '4 Ps' and a dialectic forum in the Socratic tradition of airing people's views on issues of public interest. Of course, this in an extra-economic perspective which is a far cry from holding up the market, especially in its perfectly competitive form, as the Musgraves appear to do, as a paragon of allocative efficiency. There is thus room for the peaceful coexistence of both the market and the public sector as complementary ideals, the latter being notorious for its inefficiency.

There is complementarily in the two sectors when they are treated not only as ends but also as means. If the market is allowed to operate, there is a need for regulation which normally refers to the supervision and control by the government of an industry's structure, conduct and/or performance in the interest of economic efficiency, fairness, health and safety that are of public concerns. In the United Kingdom, this form of state intervention is usually confined to cases of gross market failure that are not amenable to anti-trust legislative treatment and encompasses cases of natural monopolies and market instability.[48] The cases at issue may be privatised former nationalised or confirmed private industries like the public utilities.

It is not difficult to see how monopoly profits can be earned by such natural monopolies as electricity, gas and water companies with their local, regional or national markets. In the eyes of outsiders, they could well seek to restrict their output and so drive up the market price and their profits. This is believed to be especially effective if the demand for their outputs is highly insensitive to increased prices (Bailey) which appears to be the case in the absence of close substitutes. [49] Such exploitation can be seen to cause particularly severe inequities if expenditure on their outputs constitutes a much higher proportion of the budgets of low income than of high-income households, as is generally the case for energy and water.[50] Apart from regulating prices to ensure

[48] See Bailey, *Public Sector Economics*, p. 357.

[49] See ibid., p.357.

[50] See ibid., pp. 357-358.

that natural monopolies (especially those with substantial sunk costs stemming from past capital installations that would be difficult for a competitor to duplicate) do not take advantage of their monopoly position, the government can use subsidies to encourage them Apart from regulating prices to ensure that natural monopolies (especially those with substantial sunk costs stemming from past capital installations that would be difficult for a competitor to duplicate) do not take advantage of their monopoly position, the government can use subsidies to encourage them to provide such things as postal services in rural areas that might not be privately profitable but are viewed as socially desirable.[51]

According to Stieglitz those who advocate regulation and subsidies rather than government's taking over of production as remedies for market failure believe that the approach has three major advantages over public ownership. [52]

First, it is claimed that subsidies allow for a more consistent and efficient national policy. For instance, in the event that it is desirable to locate firms in an area with high unemployment, government-run firms can, of course, be told outright to locate there. It is felt, however, that it would be better to provide a general subsidy of which private firms for whom the move has the least cost will take advantage rather than impose the burden on the former.

Secondly, it is alleged that the use of tax and subsidies schemes yields a clearer estimate of the costs associated with the pursuit of a given policy objective. For instance, while it may be desirable to locate a firm in an area where there is high unemployment, it is not clear whether it is worthwhile. It is argued that it is all too frequently very difficult to ascertain the additional costs of government enterprises' pursuing alternative policy objectives. By contrast, providing direct government subsidies is said to bring the costs into the open and thus allow a more rational decision on whether the costs would be worth the benefits.

Thirdly, it is argued that incentives for efficiency are greater with private firms, even with regulation.

It does seems that the case particularly for regulation by taxation as well as for regulation by fiat is compelling, though the second argument in favour of regulatory taxation overlooks the fact that the costs of a subsidy which comes out of a tax, in view of the costs imposed by taxation cannot be as facilely tallied as seems to be suggested. For instance, in the United States regulation (by fiat) of natural monopolies has long been relied upon, although there is some government production especially of hydroelectric power and water. By contrast, Europe has until recently relied solely on government ownership.

Regulation by fiat is, however, not, as is admitted by Stiglitz without problems of its own. There are said to be significant costs to administering the regulations.[53] Moreover, almost any regulatory scheme is alleged to give rise to distortions in the form of deviations in the behaviour of private firms from what efficient, competitive firms could be expected to do, as they try to maximise their profits within the constraint of regulatory rules.

Thus if regulations allow a particular return on capital, as is the case in countries other than the United Kingdom, the main disadvantage is believed to be that companies can increase the absolute level of profits by expanding the capital base upon

[51] See Joseph E. Stiglitz, *Economics of the Public Sector*, (3rd ed., 2000), p. 195.

[52] See ibid., p. 195.

[53] See ibid., p. 196.

which rates of return are assessed, there being an incentive to invest too heavily in capital. In other words, firms are believed to have an incentive to substitute capital for labour since the former augments the base used to assess company profitability. Hence regulation may prevent the attainment of a cost-minimising mix of factors of production and so lead to X-inefficiency for the regulated firm and allocative inefficiency for the economy as a whole.[54] On the other hand, if regulatory rules permit more generous depreciation allowances for one type of capital than another, there is said again to be similar distortion in the investment decisions.

Despite these problems of regulation, beginning in the 1970s and 1980s, there was a major movement throughout the world towards privatisation in the form of selling off of government-owned enterprises or denationalisation (in the case of the United Kingdom) and subjecting them to regulation, the main reason being that the advantages of gains in efficiency far outweigh any disadvantages associated with regulation.[55]

Some economists question whether it might not be better in most cases just to let the private sector alone, even with natural monopolies. According to them monopolists are efficient, the only problem with them being that they charge too high a price and accordingly produce too little. Arnold Harberger is said to have estimated the loss from monopoly pricing at less than 3% of the value of output. While monopolies reduce production relative to the efficient level, resources not used by the monopolist is said to go elsewhere in the economy. The consequential loss is said to be the difference in the marginal values of the two uses. By contrast, these economists believe that the cumulative loss in efficiency from either regulation or government production may be much greater.[56] If this is true, government failure is worse than market failure that the government's intervention is supposed to cure. There is, besides, a 'political' argument from George J. Stigler which smacks of the findings of the public choice theory.[57] It is alleged that regulation may be ineffective, as the regulated group 'captures' the regulators, partly because the only people who feel at home with the highly technical matters of regulation are the regulated parties themselves and because the regulators frequently secure lucrative jobs in the regulated industry after leaving their regulatory positions in the government. Stigler's point is, of course, based on experience in the United States while in the United Kingdom Bailey reports a similarly unethical behaviour of ex-cabinet members 'becoming directors of companies whose privatisation they oversaw.[58] As a reaction to such behaviour, the Nolan Committee on Standards in Public Life (1995) advocated seven principles of public life for the holders of public office to observe: selflessness, integrity, objectivity, accountability, openness, honesty and leadership. The regulations may not only be ineffective, as is alleged, in limiting the regulated entity's profit, but are also believed to be highly distortionary. Moreover, in recent years, the boot has been on the other foot: elected regulators, following populist policies as they have been, drive down prices to the point that a regulated public utility has little incentive to invest any further.[59]

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[54] See ibid., p. 358.

[55] See ibid., p. 196.

[56] See ibid., p. 196.

[57] George J. Stigler, "Free Riders and Collective Action: An Appendix to Theories of Economic Regulation" in *Bell Journal of Economics and Management Science*, 5, Autumn 1974, idem, "The Theory of Economic Regulation" in *Bell Journal of Economics and Management Science*, 2, Spring 1971.

[58] See Bailey, *Public Sector Economics*, p. 123.

[59] See Stiglitz, *Economics*, p. 196.

Despite all the misgivings about regulation, Stieglitz believes that popular support for **eliminating** regulation of natural monopolies remains limited, though there arises considerable interest in **narrowing** the scope of regulation such that more elbow room is given to competition than has been previously thought possible.[60] Today regulation is said to be focused on ensuring competition where competition is viable and that those parts of the system where there is natural monopoly do not abuse their monopoly power, either by leveraging their monopoly power to gain further market control or by raising prices to make unduly high rates of return. In the United States, as a result of major reforms carried out in telecommunications and in electricity regulation in 1996, several firms now provide long-distance telephone service and there is a multitude of generators of electricity. Of course, there remain some location-specific natural monopoly elements such that a single firm provides local telephone service or electricity to most homes.

Bailey justifies the right of government regulation in establishing a set of necessary and sufficient conditions for growth. He argues that whereby markets fail to achieve an efficient allocation of resources, government intervention corrects rather than exacerbates the degree of allocative distortion in markets. As is in the nature of joint necessary and sufficient conditions, both conditions must be fulfilled together for intervention to be justified; failure in just one simply rules it out.

It is obvious that such conditions contrived by Bailey in the interest of allocative efficiency apply, *mutatis mutandis*, with equal validity to the goals of equity in the distribution of income and wealth and economic stabilisation also justly emphasised by the Musgraves. In other words, prior to efforts at redistribution there must be an assurance that they will make for a more equal state of distribution. In a similar vein, before taking measures to stabilize the economy, government needs to be assured of a more stable controlled outcome.

Such conditions conspire to make up, however, so tall an order as virtually to make government's intervention mission impossible. Nevertheless, one can be optimistic if one has a high regard for government's ability to do a good job. For his part, Bailey appears to believe that the British government's regulation of the privatised industries has been successful. Of course, in theory, one can well work with certainties; but in practice one has to be content with the prospect that, on the balance of probabilities, government' intervention will induce a change for the better. In view of the law of unintended consequences and the possible conflicts of fiscal objectives, such optimistic expectations could be frustrated. Thus, as noted earlier, the British government intervened to no avail to contain inflation between 1960 and 1982, though, because of such failure, distribution of wealth in the country became more equal. Failure to achieve one fiscal goal thus led to success in accomplishing another, albeit unintentionally and by default.

For their part, the Musgraves tend to be pessimistic in admitting that to argue that the limitations of the market mechanism call for corrective or compensating measures of public policy does not necessarily prove that any policy measure that is undertaken will in fact improve the performance of the economic system. In fact, public policy, as is amply demonstrated by the public choice theory, may become inefficient.

[60] See ibid., pp. 197-198.

What is also crucial is that time is the essence of the matter. Thus, in a rapidly deteriorating situation, as has been the case in the world's money economies of 2008, taking prompt action will, in all probability, avert a disaster that is waiting to happen. In other words, taking timely measures, as many governments found in late 2008, pays off more handsomely than dilly-dallying.

Unfortunately, it turns out that, while Bailey's two conditions may be necessary to justify government's intervention, they are not sufficient, the cost side of the *calculus* being inadvertently left out. As he is at pains to emphasise , intervention is justified in efficiency terms only where it reduces market failure's allocative distortions by more than any allocative distortions it causes.[61] Allocative distortions, as Bailey points out, could be brought about not only by taxation but also by such other means of government intervention as borrowing and user charges and by governments whose behaviour follows that of the leviathan model to be discussed below. This is the cost side of the cost-benefit calculus. Such distortions thus provide a compelling theoretical case against governmental intervention, also to attain such other fiscal goals as distributive equity and stability, *mutatis mutandis*, except in the most severe cases of market failure.

## Pragmatism and Conceptualisation in Functional Public Finance

As Bailey is right in pointing out, two distinct, albeit possibly related, levels of analysis are encountered in functional public finance: pragmatic and conceptual.

Conceptualisation in the form especially of modelling is necessitated by the intrinsic nature of the 'soft' sciences involved in the study of public finance, where, unlike in the exact sciences, opportunities for controlled experiments are more limited and entities to be observed do not manifest such stable behaviour as do the celestial bodies observed in astronomy and physics. In a way, modelling, imperfect representation as it may be of the economic, political and social reality, is one way of pinning such reality down for scientific scrutiny. Moreover, the 'soft sciences', as distinct from their more exact counterparts, inevitably concern themselves with norms of human behaviour derived, as they must be, from conceptualisation.

Where the private sector is concerned, the perfectly competitive market operating in a free-enterprise economy serves as the model *par excellence*. In such a *milieu*, the *homo economicus*, either in a household or a business setting, can be seen to play a central role. On the other hand, there exists, as is confirmed by Bailey, a variety of public-sector models hailing particularly from economic and political theory.[62]

In the **despotic benevolent government model** the government is said to act in the public interest, seeking, as it is believed to do, the 'first best' allocation of resources so as to maximise public welfare by offsetting specific instances of market failure. The model is asserted to assume—perhaps naively—that the government is not only benevolent but also omniscient such that it is said to make decisions on behalf of its citizens to promote their interests, hence the attributive term 'despotic benevolent'. Being omniscient, the government is believed also to know even better than individual consumers what is best for them such that action is typically taken to protect them in cases where the benefits of merit goods are seen to be undervalued. While this is clearly

[61] See Bailey, *Public Sector Economics*, p. 82.

[62] See ibid., pp. 113-115.

contrary to the Pareto optimum assumption, one of the pillars of the free-enterprise system emphasized by the Musgraves, where the individual knows best, the seven principles of public life for the holders of public office (selflessness, integrity, objectivity, accountability, openness, honesty and leadership) advocated by the Nolan Committee on Standards in Public Life (1995) in the United Kingdom, as already noted, are said by Bailey to constitute the foundations of the despotic benevolent model of government.[63]

By contrast, in the **fiscal-exchange model** government is believed to act in the private as opposed to the public interest, providing, as it is said to do, specific services for specific tax payments voluntarily agreed by citizens. Hence the epithet 'fiscal exchange' is used to characterise it. Clearly, in this model the government is, as Bailey is right in pointing out, a service-delivery instrument responding to citizens' demands for collectively-provided goods and services, it being assumed that demands can be expressed by individuals for discreet public-sector outputs with attached tax payments.

While the fiscal-exchange model is based on citizens' agreeing to service provision and the associated tax prices, the **fiscal-transfer model** is asserted to be based on compulsion. Here the majority-voting rule is said to allow the majority to over-tax the minority and direct public services to themselves at the expense of the public interest. This is why the use of the attributive term 'fiscal transfer' is justified.

In the **leviathan model** government is said to grow like a monster described as a 'leviathan': it is assumed to be made up of utility-maximising, self-serving politicians, bureaucrats, professional groups and other pressure groups. It is believed to serve its own rather than the public interest, absence of effective constitutional constraints on its growth being asserted. In other words, as Bailey is right in pointing out, the leviathan government is made up entirely of self-serving individuals who manipulate and distort public choice to further their own ends at the expense of the public interest.[64]

Obviously the fiscal-exchange model is derived from a social contract theory while the fiscal-transfer one reflects the findings of the public-choice theory, their characteristic difference from the despotic benevolent model being their jettisoning of the assumption of benevolence. As is again rightly pointed out by Bailey, government in both fiscal models has no existence of its own: it is non-organic and passively responds to the wishes of voters.[65]

Findings from the public-choice theory can be seen to underpin not only the fiscal-transfer but also the leviathan model which is affected in three ways that conspire to create a virtually monstrous public sector.[66]

First, the leviathan model assumes that the typical constraint of voters' dislike of paying taxes on the size of the public sector is weak and ineffectual because of the tenuous link existing between those who vote for, those who pay for and those who use public-sector services. In fact, as has been confirmed by the recent experience in Thailand, there is a general belief especially among the masses that someone else will foot the bill on their behalf.[67]

Secondly, as is made clear by the public-choice theory and confirmed by anecdotal evidence from developing countries like Thailand, the benefit of public

[63] See ibid., p. 123.
[64] See ibid., p. 114.
[65] See ibid., p. 114.
[66] See ibid., p. 114.
[67] See ibid., p. 114.

expenditure tends, as a matter of deliberate policy, to concentrate on particular socioeconomic or demographic groups or on people living in particular geographic areas, thereby preventing voting for increased expenditure for one's own group or area from incurring a commensurate increase in liability to pay.

Thirdly, information is typically asymmetrical in the sense that it is heavily biased in favour of one's own interests. Undue advantage is taken of such asymmetry by politicians who are believed to compete for votes of special-interest groups rather than serve the public interest. Equally, self-serving bureaucrats themselves are seen to determine or influence the supply of public-sector services independently of political decision-making on the part of the electorate.

All four of the above models of government are, as Bailey rightly confirms, admittedly gross simplifications or abstractions from reality, their principal purpose being to save us from failure to see the wood for the trees.[68] It is true that none is, as is confirmed by Bailey, superior to the other three, either in terms of accordance with reality or capability for empirical testing; but, where a number of purposes are at issue, a given model may suit the purpose at hand best. Thus the financing of public-sector outputs out of taxation and user charges and fiscal opportunism can best be understood with the help of fiscal-exchange and fiscal-transfer models and the leviathan model makes the worst excesses of an authoritarian *régime* more intelligible.

While the despotic benevolent and the leviathan models are two extreme theoretical possibilities and the other two serve as intermediate positions, they are by no means exhaustive. In fact, there could also be organic and other models at the macro and micro levels.

In the **organic state (macro) model,** which is more comprehensive in that both the private and public sectors are encompassed, the state is assumed to grow like an organism, reflecting changes in society and economy and making decisions on behalf and for the benefit of its citizens.[69] While the state serves as the outer shell for the public sector which can take any of the forms already sketched in the four foregoing models, practitioners of disciplines other than economic theory tend, as noted earlier, to identify the public sector with the state. This is why the public sector is seen by the likes of political science as an organic institution which evolves in response to the changing perceptions of national security and social expectations with regard to the welfare state.

In the organic state model, society's demands for such services as education and health can be seen to grow *pari passu* with *per capita* incomes, and these can also be provided by the private sector, whose manifestations of market failure, however, call for government intervention. The degree of market failure may increase as economy and society become more complex, and thus the state, through the public sector, may also have increasingly to manage the economy to provide a stable environment for the private sector to function smoothly. Hence, there is said to be a fairly steady long-term rise in public expenditure reflecting decisions by the state.

In the **political constraints (macro) model** taxpayers are seen to indicate through the democratic system of electoral representation what levels of taxation they are willing to pay to finance public-sector services.[70] A given tolerable tax rate is seen to yield increasing tax revenues when applied to growing personal and corporate income and expenditure. Public expenditure may, because of the 'displacement effect', also

[68] See ibid., p. 115.

[69] See ibid., pp. 48-49.

[70] See ibid., p. 49.

increase further during war, famine or other natural disasters, slowly returning (if at all) to its former level because of the time taken to repay borrowing to part-finance the crisis. The crisis may also, however, through the 'inspection effect', raise the tolerable level of taxation, there being enhanced public expectations about what the state can do to improve people's levels of living. The net result is said to be occasional short-term jumps in public expenditure against a background of a rising long-term trend. In the ultimate analysis, however, according to the model, it is the citizens' willingness to pay taxes that determine the relative size of the public sector, hence the term 'political constraints' in its appellation.

While macro models are essentially aggregative in approach and can at best address the long-term rising trend of government expenditure without being able to account for its changing composition, micro models attempt to identify the variables that directly influence the demand for and supply of specific public-sector outputs. Naturally, there are micro models of the behaviour of all the actors involved in the public finance activity scene. Thus according to model-builders, micro models of voters, politicians, bureaucrats and pressure groups, which are admittedly overlapping representations of political actors' activities, conspire to propel public expenditure growth.[71] Suffice it to deal here, however, only with elements of the voter's preferences model.

In the **voters' preferences (micro) model** voters are seen to have preferences for particular mixes and levels of public-sector services which are expressed through democratic processes.[72] The model makes the simplifying assumptions that voters are the primary determinants of both **total** public expenditure and its **distribution** among services and that the voting system accurately reflects voters' demands, the behaviour of the median voter in a fairly homogeneous electorate being specifically modelled. This scenario can be seen to contrast sharply with those of macro models already sketched. In particular, the organic state (macro) model assumes that the state makes decisions independently of its citizens, while the leviathan (macro) model postulates that government grows exogenously of its citizens. For its part, the political constraints (macro) model assumes that taxpayers are primarily concerned with tolerable levels of taxation rather with the services financed out of it, though, with the passage of time, such levels tend, through changing circumstances, to increase. Modelling is one thing; seeing to it that such modelling as is relevant is evoked is another. As noted earlier, even disciplines other than economics, taking a, pre-theoretical, pragmatic or commonsense view of the public sector as they are, at the same time cannot help looking upon the public sector as an evolving organic institution--a feature characteristic of modelling.

Models are otherwise used exclusively by economic theory. Thus, according to Bailey, the despotic benevolent government model dominated economic analysis up to the 1960s and is still a common implicit assumption of elementary economic textbooks.[73] Thus it comes as no surprise that the Marxist Marc Linder should launch into a tirade against Samuelson, characterizing, as he is, the latter's rationale for the public sector in his famous textbook as a 'rather confused mixture of traditional bourgeois political derivative material on the state (e.g., Hobbes, Locke, Rousseau) and his own a-historical concept of the development of capitalism and its state'.[74] However,

[71] See ibid., p. 50.

[72] See ibid., pp. 50-51.

[73] See ibid., p. 114.

[74] See Linder, *Anti-Samuelson*, p. 137.

according to Bailey, by the 1980s the despotic benevolent model had apparently outlived its usefulness and the leviathan model, in its turn, had come into vogue, there being a full swing from one extreme to the other. Moreover, today what transpires in the actual world especially in its developing part does appear to show the continuing dominant role of the latter model.[75]

The comparative merits and demerits of the various macro models treated not only as analytical tools but also as ideal institutional forms are, according to Bailey intriguing.[76] The despotic benevolent government model is seen to achieve allocative efficiency and indeed public welfare because all its actions are, *ex hypothesi*, in pursuit of them. On the other hand, in Bailey's view, the fiscal-exchange model of government can only achieve allocative efficiency as long as there is no market failure arising from such things as the presence of merit goods and externality characteristics. For its part, the fiscal-transfer model is seen to fall between two stools: it can neither achieve allocative efficiency nor equity since no account is taken of either market failure or equity. Of course, the worst-case scenario can be seen to be the leviathan model as it not only fails the allocative efficiency and equity tests but also actively seeks to distort both objectives in its own interests. That the model of best fit keeps changing with the passage of time does seem to reflect the fact that the organic state model successfully captures, at any rate in part, the behaviour of the public sector. While apparently mutually exclusive, in any analysis, there may be involved, as Bailey is quick to confirm, elements of all the models, none being a perfectly satisfactory explanation of public-sector outcomes. While each model may present some facets corresponding to reality, it may also possess aspects that can be seen not to accord with the way in which public decisions are made.[77]

On the whole, as Bailey is right in pointing out, both macro and micro models especially of public expenditure growth are too mechanistic in that they ignore changes in culture and perceptions of government.[78] For one thing, there has been the recent shift away from the tenet of 'bigger is better' to that of 'small is beautiful' or '*non multa sed multum'*, improvement in quality being also expected. For another, changes in the meaning and nature of the term 'public' and in the moral view of the rights and responsibilities of the individual as well as in conceptions of social justice can have profound influence on the relative size of the public sector.

While models derived from economic theory have the serious flaw, as noted, of being too mechanistic but the great merit of illustrating the wide range of value-free influences on public spending, they admittedly overlook the cultural and other factors that may be brought to bear. If economic theory may thus be said to provide only a partial explanation of the activities of the public sector and its growth, much the same, as Bailey is right in emphasizing, can, however, be said of the theories of other disciplines, thereby application of an interdisciplinary approach being necessitated.[79] Nevertheless, it is fair to concur with Bailey that, no matter how hard we try, it may not be possible to develop a totally comprehensive model of the behaviour and growth of the public sector; nor is it possible to state *a priori* whether public expenditure is too large or too small or growing too fast or too slow.

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[75] See Bailey, *Public Sector Economics*, p. 114.

[76] See ibid., pp. 114-115.

[77] See Bailey, *Public Sector Economics*, p. 60.

[78] See ibid., p. 60.

[79] See ibid., p. 60.

It is imperative, in the interest of clarity of thought, to make a distinction between an actual institution (*in concreto*) and its model (*in abstracto*). Thus a perfectly competitive market is a model while an imperfect market normally refers to an actual state of affairs. Again, the despotic benevolent government is conceptual whereas the mixed economy represents a concrete institution. In a similar vein, growth of the public sector is an actual development which needs to be explained. On the other hand, the question of proper size of the public sector is normative and has to be resolved, if possible, with the help of conceptualization, allocative efficiency, equity and stability being relevant to the process.

# Looking Back Before the Election of 2011: Thailand's Constitutional Referendum and the Election of 2007*

**Michael H. Nelson****

## Introduction[1]

From a conventional Western political science perspective, the military coup of September 2006 ended Thailand's democracy, while the constitutional referendum in August 2007 and the election in December 2007 were steps towards its re-establishment. This view arguably also represented the common hope most observers of Thai politics held at that time. The Asian Network For Free Elections even put this expectation in the title of their report about the 2007 election—*Thailand: Restoring Democracy*.[2] Bizarrely, already the "Council for National Security" (as the coup-plotters of September 2006 euphemistically called themselves) had seen their toppling of then-prime minister Thaksin Shinawatra as "Restoring Democracy in Thailand."[3]

Yet, the dichotomy of democracy/dictatorship is too simple to capture the Thai political formation. In three extremely eventful and conflict-ridden years after the 2007

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[1] Originally, the body of this article was written at the request of Michael Connors, and finished in early April 2008. A number of "accidents" prevented that manuscript from being published. For preceding articles on the 2007 elections, see Christian Schafferer, "The Parliamentary Election in Thailand, December 2007" in *Electoral Studies* (2009), Vol. 28, pp. 167-170, and Pasuk Phongpaichit and Chris Baker, "The Mask-play Election: Generals, Politicians and Voters in Thailand's 2007 Poll" *Asia Research Institute Working Paper* (2010), no. 144. There does not seem to be a text on Thailand's first national referendum, except for my own paper on Chachoengsao, see Michael H. Nelson, "Constitution Referendum in Thailand: Observations from Chachoengsao Province" *KPI Thai Politics Up-date* (2008), no. 4.

[2] See Asian Network for Free Elections, *Thailand: Restoring Democracy. Elections to the House of Representatives December 2007* (2008).

[3] See Council for National Security, "Executive Summary: Restoring Democracy in Thailand. A Factual Account: Before and After 19 September 2006" (2007; the actual issuing agency might have been the Ministry of Foreign Affairs), p. 1. At the end of the text, the CNS reproduced the royally inspired establishment discourse by stating its motto as "With Ethics, Good Governance, Morality and Understanding (Reconciliation), Tomorrow WILL be better." From the CNS's perspective, this really was a politically and even morally "well-intentioned" coup. See Michael H. Nelson, "Thaksin Overthrown: Thailand's 'Well-Intentioned' Coup of September 19, 2006" in *The Thai Challenge: Unity, Stability and Democracy in Times of Uncertainty* (2008), ed. Thang D. Nguyen, pp. 11-22.

election,[4] especially in weeks to follow the massive protests from March to May 2010 by the United Front for Democracy against Dictatorship (UDD) and their bloody crushing by the government of Prime Minister Abhisit Vejjajiva, Thai politics have become a serious cause for concern. The looming question of royal succession and the substantively increased politicization of broad lower-class sectors of Thailand's population,[5] who include the monarchy in their criticism of the current Thai political system, substantively add to the political uncertainty. In particular, the state and future prospect of what passes for democracy in Thailand has become doubtful. In September 2010, academic and well-known political commentator Thitinan Pongsudhirak suggested to call the Thai political system "hybrid authoritarianism."[6] Two months later, columnist Suranand Vejjajiva (previously a minister in the Thaksin government) noted that, "a creeping military regime is getting creepier by the minute."[7] Shortly before Suranand's column appeared, the right wing *ASTV Manager Weekend* had placed the heads of Prime Minister Abhisit Vejjajiva and hard-line Army Commander Prayuth Chan-ocha on its title page. Beneath the picture of Abhisit, big red letters said *yup sapha* (dissolution of the House), while the text beneath the picture of Prayuth expressed what many observers thought was a distinct possibility in the near future— a *patiwat* (coup d'état).[8] Rumors of an impending military coup continued well into April 2011.

At the same time, talk of fresh elections in about June became a daily feature in the Thai mass media. Talk was further spurred when a joint sitting of House and Senate, on February 11, 2011, passed an amendment to the 2007 constitution. This amendment essentially re-adopted the election system of the 1997 constitution. It comprised single-member constituencies and national party lists, with the voters having two ballots. However, the ratio of constituency to party-list seats underwent a largely cosmetic change from 400/100 to 375/125. The five-percent threshold for party-list seats contained in the 1997 constitution had been lifted by the 2007 constitution already. This would allow a handful of tiny political parties to be represented in the House by one MP

[4] For more information on this period, see Marc Askew, "Confrontation and Crisis in Thailand, 2008-2010" in *Legitimacy Crisis in Thailand* (2010), ed. Marc Askew, pp. 31-81; Marc Askew, "Afterword: The Clash of March-May 2010" in *Legitimacy Crisis in Thailand* (2010), pp. 303-318, Chairat Charoensin-o-larn, "Thailand in 2009: A Return to an Unsual Politics as Usual" in *Southeast Asian Affairs 2010* (2010), Chairat Charoensin-o-larn, "Redrawing the Thai Political Space: The Red Shirted Movement" Paper, Rural-Urban Networks and Transitions in Asia: Re-spatializing Cultural and Political Imaginaries. Jointly organized by the Asian Urbanisms Cluster of the Asia Research Institute and the Cities Cluster of the Faculty of Arts and Social Sciences, National University of Singapore, 25-26 February 2010; Duncan McCargo, "Thailand: State of Anxiety" in *Southeast Asian Affairs 2008* (2008), pp. 333-356; Michael J. Montesano, "Four Thai Pathologies, Late 2009" in *Legitimacy Crisis in Thailand* (2010), pp. 273-302; Michael H. Nelson, "Thailand's People's Alliance for Democracy: From 'New Politics' to a 'Real' Political Party?" in *Legitimacy Crisis in Thailand* (2010), pp. 119-159; Michael H. Nelson, "Thailand's Legitimacy Conflict between the Red Shirt Protesters and the Abhisit Government: Aspects of a Complex Political Struggle" in *S+F. Sicherheit und Frieden – Security and Peace* (2011), Vol. 29, pp. 14-18, Nick Nostitz, *Red vs. Yellow. Volume 1: Thailand's Crisis of Identity* (2009); Nick Nostitz, *Red vs. Yellow. Volume 2: Thailand's Political Awakening* (2011), and James Ockey, "Democracy and Street Politics in Contemporary Thailand" in *Southeast Asian Affairs 2009* (2009), pp. 315-333.

[5] See Chairat Charoensin-o-larn, "Redrawing the Thai Political Space," Nidhi Eoseewong, "Kanmueang lae watthanatham khong suea daeng" [The politics and culture of the red shirts] in *Red Why: Daeng Thammai* (2010), pp. 56-67.

[6] See Thitinan Pongsudhirak, "Thailand and its hybrid authoritarianism" in *Bangkok Post* (September 27, 2010).

[7] See Suranand Vejjajiva, "A creeping military regime get's 'creepier every day'" in *Bangkok Post* (November 26, 2010).

[8] See *ASTV Phuchatkan Weekend* (November 20-26, 2010).

each. The reduction of constituency MPs would slightly disadvantage the Democrat's coalition parties as well as the opposition Phuea Thai party, while the increase in national party-list seats would favor those parties that have huge nationwide support amongst the voters, meaning both the Democrats and Phuea Thai.

Before the planned dissolution of the House, observers generally assumed that neither the Democrat nor the Phuea Thai parties would achieve an absolute majority. This assumption led to a number of realignments amongst the medium and small parties with the aim to increase their bargaining power in case coalition-formation negotiations would have to be held.[9] Nevertheless, pessimists such as the important oppositional faction leader Pairoj Suwannachawee, thought that the shape of any coalition would be a foregone conclusion. He called the current Thai political system a "'no-choice' democracy." The "power of the gun" would force smaller political parties to form a coalition government only with the Democrat Party,[10] simply because Abhisit Vejjajiva was the establishment's preferred choice for the position of prime minister. From this perspective, smaller parties joining the Phuea Thai party in forming a coalition government would be seen by this establishment as a significant challenge in the political crusade it had waged towards the elimination of the "Thaksin regime" since early 2006.[11] Already during the vote to amend the constitution's stipulations about general elections, the Democrats' potential post-election coalition partners had shown that they knew perfectly well what was expected of them. They voted for the Democrats' preference against their own reservations that they had voiced in the weeks after the 375/125 formula had been proposed. In this scheme of things, the Phuea Thai Party, remote-controlled by Thaksin Shinawatra, would need a substantial absolute majority in the House in order to form a government.

## From Thaksin and the Coup to a New Constitution

With the rise of Thaksin Shinawatra to power following the elections of February 2001,[12] the usually clear-cut dichotomy of dictatorship (military-installed government) and democracy (elected government) was blurred. Though convincingly re-elected in reasonably free and fair elections in 2005,[13] mostly Bangkok-based academics,

[9] See the overview provided by Somroutai Sapsomboon, "Small parties vie for power" in *The Nation* (April 25, 2011).

[10] See *Bangkok Post* (January 28, 2011). In this context, the issue arose whether or not any political party that had failed to gain the highest number of MPs could try and form a coalition government right away (thought to refer to the Democrats), or whether the party with the highest number of MPs (thought to be the Phuea Thai party) had to be given the first right. The latter approach had been customary in Thai government formation.

[11] One of Thaksin's fiercest enemies, former lecturer of economics Chermsak Pinthong, who is close to the PAD, described the "Thaksin regime" as a "movement to capture state power, and use the power of the state to pursue the interests of one's clique, while at the same time protecting and increasing one's power, until it is like a dictatorship. Although it might outwardly look like a democracy, but in essence the chief executive has absolute power, without any real accountability according to the principle of balance of power." See Chermsak Pinthong, *Ru than prathet thai* [Knowing Thailand] (2008), p. 19. Chermsak was countered by well-known former minister in all Thaksin governments, Chaturon Chaisaeng, who included a chapter entitled "The Thaksin Regime: has never really existed in Thailand" in his book about the situation of democracy in Thailand. See Chaturon Chaisaeng, *Thai Democracy in Crisis: 27 Truths* (2009), chapter 2.

[12] See Michael H. Nelson, "Thailand's House Elections of 6 January 2001: Thaksin's Landslide Victory and Subsequent Narrow Escape" in *Thailand's New Politics: KPI Yearbook 2001* (2002), pp. 283-441.

[13] See Michael H. Nelson, "Thaksins kurzlebiger Triumph: Thailands Wahlen vom 6. Februar 2005" in *Internationales Asienforum. International Quarterly of Asian Studies* (2006), Vol. 37, pp. 265-296, and

journalists, and members of the establishment as well as civil society, soon accused Thaksin (not without reason) of governing like an autocrat, backed up by a "parliamentary dictatorship" (mostly, this is the Thai view on what in western democracies is known as "stable parliamentary majority"). The "People's Alliance for Democracy" (PAD), which was founded in February 2006, called Thaksin a "tyrant" and went as far as portraying him as a reincarnation of Hitler—though the very possibility of their prolonged public mass protests indicated otherwise.

Thaksin exacerbated this situation when he scandalously sold his Shin Corporation to Singapore tax-free. An enormous public outcry followed, including a serious questioning of his legitimacy as prime minister. Thaksin tried to reestablish himself by calling a snap-election scheduled for April 2006. In a surprise move, the Democrat and Chart Thai parties boycotted this election, leading to a state crisis, given neither could Parliament convene nor a government be formed. King Bhumiphol intervened by suggesting that the Constitutional Court might annul the election, which the court did. A new election date was set for October 2006.[14] Anticipating that it would return Thaksin to power, the military toppled his caretaker government on September 19, 2006. Many members of the Bangkok elite and middle class did not condemn this military coup as a destruction of democracy. Rather, they saw it as a defense of democracy and good governance against the provincial-based members of parliament, who had brought Thaksin to power. The "Thaksin regime" and its alleged basis—national-level and provincial "money politics"[15]—had to be destroyed in order to replace "pseudo-democracy" with a "real democracy" of the people.[16] Even a foreign observer as seasoned as Michael Vatikiotis could not bring himself to condemn the

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Michael H. Nelson, "Thaksin's 2005 Electoral Triumph: Looking Back From the Election in 2007"; *Southeast Asia Research Centre Working Paper Series* (2008), no. 98.

[14] For details, see Michael H. Nelson, "Political Turmoil in Thailand: Thaksin, Protests, Elections, and the King" in *Eastasia.at* (2006), Vol. 5.

[15] On the "anti-democratic" character of this perennial theme (in which the royalist establishment and "critical" academics joined hands), see Thongchai Winichakul, "Toppling Democracy" in *Journal of Contemporary Asia* (2008), Vol. 38, pp. 11-37 (p. 24 ff.). He identifies four sub-themes: blaming politicians for excessive corruption, claiming that they come to power mainly by vote buying, that, therefore, Thai elections did not equal democracy, and that politics needed to be subjected to ethical (*chariyatham*) and moral guidelines.

[16] For positive assessments of the coup by Thai academics, see Pattana Kitiarsa, "In Defense of Thai-Style Democracy" (manuscript, Asia Research Institute, National University of Singapore, October 12, 2006); Surat Horachaikul, "Political Developments of Thailand in the Last 7 Years" (A talk delivered at the National Thai Studies Centre, Australian National University on 22nd August 2007), and Surin Maisrikrod, "Learning from the 19 September Coup: Advancing Thai-style Democracy?" in *Southeast Asian Affairs 2007* (2007), pp. 340-359. They could take a cue from Kasian's pre-coup exhortation that "the immediate task should be to remove the linchpin of the corrupt and criminalized system, who should face the due process of law for the crimes alleged against him" see Kasian Tejapira, "Toppling Thaksin" in *New Left Review* (2006), Vol. 39, pp. 5-37 (p. 37). It would seem that the military coup fulfilled this "immediate task" pretty well. Famous social critic Sulak Sivaraksa had also urged, "We must organize ourselves to overthrow Thaksin", see *The Nation* (December 20, 2005). Interviews containing mixed views from intellectuals and activists appeared in the journal *October* No. 6 (its theme was *Patiwat 2549* [The Coup of 2006]). For rejections of the coup by Thai intellectuals, see Thanapol Eawsakul (ed.), *Ratthaprahan 19 kanya: Ratthaprahan phuea rabob prachathipattai an mi phramakakasat song pen pramuk* [The Coup of September 19: A Coup for a Democratic System Which has the King as Head of State], Thongchai Winichakul, "Bad excuse for the coup" (manuscript, September 2006), and Giles Ji Ungpakorn, *A Coup for the Rich: Thailand's Political Crisis* (2007). After the coup, Thongchai's article "Toppling Democracy" countered Kasian's earlier "Toppling Thaksin".

coup. Instead, he noted that Thai democracy was young and weakly developed, and then said, "There is a strong argument for a temporary pit stop for repairs."[17]

Since the coup had abolished the 1997 "people's constitution," there was the necessity to create a new document. This situation opened the opportunity to rectify problems identified in the 1997 version (though the views differed about the issue of what were the problems). More importantly, however, it allowed interested political forces to pursue their anti-politician, and in particular anti-Thaksin, political agendas. A coup-appointed Constitution Drafting Assembly (CDA) and its Constitution Drafting Committee (CDC) were tasked with drawing up a new charter that would prevent any political leaders and their parties from "monopolizing power" again—a key accusation against Thaksin and his Thai Rak Thai Party. According to the military's "Constitution of the Kingdom of Thailand [Interim], Buddhist Era 2549 (2006)," the new document had to be approved in a referendum.

## The Referendum: Neither Free nor Fair

This first referendum in Thai history did not ask the citizens to decide a narrowly defined question, such as whether they wanted to increase a tax or ban smoking in public places. Rather, ordinary people had to decide the fate of nothing less than a highly complex legal document comprising 309 articles, the controversial deliberation of which in the CDA and CDC had generated many thousand pages of minutes showing that even their technocratic members had substantial problems understanding issues and implications of what they were drafting. Thus, it was clear from the beginning that very few people would have read, much less understood, the draft before they made their cross in the "accept" or "reject" boxes of the ballot paper (it would have been politically more honest to give the people the choice between the 1997 constitution and the 2007 draft document). One was therefore justified to expect that the rules governing this newly introduced means of direct democracy would have received very careful consideration. In particular, this concerned the issue of a free and fair campaigning by all parties involved, whether they were in favor of the draft constitution or against it. At issue was the "unhindered access to the process of public opinion formation"[18] including a minimum-level of or even equal resources available to the opposing sides for their campaigns.[19]

On the other hand, at the time of the referendum, Thailand had been under military rule since September 2006, with martial law in effect in a large number of provinces. Moreover, the drafting of a new constitution was part of the military coup plotters' strategy of eradicating the so-called "Thaksin system." From this perspective, the success of the referendum was not to be measured by its compliance with principles of direct democracy. Success here merely meant that the military and its numerous technocratic, bureaucratic, and academic collaborators could manage to render some semblance of legitimacy to their document by having it accepted in a popular vote. Therefore, measures had to be taken to prevent those groups who were against the draft constitution—primarily Thaksin's Thai Rak Thai Party—from derailing its passing in the referendum.

[17] Michael Vatikiotis, "Thailand on the Mend?" in *International Herald Tribune* (September 21, 2006).
[18] Manfred G. Schmidt, *Wörterbuch zur Politik* (1995), "Wahlrechtsgrundsätze", pp. 1056-1057.
[19] International IDEA, "Issues Relating to the Referendum Mechanism" (An Electoral Processes Team Working Paper, 2004), p. 11.

The interim constitution (in article 29, paragraph 2) stipulated that the referendum had to be performed, "in accordance with the rules and procedure[s] announced by the Constitution Drafting Assembly."[20] Thus, there was no doubt that the referendum needed a legal basis, after the coup group had confirmed that the law governing the Election Commission of Thailand (ECT) was still in effect, and that the ECT was still in office.[21] Among other things, this act empowered the ECT to organize "a voting at a referendum as provided by law."[22] Yet, such a law did not exist, simply because no referendum had ever been proposed. It seemed rather strange then that the drafters of the interim charter thought that the most appropriate body to produce such a legal basis was not the military-appointed "National Legislative Assembly" (NLA), but the CDA itself. Obviously, the CDA—as the group that had drafted the constitution to be put to a referendum—would have the greatest interest in trying to convince the people to accept their product during the referendum campaign. The CDA and its provincial-level sub-committees would be the main competitors of the variety of anti-constitution groups, including the Thai Rak Thai Party, bent on derailing the draft. Giving one party in this struggle for the peoples' votes the power to determine the rules of the game, which included guiding the actions of the organizer and referee (the ECT) and designing the ballot paper, seemed to be non-conducive to a free and fair referendum.

According to the CDA's "Announcement about the standards and methods for publicizing the draft constitution and voting in the referendum" the ECT had to publicize the process and steps of the referendum "according to the assignment by the CDA" (Art. 7).[23] In addition, the ECT was tasked with organizing the referendum "in accordance with the CDA's assignment." It was even the CDA that "empowered" the ECT to issue announcements and regulations for the performance of the referendum (Art. 8). An anonymous source at the ECT stated that the CDA had even tried to include a stipulation that would have put the "independent" ECT under its direct supervision (*kamkap dulae*). According to the same source, the resistance by the ECT averted this.

Most of the 39 articles in the CDA's "Announcement" concerned merely technical issues, such as constituencies, polling areas, polling officials, ballot boxes, voting, and vote counting. There was nothing on the essential question of what a "free and fair" referendum campaign would entail and how this could be organized. Since this was the most obvious and pressing regulatory problem, I assume that its omission was intentional, and aimed at gaining an unfair advantage over groups that were intent on campaigning for a "no" vote.

More than three months after the CDA had issued its announcement, the ECT finally passed its own "Regulation regarding the standards and methods of the voting in

[20] Constitution of the Kingdom of Thailand [Interim]. Buddhist Era 2549 (2006).

[21] Announcement by the Council for Democratic Reform No. 13: Selected Organic Laws shall continue to be effective (September 20, 2006), in combination with the Clarification from the Office of the Secretariat of the Council for Democratic Reform: The Functioning of Agencies under the Enabling Laws (September 24, 2006).

[22] Sect. 10, Para. 1, Organic Law on the Election Commission, B.E. 2541 (1998) (Manuscript, Office of the Council of State).

[23] Prakat sapha rang ratthathammanun rueng lakken lae withikan wa duay kanphoeiphrae rang ratthathammanun lae kanoksiang prachamati pho. so. 2550 [Announcement of the Constitution Drafting Assembly about the standards and methods for publicizing the draft constitution and voting in the referendum 2007] in *Ratchakitchanubeksa* (2007) lem 124 ton phiset 30 ngo 16 minakhom 2550 na 1-13.

the referendum."[24] The 109 articles of this highly detailed regulation merely served to concretize the technical aspects of the CDA document. It was silent on the question of what a free and fair referendum campaign of all parties concerned would look like—after all, this was not part of the "assignment" given to the commission by the CDA. The final possibility of having a legal document detailing such principles was the "Referendum Act" as drafted by the ECT and passed by the NLA—not even three weeks before the referendum was to be held.[25] During the deliberations of the act, *The Nation* expressed in a headline what went wrong with this possibility: "Referendum law or penalty law? Focus is on punishments rather than on procedures and guidelines for holding a vote on new charter."[26] The same article quoted academic Sungsidh Piriyarangsan, a member of the NLA committee that vetted the draft, as having said, "The law is likely to be issued to threaten and sentence those who oppose the constitution and campaign to reject it."

Indeed, a number of coup-related office holders had suggested that criticism of the draft charter should be a criminal offense after the law had come into effect. Election Commissioner Sodsri Sattayatham pointed to article 10 of the act that, among other things, forbid people to "deceive, force, intimidate, or use threatening influence in order to prevent voters from using their right to vote, vote in a specific way, or refrain from voting." Violators were threatened with ten-year prison sentences and fines of 200,000 baht. From the text quoted here, one was left with the conclusion that anybody who publicized an anti-draft position would be seen as "deceiving" people into voting in "a specific way," namely "no." Such a position had to be deceptive because, surely, the draft constitution objectively was so good that the power-holders thought that only a "yes" vote was possible.

In fact, the CDA itself seemed intentionally to attempt to deceive voters in order to make them vote "yes." In a full-page advertisement campaign, the text read, "accept the new constitution so that Thailand would have an election."[27] This seemed to imply that there would not be an election if voters rejected the draft. Obviously, this was wrong. Article 32 of the interim constitution stipulated that, in case the referendum failed, the National Security Council (NSC, the coup group), together with the cabinet, would select and amend an earlier constitution within 30 days, and present it to the king for his signature. This constitution, of course, would have included stipulations concerning parliamentary elections. After strong criticism, the advertisements were withdrawn. The best-selling Thai-language newspaper *Thai Rath* remarked in an editorial, "Many government figures have come out to threaten and force [voters] by saying that the people must accept the draft constitution, because otherwise the country would have many problems."[28] Such actions seemed to have had no legal consequences, as stipulated in article 10 mentioned above.

[24] Rabiap khanakammakan kanluektang wa duay lakken lae withi kanoksiang prachamati pho. so. 2550 [Regulation of the Election Commission regarding the standards and methods of the voting in the referendum, June 28, 2007] in *Prakat sapha rang ratthathammanun rabiap khokamnot khanakammakan kanluektang kiewkap kanoksiang prachamati* (2007), pp. 18-29.

[25] Phraratchabanyat wa duai khwamriaproi nai kanoksiang prachamati rang ratthathammanun pho. so. 2550 [Act concerning the orderliness in the voting in the referendum on the constitution draft 2007] in *Ratchakitchanubeksa* (2007), lem 124 tonthi 38 ko 1 singhakhom na 18-22.

[26] See *The Nation* (July 6, 2007).

[27] See *Matichon* (June 26, 27, 29, 2007).

[28] See *Thai Rath* (July 10, 2007).

Of course, attempts to prevent criticism of the draft constitution primarily went against the remnants of Thaksin's TRT that had started a campaign to derail the draft. Not to leave the opponents in doubt about the power-holders' intentions, the houses of three or four TRT politicians were searched by police or soldiers, who confiscated anti-draft public relations material. However, the law also went against other anti-draft groups. One of them was the September 19 Network, which supported the web site www.wevoteno.net and placed a series of one-page advertisements in *Matichon* newspaper, featuring dramatic images and prominent anti-coup academics, such as Nidhi Eoseewong, Thongchai Winichakul, Worachet Phakhirat, and Somchai Prichasilapakun. Countering Sodsri's opinion, the network,

> insisted on the right to campaign to reject the draft constitution, because freedom of expression is a fundamental right that belongs to all people. Sodsri's opinion shows a lack of understanding of people's fundamental rights in a democracy and the referendum process in which all parties, opponents and proponents, can publicly express their views. A person such as Sodsri whose attitude is against the people's freedom of expression is not suitable to function as an authority that is mandated to organize the referendum.[29]

Both Sodsri and one of her fellow election commissioners, Prapun Naigowit, were of rather doubtful neutrality with respect to being in charge of organizing a free and fair constitution referendum. After all, they belonged to the group of 35 people that, as the Constitution Drafting Committee, had produced what the people were being asked to decide upon.

**The establishment's pro-constitution activists**

An historic picture demonstrating the Thai etablishment's political culture and ethics ("We are the state, and we shall win!"). Key members of the *aphichon*'s coup group at their major referendum rally with a great number of state-mobilized participants. ECT chairperson, Apichart Sukhakkhanon (on the left), lifting the hand of coup-leader Sondhi Boonyaratglin. In the middle is PM Surayud Chulanond (on leave from the king's Privy Council). On his right are Noranit Sethabutr, chairperson of the CDA, and deputy NLA speaker Charan Kullawanit. All five wear yellow ties indicating their conscious reproduction of the hegemonic royalist-bureaucratic political culture.

[29] See *Prachatai* (July 4, 2007).

**A "small counter public" reject the constitution[30]**

A full-page anti-draft constitution advertisement of the September 19 Network featuring Worachet Phakhirat of Thammasat University's faculty of law, and the text "Voting to overthrow the draft constitution is not against the law."[31]

Therefore, Sodsri and Prapun had good reasons to fully support the acceptance of the draft and act against those whose intention was to reject it. Apparently, neither of them thought that this clear conflict of interest would disqualify them from being neutral arbiters between the pro and the contra groups.

Moreover, the chairperson of the ECT, Apichart Sukakkhanon, made clear that he was politically partial when he went beyond simply attending what appeared to be the coup-group's major referendum rally, ironically called "*mahakam prachathippatai*" (democracy festival), on August 3-5, 2007, at the Impact Arena, Mueang Thong Thani.[32] He went as far as joining the leader of the coup, Sonthi Boonyaratglin, and the heads of major coup-appointed bodies—Prime Minister Surayud Chulanond, CDA chairperson Noranit Setabutr, and deputy NLA speaker Charan Kullawanit—on stage. There, he was photographed raising Sonthi's hand (all five of them grasped their hands and raised them over their heads in a gesture usually employed by politicians in election campaigns meaning, "We will beat our competitors!"). In an interview that appeared after the referendum, Apichart provided a piece of information that threw a little more light on the role informal elite networks and certain institutions play in Thai socio-political life by saying,

> As for General Sonthi, he is a close friend to me and my dear colleague, Commissioner Mr. Prapun Naigowit, from the National Defence College. We know and respect each other and he respects the need to perform our duties independently. I can assure everyone that no

[30] For the expression "small counterpublic," see Gianpaolo Baiocchi, "The Civilizing Force of Social Movements: Corporate and Liberal Codes in Brazil's Public Sphere" in *Sociological Theory* (2006), Vol. 24, pp. 285-311 (p. 305). It denotes public political communications that are positioned against a dominant state-sponsored public. An earlier expression with some more normative baggage is "subaltern counterpublics," see Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy" in *Social Text* (1990), No. 25/26, pp. 56-80. One might also speak of "oppositional and alternative political culture", see Paul Lichterman and Daniel Cefaï, "The Idea of Political Culture" in *The Oxford Handbook of Contextual Political Analysis* (2008), pp. 392-414 (p. 397).

[31] See *Matichon* (July 9, 2007).

[32] The organizers had reportedly paid people from many provinces to take part, and provided busses for transportation, though such techniques are criticized as corruption and vote buying when employed by politicians. A full-page article on the event said, "The democracy festival is another big government campaign with a huge budget," see *Matichon* (July 31, 2007).

> one interferes with the EC or tells us what to do. Everyone accepts that we are an independent organization.[33]

Given this political climate, it was not surprising that the various anti-constitution groups received neither a fair amount of access to the electronic mass media nor any financial support from the state for their campaigns. They were invited to at least three televised debates between proponents and detractors of the draft constitution. Yet, the proponents had much additional time on the airwaves for their campaign in favor of a yes-vote, an opportunity not given to those who rejected the draft. Consequently, the free flow of information to the voters was severely restricted, while a number of state agencies also subjected them to pro-constitution public relations.

Newspapers also reflected the problematic setting of the referendum. Suthichai Yoon, a prominent political columnist at the anti-Thaksin and pro-coup newspaper *The Nation* (more formally, he is the Group Editor in Chief), supported a full and lively debate of the draft constitution when he headlined a column, "Let 100 flowers bloom… but no stampede please."[34] However, his call was limited to an orderly discussion amongst "thinking members of society," as exemplified by the different stands that NGOs had taken. He also suggested which side he was on by branding those NGOs who had rejected the draft constitution as "very simple," while he applauded the pro-constitution NGOs for having done "a tremendous amount of soul-searching."[35] Given the topic Suthichai had chosen for his comment, it was very surprising that he did not say anything about the genuinely political nature of a referendum, the requirements of a free and fair campaign, and the actual and normative status of government agencies in this context.

By contrast, the influential mass circulation *Thai Rath* published three editorials warning the powers-that-be to allow fair referendum campaigns by all parties. First, on July 10, 2007, it reminded the public that, "Both the proponents and the opponents of the draft constitution must have complete freedom in their campaigns in order to provide information and reasons for their respective positions." The referendum law, the paper continued, might be an obstacle in this respect, because it seemed to adopt the worldview of the bureaucrats (*chaokhunmunnai*). The law was also overly fussy regarding punishments, especially towards those who aimed to reject the constitution. The editorial wondered whether this law aimed to facilitate or obstruct the referendum. On July 21, 2007, the paper's editorial stated that one factor in making the referendum legitimate was the opportunity of equal campaigns by proponents and opponents. "If the proponents can campaign freely by using the taxpayers' money while the opponents are obstructed or denounced as people who do not love the nation, then the referendum is not legitimate." Finally, on July 30, 2007, *Thai Rath* took up the confiscation by soldiers of anti-coup material from the house of a former TRT MP in Kamphaengphet province. Its editorial stated, "It seems that the proponents can perform all sorts of actions in favor of the referendum or in favor of accepting the draft

[33] See *Bangkok Post* (November 4, 2007). The classes conducted by the National Defence College mentioned in the quote are a key mechanism of socializing high-level bureaucrats, technocrats, soldiers, and business people into the official national political culture, and of creating networks among the individual members of the establishment. Courses for high-ranking political and bureaucratic personnel offered by the parliament-affiliated King Prajadhipok's Institute consciously fulfill a similar function.

[34] See Suthichai Yoon, "Let 100 flowers bloom… but no stampede please" in *The Nation* (July 19, 2007).

[35] Ibid.

constitution, while actions in favor of the rejection of the draft constitution are subjected to obstruction or watched by state officials for committing violations."

These quotes indicate well the political atmosphere during the weeks leading to the referendum. Even though the official public relations line merely pushed for a high turnout, the coup group, its government and CDA, and the ECT nevertheless seemed to have joined hands in their determination to have the voters accept the draft constitution.[36] Holding Thailand's first referendum in a free and fair manner was not a priority. The authorities probably rightly assumed that—in the absence of open cheating by the proponents—the question of legitimacy was a rather academic matter. Moreover, they were probably right to assume that the more important issue to most people was that the acceptance of the draft would pave the way for fresh elections and thus promised the return to political normalcy. Under these circumstances, anything but an acceptance of the draft constitution would have come as a surprise. Table 1 shows the results by region.

| Region | Registered voters | Ballots cast | Invalid Votes [a] | Valid votes | Yes | No |
|---|---|---|---|---|---|---|
| **Central** | 15,144,307 | 8,741,488 (57.72%) | 151,841 (1.74%) | 8,589,647 | 5,714,973 (66.53%) | 2,874,674 (33.47%) |
| **South** | 6,268,074 | 3,717,664 (59.31%) | 77,275 (2.08%) | 3,640,389 | 3,214,506 (88.30%) | 425,883 (11.70%) |
| **Northeast** | 15,351,973 | 8,350,677 (54.39%) | 150,538 (1.80%) | 8,200,139 | 3,050,182 (37.20%) | 6,149,957 (62.80%) |
| **North** | 8,328,601 | 5,169,125 (62.06%) | 124,553 (2.41%) | 5,044,572 | 2,747,645 (54.47%) | 2,296,927 (45.53%) |
| **TOTAL** | 45,092,955 | 25,978,954 (57.61%) | 504,207 (1.94%) | 25,474,747 | 14,727,306 (57.81%) | 10,747,441 (42.19%) |

**Table 1:** Countrywide result of the referendum (by region)

*Source*: "The statistics of the referendum on 19th August 2007," as posted on the ECT web site.

[a] In addition to the invalid votes, a number of voters returned their ballot papers to the officials in their polling stations. Altogether, 87 voters did so. These ballots are included in the invalid votes.

The coup leaders and their assorted auxiliary bodies had certainly hoped for a higher turnout than 57.61 percent, and even more so for a higher rate of approval than merely 57.81 percent. These bodies had promoted the concept of "reconciliation," which simply meant making TRT voters agree with the coup and turn away from Thaksin.[37] Contrary to this goal, however, the referendum result confirmed that most of the Northeast (with a majority of 62.80 percent against the draft) and much of the North (with a majority of 54.47 to 45.53 percent in favor of the draft) continued to follow TRT. The result in the South, with a mere 11.70 percent of votes against the draft constitution, confirmed the

[36] The organizational aspects of voting and counting did not draw criticism. In this respect, the referendum proceeded in a routine way.

[37] The concept of "reconciliation" propagated after the protests of April 2009 and April/May 2010 is of a similarly one-sided nature.

Democrats' dominance in this region. Given the great electoral importance of the North and the Northeast (210 of the 400 constituency MPs are elected in these two regions), combined with the rather limited significance of the South (56 seats), preventing the remnants of TRT from returning to government after the elections seemed problematic.

Nidhi Eoseewong suggested that if the People's Power Party, the partial reincarnation of TRT, won the election in the North and the Northeast, "then we would have an opposition party that is based on 'class' (in a loose sense of the word)." Thus, the question arose, "How would the new government respond to a class-based opposition?"[38] As it turned out, this supposed class-based opposition in fact formed the core of the government after the election of December 2007, and the question was rather how the anti-Thaksin establishment forces would respond to a government that they had wanted to prevent.

The path to this result led through legal and organizational changes to which I will turn in the following two sections.

## Reform of the Election System

Before the constitution of 1997 reformed Thailand's election system for the House of Representatives, it consisted of 393 MPs elected in 156 constituencies. Of these, seven were single-member constituencies (SMC), 61 two-member and 88 three-member constituencies (MMC; plurality system with multiple votes). The 1997 constitution provided for a segmented election system comprising 400 MPs elected in SMC (simple plurality) and 100 MPs proportionally elected from closed national party lists, with a threshold of five percent.[39] Voters had two votes, one for the constituency candidate and one for the party list. For the first time, voters could express their national-level political preferences, thereby also increasing the degree of representation in the House.[40] Voting was made compulsory, and vote counting was moved from the polling stations to one single location in each constituency.[41]

Regarding the constituency level, the 2007 constitution returned to the pre-1997 system. There were now 400 constituency MPs, elected in 157 constituencies, divided into four SMC, 63 two-member and 90 three-member constituencies. Members of the CDC thought that enlarging the constituencies would make it easier for "good and capable people to compete with candidates who have money."[42] In the CDC's brochure that compared the 1997 constitution with its own draft and gave reasons for the changes made, it was added that bigger MMC would make the elections more honest and just, because vote-buying would become more difficult. Moreover, voters would not elect

[38] See *Bangkok Post* (August 29, 2007).

[39] It also replaced the 262 appointed senators with 200 elected senators. The 2007 constitution introduced a Senate consisting of 76 elected senators (one in each province) and 74 appointed senators.

[40] This issue has become more significant, because the event-filled years since the first election of Thaksin in 2001 obviously have enormously increased the attention voters pay to national-level politics. Previously, voters were depicted as uninterested in and ignorant of national issues, and politics. The unintended consequence of all those events, which occurred in a comparatively brief span of time, was a huge wave of politicization reaching straight down to the village level.

[41] For details of the 1997 election system, see Michael H. Nelson, "Thailand" in *Elections in Asia and the Pacific: A Data Handbook*. Volume II: South East Asia, East Asia and the South Pacific (2001), pp. 261-320, and Orathai Kokpol, "Electoral Politics in Thailand" in *Electoral Politics in Southeast and East Asia* (2002), pp. 277-320.

[42] Quoted from the CDC's document selling their first draft as published in *Post Today* (April 18, 2007), and *Matichon* (April 19, 2007).

merely one single candidate, but could vote for more candidates who they thought were appropriate. Therefore, the votes of people would have more meaning than in SMC since in this system all votes not cast for the winners were lost.[43]

Obviously, it was difficult to transform the complex process of committee discussions, including politicking and compromise building between the CDC's factions, and probably outside influence, into publishable reasons for their decisions. Some issues—such as the demarcation of constituencies, the method of election, voting, vote counting, and the method of calculating proportional seats—even had to be left out of the brochure, because the CDC was unable to reach agreement on them. Yet, even the published reasons were hardly valid.[44] First, the phrase "good and capable people" merely repeated a long-standing bureaucratic cliché used to denigrate elected representatives. It seemed that CDC members thought that the provinces were full of poor but politically "good and capable people," who unfortunately were prevented from running in elections for national parliament by their moneyed competitors. This was a simplistic view of the structures and necessities of sub-national political recruitment, and certainly overestimated the availability of "untainted" *political* talent at the provincial level.

Second, bigger constituencies surely would require higher expenses for campaigning rather than lower. If poor people could already not compete with better-off competitors in smaller areas, then it did not seem to be logical to assume that they could do so in bigger ones. After all, their well-off rivals could easily inject more money into their campaigns.[45] Concerning the issue of vote buying, it is unclear why this should be more difficult in bigger constituencies, while it would certainly be more necessary, and should not pose any great challenge for moneyed candidates. Under these conditions, poorer candidates—who might be neither better nor more capable than their established competitors—would find it even harder to compete in national elections. Finally, the CDC's perspective neither took into account the importance of long-established provincial or constituency-level electoral networks nor did it address the question of why so many well-off citizens, who might have even more money than the so-called "moneyed" candidates, chose not to involve themselves in politics.

Third, it did not seem to be logical that the return to MMC would make votes more meaningful than they had been in SMC by reducing the number of votes cast for losing candidates. If a province previously had four SMC with two serious candidates each, the votes for the losing four candidates would be lost. Turning these four SMC into two MMC would still leave us with the same eight candidates who would compete for the four seats available. Consequently, the votes not cast for the winners would be

[43] Khanakammathikan yok rang ratthathammanun sapha rang ratthathammanun, *Sara samkhan khong rang ratthathammanun chabap mai phrom tarang priapthiap kap ratthathammanun phutthasakarat 2540* [Important points of the new draft constitution, together with a table comparing it with the constitution of 1997.] Chabap rapfang khwamkhithen (2007), p. 59.

[44] In addition to the following paragraphs, see Michael H. Nelson, "Electoral Rules Concerning the House of Representatives in the 2007 Thai Constitution" *Southeast Asia Research Centre Working Paper Series* (2009), No. 104; Michael H. Nelson, "The National Assembly of Thailand: Constructing a Representative Institution (1997 to 2007). Part 1: The Constitution Drafting Committee of 2007", Final research report submitted to the King Prajadhipok's Institute (2010), pp. 83-120, and Ploy Suebvises, "Constitutional Policymaking by the Thai Elite: Designing the Election System for House and Senate in the 2007 Constitution" *Southeast Asia Research Centre Working Paper Series* (2010), No. 105.

[45] The legal limits on campaign expenditures are widely ignored. Candidates must report their actual expenses to the provincial election commissions after the election. However, this is nothing more than a ritualistic exercise by both sides.

lost just as they were in SMC. In the last MMC election in 1996, for example, the share of lost votes in Srisaket province was 37 percent. In the first SMC election of 2001, this share increased to 53.5 percent. The second SMC election in 2005 saw a return of the lost votes to the previous level (37.7 percent). After the reintroduction of MMC in the election of 2007, the lost votes in Srisaket increased to 49.5 percent. They did not decrease, as had been anticipated.[46]

If the constitution drafters really had wanted to increase electoral fairness, they could have chosen to strengthen the proportional element of the previous election system (they could also have introduced a proportional system at the provincial level). Instead, the party list came under threat of being abolished altogether. With Thaksin Shinawatra in mind, Charan Phakdithanakun, the hard-line chairperson of the CDC's sub-committee on political institutions (who later supported the introduction of a mixed-member proportional election system), stated that the party list "makes some people too power crazy. They think that they had received 19 million votes and therefore cannot do any wrong. This thinking is totally wrong."[47] In an interview, Charan added that the party list element of Thailand's election system had been turned into a quasi-direct election of the prime minister so that it now resembled a presidential system. This "severely contradicts the parliamentary democratic regime of government that has the king as head of state."[48]

Eventually, the CDC settled for 80 MPs proportionally elected from closed party-lists in eight regional constituencies of roughly the same population number. The threshold was abolished. Late in the drafting process, during May and June 2007, some CDC members had pushed for a German-style proportional election system (mixed with SMC) to replace the one laid down in the draft distributed for public hearings.[49] In such a system, the distribution of seats in parliament solely depends on the votes political parties receive for their lists. The application of this system would have led to a very

[46] The change to MMC, together with the forced demise of TRT, led to an enormous increase in the number of political parties and constituency candidates. In 1996, there were 15 parties fielding 2,310 candidates. The figures for 2001 were 39 and 2,782. In 2005, they dropped to 24 and 1,707. The 2007 election saw 39 parties with 3,894 candidates; for the figures on the 2007 election, see Samnakngan khanakammakan kanlueaktang, *Khomun sathiti lae phonkanluektang samachik sapha phuthaenratsadorn pho so 2550* [Data, Statistics and the Election Result of the Members of the House of Representatives 2007] (2008), p. 48f. One reason for the high number of candidates was that parties were forced to field as many candidates in a constituency as there were seats, even if they had only one "real" candidate. In a three-seat constituency, this situation would lead to two "ghost" candidates.

[47] See *Matichon* (January 31, 2007; web site version).

[48] See *Matichon* (February 5, 2007). Thailand's Thaksin was a good example for the trend of "personalization" of politics, which has been observed in the West for quite some time, be it in presidential or in parliamentary systems. According to Ian McAllister, "The trend [towards personalization] is especially pronounced within the established parliamentary democracies, where the character and style of election campaigning, the presentation and promotion of policies, and the executive authority of the prime minister have all changed markedly from what was observed a generation earlier," see Ian McAllister, "The Personalization of Politics" in *The Oxford Handbook of Political Behavior* (2009), pp. 571-588 (p. 584). Shortly before the 2005 election, respected establishment economist Ammar Siamwalla thought that this was not really an ordinary election. Rather, "It has turned out to be a national referendum on whether we should accept Thaksin or not accept him", see *The Nation* (January 28, 2005). Thus, one could wonder whether an "ordinary" election from Ammar's perspective would have been if an elected parliament had selected an unknown MP to assume the position of prime minister. In this respect, was Thaksin really that much different from, for example, Margaret Thatcher or Tony Blair?

[49] See Michael H. Nelson, "A Proportional Election System for Thailand?" in *Kanmueang kanpokkhrong Thai 2550: Thai Politics Forum 2007* (2007), pp. 21-43, and Michael H. Nelson, "The National Assembly of Thailand: Constructing a Representative Institution (1997 to 2007), pp. 83-120.

different outcome of the 2007 election, potentially including a fundamentally different coalition government led by the Democrats.[50]

The last point I will briefly touch upon is the return of vote counting from central counting stations in the constituencies to the polling stations. Polling stations in Thailand are village based and thus often reproduce the respective village's socio-political power structure. When the 1997 constitution introduced central counting stations the logic was to increase the freedom of the voters in making their choices by preventing village-level political power brokers from easily checking whether their exertion of influence on the voters, including vote buying, had been effective. Irrespective of the great management problems central vote counting faced (this author went through two such very exhausting exercises in 2001 and 2005), the idea was certainly worth considering.

In her vision statement to the Senate's ECT selection committee, Sodsri Sattayatham suggested to return vote counting to the polling stations. She was apparently under the (probably wrong) impression that in previous elections a significant number of ballot boxes were switched on their way from the polling to the counting stations.[51] After Sodsri was appointed to the ECT, she pushed, in her capacity as member of the CDC, for her idea and succeeded. "Her satisfaction that the advice will be implemented in the upcoming election was visible."[52] The International Foundation for Election Systems (IFES) supported Sodsri writing that, "Counting at the polling station greatly contributes to the transparency as well as accountability of the election process."[53] Generally, this might well be true. However, in Thailand's rural polling stations, transparency often relates to the effectiveness with which local canvassers can control the success of their work, while accountability may refer to the voters' need to answer to their village-level canvassers.[54] Observers of the Asian Network for Free Elections (ANFREL) found that "unauthorised individuals" were present in a number of polling stations that they had visited. "Such individuals included village headmen (*phuyaiban*), high-ranking local government officials, and police and army officers…Their presence leaves open the possibility of them exercising undue

[50] For a proportional recalculation of the 2007 result, see Table 3 in Michael H. Nelson, "The National Assembly of Thailand: Constructing a Representative Institution (1997 to 2007), p. 112. The three points about the deliberations of CDC members reported above can be seen as supporting research approaches to institutional development that give "due attention to micro foundations," including "the potential causal importance of political mistakes, misperceptions, and unintended consequences … on both strategic behavior and institutional outcomes." See Giovanni Capoccia, and Daniel Ziblatt, "The Historical Turn in Democratization Studies: A New Research Agenda for Europe and Beyond" in *Comparative Political Studies* (2010), Vol. 43, pp. 931-968 (p. 937f). Similarly, Vivien Schmidt, using the label "discursive institutionalism," pleads for "a framework for analysis capable of endogenizing agency in such a way as to explain the dynamics of institutional change and continuity." See Vivien A. Schmidt, "From Historical Institutionalism to Discursive Institutionalism: Explaining Change in Comparative Political Economy." Paper prepared for presentation at the American Political Science Association Meeting, Boston, Aug. 2008. Revision of a paper prepared for presentation to the biannual meeting of the Council for European Studies (Chicago, Ill., March 6-8, 2008), p. 2f. "Discursive institutionalism" is the same as "constructivist institutionalism", see Colin Hay, "Constructivist Institutionalism" in *The Oxford Handbook of Political Institutions* (2006), pp. 56-74.

[51] See *The Nation* (August 18, 2006).

[52] See *Bangkok Post* (May 6, 2007).

[53] See Robert A. Dahl et al., *Thailand: 2007 Pre-Election Technical Assessment Report* (2007), p. 47.

[54] Stokes used the expression "perverse accountability" if there was the possibility of negative sanctions for "wrong" voting. See Susan Stokes, "Perverse Accountability: A Formal Model of Machine Politics with Evidence from Argentina" in *American Political Science Review* (2005), Vol. 99, pp. 315-325.

influence over voters' freedom to select the candidate or party of their choice."[55] On the other hand, since the constituency-level electoral outcomes were almost invariably similar to previous elections, one might well doubt whether the vote-counting place really was of great significance. In that case, serious management issues, timeliness of the result, and transparency of the vote counting by the presence of citizen observers are good reasons to continue vote counting at the polling stations.

## The Election Commission of Thailand

ANFREL's about 40 staff members operating in 20 provinces were the only foreign election observers. In August 2007, a public spat occurred between the ECT and the European Union about its rather misconceived intention to dispatch an election observation mission, presumably comprising 150 to 250 personnel. The EU also wanted the ECT to sign a memorandum of understanding. Issues such as interference, patriotism, and sovereignty surfaced. Then-Foreign Minister Nitya Pibulsonggram stated, "We are not a failed state or on any watch list … We are mature. We can solve our own problems. I don't think we need anybody to teach us how to vote."[56] Thailand's main non-governmental election watchdog, the Peoples Network for Elections (P-Net), also kept to the background this time. Sodsri had accused them of the misuse of ECT funds in a previous election and did not want to apologize. Therefore, only members of local groups registered with the provincial election commissions (PEC) acted as "election observation volunteers." They received some training, an ECT-produced manual,[57] and a small allowance. One cannot assess the effectiveness of these volunteers because there are no substantial reports about their work. Given that the most important part of electioneering by the majority of winning candidates probably takes place underground and starts well before election day, the observation of voting and counting by poorly informed and motivated individuals might well be of limited use.

While each PEC had to propose three models of re-drawn constituencies to the ECT in order to reduce the 400 SMC to 157 MMC, the ECT had to establish the eight regional constituencies for the proportional vote. The ECT announced them on October 17, 2007.[58] Whereas this announcement aroused relatively little interest, an ECT regulation on electioneering[59] and an ECT announcement concerning principles of state support for the election,[60] both issued on October 24, 2007, caused a public outcry. The

[55] See Asian Network for Free Elections, *Thailand: Restoring Democracy* (2008), p. 43.

[56] See *Bangkok Post* (August 30, 2007). As with the referendum, the ECT performed the election in a routine manner. For a provincial-level view on the election, see Michael H. Nelson, "The Election of 2007 in Thailand: Observations from Chachoengsao Province" *KPI Thai Politics Up-date* (2009), no. 5.

[57] Samnakngan khanakammakan kanlueaktang, *Khumue asasamak ongkan ekachon nai krabuankan truatsop kanluektang* [Manual for volunteers of private organizations in the process of inspecting the election] (2007).

[58] Samnakngan khanakammakan kanlueaktang, "Ekasan khomun kanbaeng khetlueaktang samachik sapha phuthaenratsadon baep baeng khet lae baep satsuan" [Data document on the division of constituency and proportional MP constituencies] (2007).

[59] Khanakammakan kanlueaktang, "Rabiap khanakammakan kanluektang wa duay kanhasiang khopattipat lae khoham mihai pattipat nai suan thi kiaokhong kap kanlueaktang samachik sapha phuthaenratsadon lae kandamnoenkan dai dai khong phakkanmueang phusamak rau lueaktang lae phumisitlueaktang pho.so. 2550" [Regulation of the Election Commission on campaigning, practices and prohibitions relating to the election of members of the House of Representatives and any other actions by political parties, candidates, and voters 2007] (original version and first amendment).

[60] Khanakammakan kanlueaktang, "Prakat khanakammakan kanluektang rueang lakken kantamnoenkan khong rat nai kansanapsanun kanlueaktang samachik sapha phuthaenratsadon pho.so. 2550" [Announcement

normally demure *Bangkok Post* harshly judged, "The EC wants to limit political campaigning by a dictatorship of the bureaucracy."[61]

The list of restrictions was indeed impressive. Candidates could no longer hold the customary colorful parades on registration day. They could not any longer rent or erect billboards at intersections or hang banners from the ceilings of shop houses, nor were any voters allowed to show their support for a candidate or a political party by putting up election posters on their premises. Voters were also prohibited from allowing candidates to place posters on the walls or in the windows of their houses and shops. Posters put up by the candidates could not exceed 30x42 centimeters, and cutouts could not exceed 130x235 centimeters. They could be displayed only at public places that belonged to or were specifically arranged for by state agencies. The number of posters was limited to ten times the number of polling stations in a given constituency, cutouts to five times the number.

Most bizarrely, neither candidates nor political parties were allowed to hold what most observers would certainly think are key elements of any democratic election campaigns, namely election rallies. Instead, candidates and parties were supposed to participate in electioneering events (twice in each administrative district) organized for all candidates and parties by the PECs. Pick-up trucks could be used as campaign vehicles, though the number of sign boards attached to them was limited to two and to a size not exceeding that determined by the ECT—and candidates "must not modify these trucks to serve as stages for electioneering."[62] Candidates and parties could not rent advertising time on radio or television. Rather, they had to submit 30-second (candidates) and 10-minute (party) spots to the ECT for broadcasting them a number of times. Television and radio stations were not allowed to broadcast programs with only certain selected candidates, nor were candidates allowed to participate in any program that did not include all of their competitors.[63]

Although the ECT's restrictions certainly appeared to be excessive, it did not devise them purely on its own. Rather, section 236 (1) of the new constitution[64] had introduced a mandate for the ECT to pass such a regulation on campaigning in the interest of conducting an honest and fair election, as well as the announcement concerning state support in the interest of equal campaign opportunities for all candidates and political parties. Both aimed to undermine the perceived distortion of the composition of parliament through "money politics" by having the state take over important parts of electioneering from the candidates and parties. Article 59 of the election act, as amended by the coup-appointed CDA and NLA, also mandated the ECT to stipulate the rules of state support in five key areas of the campaign process. The ECT's documents merely reflected the content of this article.[65] Moreover, the pre-coup

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of the Election Commission about principles of conduct of the state in supporting the elections of members of the House of Representatives 2007] (original version and first amendment).

[61] See *Bangkok Post* (October 29, 2007).

[62] Rueangrot Chomsueb, "Naeothang mai nai kanhasiang lueaktang so.so. 50" [New directions in the electioneering for MPs 2007]. The author was the director of the ECT's public relations office.

[63] Shortly before these stipulations were made public, the National Institute of Development Administration (NIDA) had placed half-page advertisements in newspapers announcing a discussion with a small number of important party leaders. After October 24, a smaller advertisement told readers that the event had to be cancelled because of the ECT's prohibitions.

[64] This represented a substantial redesign of the equivalent Section 145 (1) in the constitution of 1997.

[65] Initially, the content of this article of the election act was even supposed to be part of the constitution, as section 98. When it was discussed during the preparation of the public hearing draft constitution, which eventually did not contain this section, there were doubts as to whether the list of state-organized actions

version of the election law, in article 49, merely said that candidates, parties, or any other person could not place election posters or cutouts "at public places owned by the state" (without permission). The amended election law (in article 60) added "or at private places" at the end of the quote. Thus, there could be no billboards at intersections, banners hanging from the ceilings of houses, or posters in the windows of shop houses and on walls—even if the owners as citizens had wanted to use their democratic right to express their political opinion by supporting a candidate and/or party).

The public outcry was so loud that the ECT had to retreat and issue amendments, both to the announcement and the regulation. Consequently, radio and television stations could use their professional principles and ethics in deciding which candidates and parties they should invite to their programs. Moreover, candidates were free to accept invitations from such stations, even if they were the only invitees. Candidates and parties could organize their own election rallies, and make speeches from advertising pick-up trucks. Registration day did not have to pass without its customary parades, music, dances, and voters cheering their favorites.

Finally, the ECT also did its part to demobilize, beyond what was stipulated in the law, the 111 former TRT executives "banned from politics" as part of a verdict by the coup-plotters' "Constitutional Tribunal" to dissolve TRT. One might recall that the pre-coup political party act merely stipulated that executive members of a dissolved party could not take part in forming "a new political party, be a member of an Executive Committee of political party nor be a promoter of a new political party" for five years.[66] Such former executives could still be members of political parties, run for parliament, become ministers and even prime minister. Coup leader Sonthi Boonyaratglin, with the "Announcement by the Council for Democratic Reform No. 27," blocked most of these possibilities by decreeing that executive members of dissolved parties would also lose their right to vote in elections.[67] Disenfranchised citizens, however, cannot run in elections or be members of the cabinet. The CDA and NLA faithfully added the content of Sonthi's decree to their amended version of the political party act.[68]

Nevertheless, the disqualified former members of TRT's executive board could still engage in the election campaign. An opportunity for blocking them from doing so arose when the Phuea Phaendin Party officially asked the ECT what exactly these former board members could do in the run-up to the election. The ECT's response was clear: nothing. They could not participate in election rallies by giving speeches, take pictures with election candidates, hold any informal advisory positions in parties, and

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meant that the candidates and parties themselves were prohibited from doing anything similar, for example, holding election rallies. See Khanakammathikan yokrang ratthathammanun [Constitution drafting committee], "Raingankanprachum khrang thi 20, 3 mesayon 2550" [Minutes of the meeting no. 20, April 3, 2007]. Typescript, pp. 122ff. Apparently, the ECT adopted a restrictive interpretation of this article.

[66] Sect. 69, Organic Law on Political Parties, B.E. 2541 (1998). Manuscript, Office of the Council of State.

[67] Announcement by the Council for Democratic Reform No. 27: Amendment of Announcement by the Council for Democratic Reform No. 15, dated 21 September B.E. 2549 (2006) (unofficial translation).

[68] Art. 98, Organic Act on Political Parties B.E. 2550 [2007] (unofficial translation prepared by IFES). Moreover, Sonthi's coup decree had also found its way into the 2007 constitution already, specifically in the form of section 68 (as part of "Rights to Protect the Constitution"). This section empowers individuals who know that people or political parties attempt to acquire state power by means not stipulated in the constitution (in particular, this refers to vote buying) to inform the Prosecutor General. He might investigate the case, and, if it has virtue, transfer it to the Constitutional Court. This court may dissolve that political party, which will make its leader and executive committee members lose their voting rights for five years.

give lectures at party meetings. The ECT went as far as prohibiting them from even becoming ordinary members of political parties.[69]

To be more precise, the ECT did not prohibit anybody from doing anything, because it did not issue any formal decision. It merely provided its "opinion" on the question submitted by the Phuea Phaendin Party. Thus, the ECT's answer merely was "advice" on the possible consequences certain actions taken by former TRT executives during the election campaign might have—especially for candidates and parties who benefited from such campaign help—in case anybody submitted a formal complaint to the ECT. This way, the politicians affected by the ECT's "advice" did not have any legal recourse. Of course, people who were against the detested political class of "electocrats" and in favor of the purpose of the coup could not care less. From their perspective, the TRT's former executives fully deserved their fate and had to be kept away from any active roles in political parties and elections.[70]

## The Election Result

Prior to the coup, some factions of TRT had considered a non-Thaksin version of the party. After the event, but before TRT's dissolution, some tried to save their skins by leaving TRT. Jubilant headlines read, "TRT sinking like Titanic,"[71] and "The end of the TRT juggernaut."[72] This latter editorial added, "The grand experiment that was Thai Rak Thai (TRT) ended yesterday with a terse message from its deposed leader, Thaksin Shinawatra, calling it quits from his new home in London."[73] Three months after the dissolution of TRT in May 2007, most of its remaining MPs had moved in with the tiny Peoples' Power Party (PPP). Samak Sundaravej (now deceased), on the invitation of Thaksin, assumed the position of party leader. Some of the disqualified 111 executives intensively cooperated with "untainted" former colleagues in setting up new parties. As a result, the pre-election party landscape included new outfits such as Ruam Jai Thai Chart Pattana (RJT), Phuea Phaendin (PP), and Matchimatthipattai (MCT). An earlier addition had been the Phracharaj Party (PRP), established by Sanoh Thienthong in April 2006, after he and his family members had left TRT. Banharn Silapa-archa's Chart Thai Party (CTP) gained some former MPs from TRT. Table 2 shows the initial post-election distribution of seats amongst these parties by region, while Table 3 provides detailed numbers and percentages of votes in the constituency and party-list contests by party and region.

[69] See *Matichon* (November 19, 2007).

[70] All this is in stark contrast to the crucial role Newin Chidchob and one of his brothers were allowed to play in forming the Abhisit government (Abhisit went with red roses to thank Newin for his help, after which they awkwardly embraced in front of cameras), running the Bhumjaithai party, and capturing the ministry of the interior, despite being "disqualified from politics".

[71] See *The Nation* (October 3, 2006).

[72] See *Bangkok Post* (October 4, 2006).

[73] Four years on, with Thaksin having taken control of the Phuea Thai party's election campaign from abroad via video links, and apparently being the key man in the (probable) election of 2011, the expression "calling it quits" seems to have been premature.

| | BKK | Central | North | NE | South | Regions Total | Party Lists | MPs Total |
|---|---|---|---|---|---|---|---|---|
| **People's Power** | 9 | 39 | 47 | 102 | 2 | 199 | 34 | **233** |
| **Democrat** | 27 | 35 | 16 | 5 | 49 | 132 | 33 | **165** |
| **Chart Thai** | -- | 18 | 6 | 7 | 2 | 33 | 4 | **37** |
| **Phuea Phaendin** | -- | 1 | 1 | 12 | 3 | 17 | 7 | **24** |
| **Ruam Jai Chart Pattana** | -- | -- | 2 | 6 | -- | 8 | 1 | **9** |
| **Matchima-thipattai** | -- | 2 | 2 | 3 | -- | 7 | -- | **7** |
| **Phracharaj** | -- | 3 | 1 | -- | -- | 4 | 1 | **5** |
| **TOTAL** | **36** | **98** | **75** | **135** | **56** | **400** | **80** | **480** |

**Table 2:** Initial election results 2007 (number of seats by party and region)

*Sources*: *Krungthep Thurakit* (December 25, 2007); *Matichon* (December 26, 2007); Samnakngan khanakammakan kanlueaktang, "Praden thalaeng khao wan thi 35 thanwakhom 2550 wela 13.30 no" [ECT press release December 25, 2007, 13:30 hours].

It had been widely anticipated that the Democrat Party would improve on its result in the 2005 election (96 constituency and 26 party-list MPs). On the other hand, PPP was set to take fewer seats than TRT (310 constituency and 67 party-list MP). The decisive questions were, first, whether PPP could manage an absolute majority of seats (241), or at least come close in order to claim a clear first right to form a coalition government. The second question was whether the gains of the Democrats would be high enough to enable it to try forming a coalition government with the smaller parties and thus exclude PPP from the reigns of power.

The election result, to an extent, represented a return to the situation of 2001 (Table 4). The PPP returned to the vote shares TRT had in 2001, before its shares substantially increased in 2005 due to mergers with other parties, successful government, a charismatic leader, and a weak opposition. The Democrats were able to increase their share of the constituency votes. Most remarkably, they received almost as many party-list votes as the PPP did, raising their share from 23.23 percent in 2005 to 40.45 percent in 2007—a clear reaction of the voters to the political turmoil since February 2006. Thus, the Democrats' party list was a considerably more popular choice (by 10.24 percent) than its constituency candidates were. The PPP's party list was also more popular than its candidates were, but more modestly so, at 4.25 percent. The medium-level parties (in fact, "small" parties would be a better descriptor) altogether gained a slightly bigger share of the constituency votes than the Democrats did. Yet, their share of MPs was considerably smaller (69 to 132).

| | | Bangkok | Central | North | Northeast | South | Total |
|---|---|---|---|---|---|---|---|
| **PPP** | **Const.** | 3,083,118 (40.21%) | 5,822,407 (32.52%) | 6,088,524 (43.68%) | 10,937,086 (46.05%) | 1,040,095 (10.43%) | **26,971,230 (36.83%)** |
| | **PL** | 1,085,724 (40.52%) | 2,585,250 (33.32%) | 2,559,820 (45.12%) | 5,772,679 (59.29%) | 335,430 (8.02%) | **12,338,903 (41.08%)** |
| **DEM** | **Const.** | 3,748,067 (48.88%) | 5,794,929 (32.36%) | 3,593,846 (25.78%) | 1,913,139 (8.05%) | 7,078,353 (70.97%) | **22,128,334 (30.21%)** |
| | **PL** | 1,422,308 (53.08%) | 3,468,948 (44.70%) | 2,169,231 (38.23%) | 1,703,972 (17.50%) | 3,384,045 (80.89%) | **12,148,504 (40.45%)** |
| **PP** | **Const.** | 185,439 (2.42%) | 680,604 (3.80%) | 695,728 (4.99%) | 4,347,186 (18.30%) | 738,236 (7.40%) | **6,647,193 (9.08%)** |
| | **PL** | 35,437 (1.32%) | 239,041 (3.08%) | 211,217 (3.72%) | 948,567 (9.74%) | 162,238 (3.88%) | **1,596,500 (5.32%)** |
| **CTP** | **Const.** | 226,553 (2.95%) | 3,143,555 (17.56%) | 1,256,126 (9.01%) | 1,617,397 (6.81%) | 242,922 (2.44%) | **6,486,553 (8.86%)** |
| | **PL** | 41,084 (1.53%) | 743,800 (9.59%) | 160,517 (2.83%) | 207,717 (2.13%) | 60,414 (1.44%) | **1,213,532 (4.04%)** |
| **RJTCP** | **Const.** | 106,637 (1.39%) | 158,303 (0.88%) | 862,462 (6.19%) | 2,055,105 (8.65%) | 300,397 (3.01%) | **3,482,904 (4.76%)** |
| | **PL** | 15,888 (0.59%) | 103,199 (1.33%) | 149,480 (2.63%) | 408,428 (4.19%) | 63,466 (1.52%) | **740,461 (2.47%)** |
| **MCT** | **Const.** | 160,632 (2.10%) | 1,092,510 (6.10%) | 943,067 (6.77%) | 1,502,782 (6.33%) | 213,339 (2.14%) | **3,912,330 (5.34%)** |
| | **PL** | 36,075 (1.35%) | 121,265 (1.56%) | 126,462 (2.23%) | 147,709 (1.52%) | 18,871 (0.45%) | **450,382 (1.50%)** |
| **PCR** | **Const.** | 36,412 (0.47%) | 781,316 (4.36%) | 134,080 (0.96%) | 643,355 (2.71%) | 80,042 (0.80%) | **1,675,205 (2.29%)** |
| | **PL** | 9,306 (0.35%) | 189,606 (2.44%) | 38,520 (0.68%) | 144,947 (1.49%) | 26,472 (0.63%) | **408,851 (1.36%)** |
| **Others** | **Const.** | 120,433 (1.57%) | 432,955 (2.42%) | 365,392 (2.62%) | 736,380 (3.10%) | 280,075 (2.81%) | **1,935,235 (2.64%)** |
| | **PL**[a] | 33,924 (1.27%) | 308,801 (3.98%) | 258,251 (4.55%) | 402,877 (4.14%) | 132,512 (3.17%) | **1,136,365 (3.78%)** |
| **TOTAL** | **Const.** | 7,667,291 (10.49%) | 17,906,579 (24.45%) | 13,939,225 (19.03%) | 23,752,430 (32.43%) | 9,973,459 (13.62%) | **73,238,984 (100%)** |
| | **PL** | **2,679,746 (8.92%)** | **7,759,910 (25.84%)** | **5,673,498 (18.89%)** | **9,736,896 (32.42%)** | **4,183,448 (13.93%)** | **30,033,498 (100%)** |

**Table 3:** Constituency and party-list votes by party and region

*Source*: Author's calculation based on Samnakngan khanakammakan kanlueaktang, *Khomun sathiti lae phonkanluektang samachik sapha phuthaenratsadorn pho so 2550*.[74]

[a] This category includes 24 political parties.

As expected, small parties did not constitute viable party-list choices. Outside of their immediate strongholds, they could typically only recruit individual high-scoring candidates in some constituencies, while the number of proportional votes would be

[74] For equivalent data on the 2005 elections, see Michael H. Nelson, "Thaksin's 2005 Electoral Triumph: Looking Back From the Election in 2007." See also Michael H. Nelson, "Thailand's House Elections of 6 January 2001: Thaksin's Landslide Victory and Subsequent Narrow Escape" in *Thailand's New Politics: KPI Yearbook 2001* (2002), pp. 283-441.

much smaller. In Uttaradit, for example, RJT's constituency candidate scored 41,469 votes, while RJT's party list received only 8,095 votes. All remaining parties, listed as "Others," were irrelevant.

| | 2001 | | 2005 | | 2007 | |
|---|---|---|---|---|---|---|
| | **Co** | **Pl** | **Co** | **Pl** | **Co** | Pl |
| **TRT/PPP** | 37.06 | 40.64 | 55.51 | 61.17 | 36.61 | **41.08** |
| **DEM** | 25.90 | 26.58 | 24.96 | 23.23 | 30.29 | **40.44** |
| **Medium** | 26.84 | 18.47 | 18.02 | 10.98 | 30.36 | **14.70** |
| **Others** | **10.18** | **14.31** | **1.29** | **4.63** | **2.74** | **3.76** |

**Table 4:** Vote shares of parties by constituency and party list (in percent)

*Source*: Author's calculations, based on official and unofficial ECT election results.

Table 2 on the distribution of seats already shows significant regional differences in the election result. The Democrats reversed their 2005 result in Bangkok (four seats) by beating PPP with 27 to nine seats, due largely to the Bangkok voters' rational voting behavior (meaning that the decisive share of the voters in Bangkok tend to base its decisions, from election to election, on a comparative evaluation of the electoral options in the context of the given political situation). As expected, the Democrats also won the great majority of seats in the South, their stronghold, while PPP dominated the Northeast and parts of the North. The central region showed a mixed result. Table 5 presents another perspective on regional differences, this time concerning different vote shares in the newly introduced proportional voting zones. In addition, table 6 shows how these vote shares translated into constituency and proportional MPs for each party in the eight zones.

While the PPP led the Democrats in zones one to four with 147 to 22 constituency and 23 to 11 party-list seats, the Democrats had an advantage in zones five to eight, leading PPP with 110 to 52 constituency and 22 to 11 proportional seats. The remaining five parties were left with 69 constituency MPs and 13 party-list MPs. Considering the average results of the proportional vote, CTP, RJT and PRP would not have received party-list MPs under the 1997 rules, because they did not reach five percent of the national vote total. Although MCT received more proportional votes nationwide than PRP, it did not get any party-list MP, unlike PRP, which got one. This was because PRP managed to pass the arithmetic threshold in zone five, while MCT's votes were dispersed among all zones. The election system and the political situation in Sakaew province combined to enable the Thienthong household—via their electoral

vehicle PRP—to be represented in the national parliament with four of its family members (adding the phenomenon of "family delegates" to that of "clique delegates").

| Zone | PPP | | DEM | | CTP | | PP | | RJT | | MCT | | PRP | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | **Co** | **Pl** | **Co** | **Pl** | **Co** | **Pl** | **Co** | **Pl** | **Co** | **Pl** | **Co** | **Pl** | **Co** | PL |
| **1** | 47.6 | 49.6 | 25.7 | 35.6 | 6.5 | 1.7 | 6.7 | 3.8 | 3.5 | 1.7 | 6.3 | 2.1 | 0.5 | -- |
| **2** | 40.7 | 45.9 | 19.1 | 33.5 | 14.5 | 5.0 | 7.7 | 6.3 | 6.9 | 3.2 | 5.3 | 1.8 | 3.6 | **2.1** |
| **3** | 50.0 | 66.2 | 6.4 | 14.5 | 5.9 | 1.4 | 19.0 | 9.4 | 6.8 | 2.4 | 6.0 | 1.1 | 2.4 | **1.4** |
| **4** | 44.2 | 57.2 | 8.1 | 19.1 | 9.0 | 3.0 | 18.3 | 9.7 | 6.0 | 1.8 | 8.8 | 2.3 | 2.8 | **1.5** |
| **5** | 31.4 | 34.2 | 27.2 | 39.8 | 7.4 | 3.1 | 8.7 | 5.3 | 10.3 | 7.1 | 4.7 | 1.4 | 7.4 | **4.8** |
| **6** | 40.6 | 41.4 | 44.3 | 50.6 | 3.7 | 1.7 | 4.6 | 2.3 | 1.2 | 0.6 | 2.4 | 1.2 | 1.4 | **0.5** |
| **7** | 28.5 | 28.8 | 35.9 | 47.2 | 23.0 | 14.4 | 1.7 | 2.3 | 0.6 | 1.3 | 7.1 | 1.6 | 0.3 | -- |
| **8** | 10.9 | 8.3 | 69.8 | 80.2 | 2.5 | 1.5 | 7.7 | 4.1 | 3.2 | 1.6 | 2.3 | 0.5 | 0.6 | **0.7** |
| **Total** | **36.6** | **41.1** | **30.3** | **40.4** | **8.9** | **4.0** | **9.1** | **5.3** | **4.7** | **2.5** | **5.3** | **1.5** | **2.4** | **1.4** |

**Table 5:** Vote shares in percent (by zone, constituency, and party list)

*Source*: Author's calculations based on official and unofficial ECT election results, excluding reelections.

| Zone | PPP | | DEM | | CTP | | PP | | RJT | | MCT | | PRP | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | **Co** | **Pl** | **Co** | **Pl** | **Co** | **Pl** | **Co** | **Pl** | **Co** | **Pl** | **Co** | **Pl** | **Co** | **PL** |
| **1** | 37 | 5 | 9 | 4 | 1 | -- | 1 | 1 | 1 | -- | 1 | -- | -- | -- |
| **2** | 29 | 5 | 8 | 3 | 10 | 1 | -- | 1 | 1 | -- | 1 | -- | 1 | -- |
| **3** | 47 | 7 | 1 | 2 | -- | -- | 1 | 1 | 1 | -- | -- | -- | -- | -- |
| **4** | 34 | 6 | 4 | 2 | 5 | 1 | 5 | 1 | -- | -- | 3 | -- | -- | -- |
| **5** | 15 | 3 | 17 | 4 | 2 | -- | 7 | 1 | 5 | 1 | 1 | -- | 3 | **1** |
| **6** | 20 | 4 | 29 | 5 | -- | -- | -- | 1 | -- | -- | -- | -- | -- | -- |
| **7** | 15 | 3 | 19 | 5 | 13 | 2 | -- | -- | -- | -- | 1 | -- | -- | -- |
| **8** | 2 | 1 | 45 | 8 | 2 | -- | 3 | 1 | -- | -- | -- | -- | -- | -- |
| **Total** | **199** | **34** | **132** | **33** | **33** | **4** | **17** | **7** | **8** | **1** | **7** | -- | **4** | **1** |

**Table 6:** Number of MPs (by zone, constituency, and party list)

*Source*: Author's calculations based on official and unofficial ECT election results, excluding reelections.

Regarding the formation of a government, Table 2 shows that even a Democrat-led six-party coalition would have given a government under Abhisit Vejjajiva only a tiny and probably unworkable majority of seven seats in the House (247 in total). Besides, in trying to form a coalition government, the Democrats would have to break with political custom, that the first right to form a government belongs to the party with the highest number of seats. In any case, the public consideration of different scenarios ended after only a few days, when RJT, MCT, and PRP agreed to join PPP. This gave Samak a majority of 14 seats in the House. Since the PPP deemed this too small to be workable under Thai parliamentary conditions, it invited CTP and PP to join its government. This posed a problem for CTP's Banharn Silapa-archa, because he had earlier categorically

rejected any possibility of ever joining a PPP-led government. However, in November, he had said that all commitments had ended and that talks would have to start anew after the election result was known. As a face-saving measure, CTP and PP established five conditions for joining the government. They were respect for the monarchy; respect for Prem Tinsulanonda; no revenge against coup-connected people; no interference with the judicial process against Thaksin; no dissolution of the Asset Examination Committee. The PPP agreed, and so the government with Samak Sundaravej as prime minister was sworn in on February 6, 2008, leaving the Democrats as the sole opposition party.

## Conclusion

Perhaps, the conventional Western political science perspective mentioned at the beginning is not entirely wrong when it perceives the two events described in this article as elements of a return to "democracy" in Thailand—"Thai-style" democracy, that is. Thus, writing about the constitutional referendum and the elections of 2007 provides but snapshots taken of a moving object—the Thai political system, its actors, and its constitution. In particular, the referendum and the elections were steps to steer Thailand's politics away from the "Thaksin regime," and restore what Kasian Tejapira called, "an electocracy under royal hegemony in which the military, the monarchical network and the judiciary—that is the unelected, virtuous, super-Thai elites—assume a behind-the-scenes guardian/corrective and arbiter/moderator role."[75] Thitinan Pongsudhirak put the political situation in Thailand this way, "Westerners think of Thailand as a democracy, ruled by the will of the majority. In reality, our country is governed by an establishment made up of the monarchy, military and bureaucracy."[76] In other words, a set of three pre-democratic power groups compete with the country's formal democratic political system, and can act—as the coup of September 2006 and the PAD protests in 2008 again demonstrated—as veto powers. Following Wolfgang Merkel's typology, Thailand can be categorized as a "domain democracy," because these veto actors are able, and at times willing, to deny the democratically elected representatives their right to exercise effective government.[77]

If "constitutions can be regarded as ceasefire agreement or a peace treaty between social forces struggling for power in a polity,"[78] then the drafting of the 2007 Thai constitution was a case of unilateral "negotiations" performed amongst only one set of socio-political forces, meaning members of the veto powers, while the most important competing forces were excluded. Since essentially imposed contracts—even though they have passed through the legitimizing exercise of a "referendum"—cannot bind the excluded parties, they were free to contest the "agreement" and its political

[75] See Kasian Tejapira, "Democratization and the Thai Military Coup d'Etat." Lecture notes prepared for the Violet Wurfel ASEAN Lecture-Series, Lecture#1. University of the Philippines, Manila, 13 March 2007.

[76] See *New York Times* (April 18, 2009).

[77] See Wolfgang Merkel, "Embedded and Defective Democracies" in *Democratization* (2004), Vol. 11, pp. 33-58. This situation is the gist of the traditional issue of "civil-military relationships." For a recent assessment of this relationship in Thailand, see Paul Chambers, "In the Shadow of the Soldier's Boot: Assessing Civil-Military Relations in Thailand" in *Legitimacy Crisis in Thailand* (2010), pp. 197-233. For a recent attempt on the tricky issue of how the Thai monarchy relates to the country's developing democracy, see Søren Ivarsson and Lotte Isager (eds.), *Saying the Unsayable: Monarchy and Democracy in Thailand* (2010).

[78] See Ulrich K. Preuss, "Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalization" in *New York Law School Law Review* (2006/07), Vol. 51, pp. 467-496 (p. 469).

consequences at the first possible opportunity. This opportunity arrived when Samak Sundaravej assumed the premiership. Before long, his government embarked on a course to amend the 2007 constitution. This move prompted the People's Alliance for Democracy (PAD) to restart its protests on May 25, 2008. They soon went beyond the mere blocking of constitutional amendments. Rather, the Samak-led "country-selling hooligan puppet government," as a PAD propagandists called it,[79] had to be expelled altogether. The protest lasted for 193 days and included the prolonged blocking of key public roads, the occupation of the Government House compound, and attempts to provoke another military coup. They culminated in the occupation of Don Mueang and Suvarnabhumi airports.[80] Serious questions arose as to what perceptions of ends could justify a supposedly democratic social movement's choice of means given that a democratically elected government was in place, and that amending the constitution was its constitutional right. Few governments in western democracies that had a similar degree of electoral legitimacy as the one led by Samak Sundaravej would have tolerated that a right-wing protest group prevented them from working in their respective seats of government by storming and occupying their premises. In Thailand, the PAD protests were alternatively seen as expressions of "real democracy,"[81] or as "anti-democratic,"[82] or "ultra-royalist anti-democratic."[83] This range of views illustrates well how contested concept, structures, and practice of democracy are in Thailand.

I ended the original manuscript with the sentence, "An end to this contest, and thus a more consolidated democracy, does not seem to be on the horizon." In fact, soon after Abhisit Vejjajiva had formed his government in December 2008, with more than a little help from military circles as well as defectors from the People's Power/Phuea Thai party, the first UDD-led protests occurred, only to be subdued in April 2009. After one year of regrouping and preparation, the UDD protests from March to May 2010 posed a much bigger challenge to the Abhisit government. Following the failure of mediation attempts, Prime Minister Abhisit used the military for overrunning the UDD's barricades in inner Bangkok, resulting in 92 dead and around 2,000 injured.[84] Some red-shirt leaders fled the country, while most remained in jail, accused of terrorism and of wanting to topple the monarchy, until bail was finally granted on February 22, 2011. At the same time, repeated statements by the prime minister seemed to indicate that new elections would be held sometime in mid-2011 (later, this was narrowed down to the

[79] See *Phuchatkan* (September 9, 2008).

[80] For a chronology of the events, see the excellent photo reports of Nick Nostitz, *Red vs. Yellow. Volume 1: Thailand's Crisis of Identity* (2009), and Nick Nostitz, *Red vs. Yellow. Volume 2: Thailand's Political Awakening* (2011).

[81] See *The Nation* (May 24, 2009).

[82] See Chang Noi [pseudonym], "PAD: Bulldog on a leash or another nail in democracy's coffin?" (July 21, 2008; www.geocities.com/changnoi2/padmeaning.htm, last accessed: December 31, 2008).

[83] See Kasian Tejapira, "The Misbehaving Jeks: The Evolving Regime of Thainess and Sino-Thai Challenges." Paper prepared for ARI Asia Trends 2008 Conference on "Chineseness Unbound: Boundaries, Burdens and Belongings of Chineseness outside China," organized by Asia Research Institute, National University of Singapore, Singapore, September 11, 2008, p. 33. Similar problems of democracy had already characterized the first round of PAD protests. See Michael H. Nelson, "'People's Sector Politics' (*Kanmueang Phak Prachachon*) in Thailand: Problems of Democracy in Ousting Prime Minister Thaksin Shinawatra" *Southeast Asia Research Centre Working Paper Series*, No. 87.

[84] See Michael H. Nelson, "Thailand's Legitimacy Conflict between the Red Shirt Protesters and the Abhisit Government: Aspects of a Complex Political Struggle" in *S+F. Sicherheit und Frieden – Security and Peace* (2011), Vol. 29, pp. 14-18.

last Sunday of June or the first Sunday of July).[85] As indicated by the expression "'no-choice' democracy," mentioned at the beginning of this article, it is an open question whether and to what degree fresh elections will be democratically meaningful.

[85] The political party landscape has changed from what is reported in Table 2. At the end of January 2011, the situation is approximately as follows (as reported in *Matichon*, January 28, 2011:2): Phuea Thai (187 MPs); Democrats (171 MPs); Bhumjaithai (31 MPs); Phuea Phaendin (31 MPs); Chart Thai Pattana (24 MPs); Ruam Jai Thai Chart Pattana (9 MPs); Pracharaj (8 MPs); Social Action (5 MPs), and Matuphum (3 MPs). Two MPs were not under any party. Nine seats were unaccounted.

# "Property Entails Obligations": Land and Property Law in Germany*

**Fabian Thiel****

*"No man made the land."****

## The Legal Framework for Planning and Property Rights in Germany

*"Urban planning determines the legal fate of urban land."*
(German Constitutional Court, "Legal Expertise on Building Responsibilities",[1] 1954)

With respect to absolute landownership and its restrictions, property is a "key player" for spatial development in Germany. The country is endowed with a highly sophisticated system of fundamental rights protection in general and of private property protection in particular. Private property in land is protected under the German Constitution and the legal system (federal law and state law). The most common form of land titling occurs as absolute, exclusive ownership (Art. 14 Para 1 Sentence 1 German Constitution; Section 903 Civil Code). The absolute owner, who is not subject to any general restrictions imposed by law or any rights of third parties, has complete control of the land and the buildings as its immovable fixtures connected with the land. "Immovable property", which land ideally represents, includes land + buildings/improvements (immovable fixtures)[2] + property rights + servitudes (personal rights combined with the property ownership).

The term "land" has to be interpreted as land including buildings or improvements (e.g., real assets), property rights which are appraisable for mortgages and hypothecs, to determine co-ownership value or for capital gain, and servitudes. The concept of social obligations of ownership within the German Constitution has been a common concern ever since.[3] The same is true for Europe where the social responsibility of landowners has a long heritage, with special respect to German constitutional law. With article 14 para 2 of the German Constitution, a formidable statement on the social role of property was formulated; one which could be deemed a

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*** J.S. Mill, *Principles of political economy and chapters on socialism*, 1848, (reissued edition 2008), p. 233.

[1] See the decision of the German Constitutional Court: *Baurechtsgutachten* (BVerfGE 3, p. 407).

[2] The term "building" may be interpreted in a broad sense; even e. g. golf courses and housing boats as immovable fixtures with the land can be subsumed under the term "building".

[3] Art. 544 of the French Civil Code states: "Ownership is the right to enjoy and dispose of things in the most absolute manner, provided, however, they are not used in a way prohibited by statutes or regulations".

"social model" of some significance. The model seemed to contrast, even conflict, with the appeal to individualism of Section 903 of the Civil Code, whereby "the owner of a thing may, to the extent that a statute or third party rights do not conflict with this, deal with the thing at his discretion and exclude others from every influence".

**Socially Just Property Order vs. Private Property Protection: A Contradiction?**

The "social model" of property clearly requires landowners to act in a socially responsible manner, as determined by regulations authorised by the legislator. The contents and limits of property rights aim to promote a "socially just property order". This means that the social obligation must meet the proportionality test and allows (under certain circumstances) government interventions that depend on the social importance of the property type which may change over time.[4] The German Constitution distinguishes two forms of property restrictions (see Figure 1 below):

- the determination of content and limits (Art. 14 Para 1, Sentence 2), and
- expropriation (Art. 14 Para 3), e.g., as a last resort for the public interest in connection with urban land use planning and its implementation.

| **Meaning of "property" according to Art. 14 German Constitution** | | |
|---|---|---|
| **Property**<br>(Art. 14 Para 1 Sentence 1) | **Content and Limit** | **Expropriation**<br>(Art. 14 Para 1 Sentence 2)<br>(Art. 14 Para 3) |
| ↓ | ↓ | ↓ |
| Private property rights<br>Rights given by public law and based on owner's performance<br>No property: Possibilities, (business) expectations, chances and wealth | Government action to determine contents and limits Generally: no compensation required (balance between private and public interests (proportionality)<br>Protection of interest | Legal and administrative action<br>Public interest<br>Civil court procedure for compensation<br>Compensation (not necessarily due to the market value) |

***Figure 1**: The concept of "property" within Art. 14 of the German Constitution*

In case law from the German Federal Constitutional Court, extensive efforts have been made to demarcate the parameters of Para 1 and 3 of Art. 14 of the German Constitution. Despite this, discussion and interpretation of the combined with Art. 14 are anything other than decisively resolved. This is true in respect of the social and natural functions of non-renewable resources, and the legally justified governmental interventions to restrict and – even more essential – to re-define private property rights in the public interest. The content and limits of "expropriation" are entirely clear, at least in theory: "Expropriation means a deprivation of property in an individual case directed at a transfer of property from one person to another in order to achieve an

[4] See A. McHarg, "The Social Obligations of Ownership and the Regulation of Energy Utilities in the United Kingdom and the European Union" in *Property and the Law in Energy and Natural Resources* (2010), eds. A. McHarg, B. Barton, A. Bradbrook and L. Godden, pp. 360 - 387.

objective of public interest",[5] consisting of all general restrictions of property imposed by law that constitute a determination of content and limits in the sense of Art. 14 Para 1 Sentence 2 of the German Constitution.

However, the problem lies within the interpretation of Art. 14 Para 1 Sentence 2 German Constitution, since it does not say anything about compensation.[6] All general restrictions of property imposed by law do only constitute a determination of content and limits (Art.14 Para 1 Sentence 2).[7] Interestingly, according to the European Convention on Human Rights (ECHR) from 1950, the possibility to restrict private land use without compensation for general interest purposes is one of the three basic principles of ECHR which serves as an important legal document of the European Union.[8] In Germany, there is no such thing as a regulatory expropriation or takings by statute. Compensation serves as a consequence of expropriation,[9] but also as a balancing factor within the principle of proportionality. An expropriation for the benefit of private persons or companies is not excluded, as expropriation can be done for the public good: the expropriation of private real estate in favour of a car manufacturer for the purpose of building a car testing range in an economically weak region is considered as generally possible when pursuing a public interest.[10]

In sharp contrast[11] to Art. 14 Para 1 Sentence 1 German Constitution/Section 903 Civil Code, according to Art. 15 German Constitution, land, natural resources, and means of production (factories, banks) may for the purpose of socialisation be transferred to public ownership or other forms of public enterprise[12] by a law that determines the nature and extent of compensation. This innovative constitutional regulation requires a law by the federal Government in order to be fully implemented. The aim of property steering and implementation in favour of new forms of communal (and collective) property[13] and/or public enterprises[14] for the sectors:

- building industry and real estate (e. g., commercial developers; public building-principals);
- energy (e.g., coal, water or geothermal energy);

[5] See the decision of the German Constitutional Court: *Nassauskiesung* (BVerfGE 58, p. 300).

[6] See I. del Guayo, G. Kühne and M. Roggenkamp, "Ownership Unbundling and Property Rights in the EU Energy Sector" in *Property and the Law in Energy and Natural Resources* (2010), eds. A. McHarg, B. Barton, A. Bradbrook and L. Godden, pp. 326 - 359.

[7] Ibid., p. 346.

[8] Principle 1 ECHR describes the guarantee of property; Principle 2 ECHR allows the possibility of expropriation in the public interest.

[9] Compensation for expropriation and compensation for damages from public planning and building law damages as well can be made below the market value. A general prescription for any compensation is not possible. The compensation surely depends on the motivations and rationalities of both involved parties – the landowners *and* the government.

[10] See the decision of the German Constitutional Court: *Boxberg* (BVerfGE 74, p. 264).

[11] The question: "The earth – private or common?" does not only arise in Germany, but is an academic, ideological and political "hot issue" all over the world. *See* A. Varley, "Private or Public: Debating the Meaning of Tenure Legalisation" in *International Journal of Urban and Regional Research* (2002), Vol. 26, No. 449.

[12] Public enterprises can be organised as indeed workable within the existing structure of the market economy. Common property forms as institutional framework for companies may be built upon beside private property. See C. Dahlman, *The Open Field System and Beyond: A Property Rights Analysis of an Economic Institution* (1980).

[13] See J.G. Backhaus, *Gemeineigentum – Sozialgemeinschaften und Landesgemeinschaft: Eine ökonomische Analyse*, Research Memorandum RM 93-013, Limburg University (1993).

[14] See L. v. Mises, *Die Gemeinwirtschaft* (1976).

- industries (e.g., steel industry) and
- banks and insurance companies has to be politically desired.[15] With respect to the compensation, the third and fourth sentence of Para 3 of Article 14 German Constitution shall apply *mutatis mutandis*. The following (figure 2) shows a possible future alternative to realise Art. 15 German Constitution as a contingency plan, since the norm still represents a "terra incognita" as a result of political obstacles that prevent its implementation. Though, Art. 15 is part of the existing constitution; it could not become obsolete even after decades of neglect and non-use.
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**Figure 2**: "Terra Incognita": The concept of democratic socialisation and public participation within Art. 15 German Constitution.

Provided it complies with the principle of proportionality, the German Federal Government may guide and restrict the use of real estate property and the property rights, in order to protect and promote public interests via Art. 15 German Constitution and public planning law. Restriction on private property is thus unconstitutional, should pursue public interest ineffectively. This also applies should the very least degree of force necessary to achieve the aim be deployed; so too if there is no reasonable relationship between the means employed and the aim pursued. However, it is not only the task of the state to guarantee property rights and the inheritance of these rights. Another element of "regulatory quality" is that the state defines and implements underlying legal and institutional conditions. The state must ensure that "public good" of the ownership of land shall be used, to the maximum possible value for all (Article 14 Para 2 German Constitution).

Hence, one of the main principles of the social market economy is the principle of "property entails obligations". This statement is of paramount importance for the land market, investments and a comprehensive land policy. The assumption is made that what is known as the "freedom to build" forms an essential element of the individual

[15]From the perspective of property analytic approach, good property management in the sense of good governance is the key.

land ownership, although it cannot be directly derived from Art. 14 Para 1 Sentence 1 of the German Constitution. Individual landowners are only entitled to make personal use of this right whereby it is possible to ensure that the building activity does not counteract public purposes (e.g., environmental issues). The "right to build" is thus be formed by urban development law and construction statutes; it does not include or create a right to profit from property.[16]

Land use models with the concept of common property resources – as constitutionally prepared by Article 15 of the German Constitution – or common-pool resource systems with internal regulations, participation and decentralisation strategies to avoid a natural resource 'free-for-all' mentality[17] are underdeveloped in Germany. Land management and socio-ecological land policy also need a sound land use planning system. As an innovative land use alternative, agricultural[18] associations, service/producer cooperatives, group rights regarding common property resources (land, forest, water, energy) and collective entrepreneurship[19] are additional and important instruments for secure land rights. This applies not only in Germany, but also on global scale in view of the "économie sociale" and the people-centred development context.[20] "Économia popular y solidaria", "Community Economy", and "Économie Solidaire" are based on key principles such as strictly voluntary membership and exit options, autonomy and independence from government activities ("third way"), self-organisation, and governance. As a result, autonomous decisions regarding objectives, output, strategies, marketing, sales, and management are made by both participants and shareholders. Cooperatives encourage self-help groups,[21] house construction and business communities, income generation for women and agriculture food processing. Moreover, cooperatives and associations can provide access to (micro-) credit institutions and build up credit/loan/or mortgage communities, which may include value chain business approaches.

## The Hierarchy of Spatial Planning

German property and planning systems are supposed to base on property market transparency and flexibility.[22] In theory, precautions in favour of competition over use rights and against speculation and the manipulation of prices are often structurally enshrined within the land use planning guidelines and mechanisms. However, the reality

[16] See D. Krueckeberg, "The difficult character of property: To whom do things belong?" in *Journal of the American Planning Association* (2003), Vol. 61, No. 301; ed. C.-H. David, *Law and Practice of Urban Development in the Federal Republic of Germany* (1993), p. 12.

[17] The design principles for governing sustainable resources are mainly derived from long-enduring studies of institutions undertaken by the 2009 Nobel-prize winner Elinor Ostrom. See E. Ostrom, *Governing the commons*: *The evolution of institutions for collective action* (1990); see E. Ostrom, "Design Principles of Robust Property Rights Institutions: What Have We Learned"? in *Property Rights And Land Policies* (2009), eds. G.K. Ingram and Y.-H. Hong, pp. 25 - 51.

[18] See C. Iliopoulos, "Organisational Remodelling of Agriculture Cooperatives" in *Beiträge der genossenschaftlichen Selbsthilfe zur wirtschaftlichen und sozialen Entwicklung* (2009), eds. H.J. Rösner and F. Schulz-Nieswandt, pp. 627 - 642.

[19] See M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1965/1971).

[20] See H.-H. Münkner, *Ten lectures on co-operative law* (1982); J.W. Kramer, The Allocation of Property Rights within Registered Co-operatives in Germany, *Wismar Discussion Papers*, No. 10/2003 (2003), pp. 5 - 15.

[21] See H.-H. Münkner, *Co-operatives and the State beyond Europe* (2000).

[22] See H. Dieterich, E. Dransfeld and W. Voß, *Urban land and property markets in Germany* (1993), pp. 190 -203.

proves rather different: decisions regarding land use changes must be made by the municipality during the planning process, due to the difficulties in assessing external effects, among others. The planning process should be neutral – meaning, the competing claims of the diverse stakeholders should be balanced in order to optimise the common good. Germany has a legal basis for a comprehensive hierarchic spatial planning system[23] (e.g., the Federal Spatial/Territorial Planning Act, the Federal Building Code, the Federal Land Utilisation Ordinance or the Urban Renewal and Development Act) and for informal planning approaches which give the organizational framework conditions affecting urban and regional development with detailed regulations for urban planning law and building permission applications (see Figure 3). These applications are workable for land reallocation, village renewal, building regulation laws, and judicial control instruments.[24]

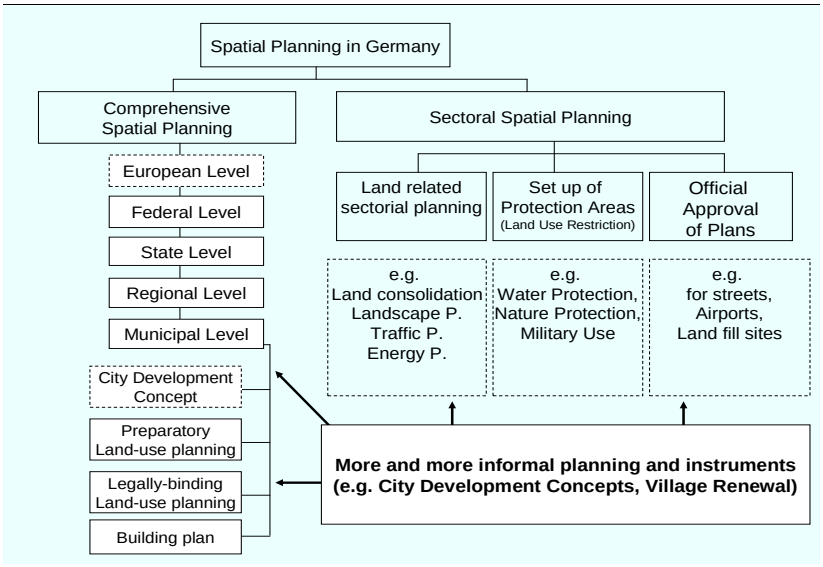


***Figure 3**: The hierarchy of spatial planning in Germany*

The interlocking set of land use plans on national, regional, and communal levels (see Figure 3) is necessary to avoid urbanisation, urban sprawl tendencies, underused land hoarding, and the on-going destruction of fertile farm land. Land use plans can protect land that has been designated for a special purpose, such as the protection of landscapes for biodiversity/agricultural purposes, or the prevention of an open space from development. Land policy is interpreted as part of spatial planning; it is defined as a systematic acting to achieve or maintain the optimal use of land. This includes socially just distribution of land property - or more precisely, of property rights - and of windfall profits. Economic gains are thus derived from land use, from the incremental land value or land rent.

[23] See C.-H. David (ed.), *Law and Practice of Urban Development in the Federal Republic of Germany* (1993), p. 18.

[24] See G. Schmidt-Eichstaedt, *Land Use Planning and Building Permission in the European Union, Part Germany* (1995), pp. 41 - 51.

Thus, land policy in Germany can be seen as a property-steering application of spatial/territorial planning. It includes all aspects of land-related actions of the public sector *and* the private landowners. Given the local governments of Germany, the intended outcome of such laws, are partly, albeit not entirely, achieved. For example, these include: public participation, empowerment and awareness of the local people for urban regeneration, consultation and social planning within urban development. In fact, despite of the differences of planning systems (that reflect the characteristics of the political system) the lower level of government is crucial as to how higher level plans are implemented.

Despite this, leaders of some local governments do not primarily pursue an optimization of the 'common good', but rather, of individual benefits. Most certainly, local politicians wish to be voted in again. To achieve this, they may aim to acquire financial benefits for the municipality. Revenues from taxation or from the financial equalisation scheme may increase should the number of inhabitants within the municipality increases, or if they are able to attract new companies. With view to obtain both land rents and incremental value, some strong actors try to "capture" (local) governments by lobbying and manipulating them, both by legal and illegal means. A "captured" (local) government is no longer a neutral trustee of the common good. Furthermore, there are common financial interests: the local government also depends strongly on land use changes, mainly by taxation or the financial equalisation scheme.

The classical means of regulation is to introduce a great deal of red tape, leaving those rights based on value and rent to the private sector. In Germany, bureaucracy hampers the economic activities of private sector actors; the regulations have impact as well on *usus* and *abusus* of the property. Indeed, this kind of regulation is nothing more than a dilution of private property rights through means of public law. Hence, from an economic point of view, the so called "full ownership title" (see Section 903 Civil Code) is anything other than full. In Germany, authorisation of investments is time-consuming and complicated; construction law, likewise, is complex. Architects, for example, experience a high degree of risk that they might inadvertently violate construction law.[25]

All public and private land is listed in the public land registry. Stakeholders are required to register their titles to obtain and convey property and other land-related rights. Private individuals have the right to bequeath, inherit, buy, sell, own, or mortgage real estate. Landowners have the right to use, improve, and develop their property according to their own needs. This right entitles landowners to the profits of land use; for example, with regard to land rent, use value, and exchange value. Although the conveyance and use of urban land may be regulated or restricted, landowner's rights are protected by law. Every person may seek protection for their rights from either the civil and administrative law courts. Municipal governments prepare and control the use of urban land through urban land use planning, through the development of infrastructure (public works), participation in the land market and via expropriation of private land and its improvement.

Land use planning safeguards are instruments which serve for development freeze purposes or the municipality's statutory right to buy land (i.e. pre-emption right). Of special importance is the control of land use for certain purposes. These may include

[25] See D. Löhr, *Land Conversion Out of Control – How to Achieve Better Governance*, paper presented at the FIG 2010 conference, Sydney [http://www.fig.net/pub/fig2010/papers/ts03e% 5Cts03e_loehr_4666.pdf].

developments restricted to designated buildings, the protection of open space, or to provide compensation to landowners affected by legally binding land use plans. In general, land use plans determine the permissible use of each plot of urban land through preparatory land use plans (development plans) and binding land use plans (zoning ordinances).[26] De jure, local land use planning aims to protect and promote sustainable urban development and social justice in land use, in order to provide both an environment worthy of human beings, and the natural foundations of human existence.

It is not uncommon that intermediate owners should buy land zoned for buildings by a preparatory land use plan, or farmland at the edge of town, before re-selling the plots after they have been zoned into binding land use plans. Profits from these increased values remain mainly with the intermediary landowners. At times, highly speculative purposes with land are commonly found, so too the "NIMBY"[27] behaviour of private landowners affected by public planning. This occurs, for example, in the field of inner-urban restructuring (land conversion), gentrification, social segregation, or the modernisation of apartment blocks.[28] The planning instrument of land re-allocation comprises the adjustment of plot boundaries, with the municipality entitled to limited value capture. For the development of local public infrastructure, landowners may be charged up to 90% of the infrastructure costs.

## Property and Land Evolution

Property rights theory – in environmental economics often discussed in the context of the Coase-theorem – rarely plays a dominant role in the sciences of land management. Property theory discusses property as society's most powerful tool for the distribution of goods; scope and content of property rights, however, are defined by public law. Property rights, according to Ronald Coase, should be given into the hand of private owners who feel responsible for the asset.[29] Owners must be able to exclude others from using their property (exclusive property rights; exclusivity).[30] Property issues widely lack acceptance within the public, political, philosophical or even legal discussion. State and private land, private, public and common property rights according to the *Corpus Iuris Civilis* (Justinian), spatial/land use planning and value are undividable elements of land markets. Where land is valued, the exclusive property rights form the basis for each determination. Thus, without the state and private property, there proves neither valuation nor land value.

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[26] See G. Schmidt-Eichstaedt, *Land Use Planning and Building Permission in the European Union, Part Germany* (1995), pp. 43 - 50; W. Usinger and H.-J. Schneider, *Real Property in Germany, Legal and Tax Aspects of Development and Investment*, (7th ed., 2009), pp. 59 - 78.

[27] NIMBY means "Not In My Backyard". NIMBY describes the phenomenon that some private residents tend to oppose nearby development or to use land they see as undesirable such as homeless shelter buildings, wastewater treatment plants, nightclubs, petrol filling stations, and airports. *See* the excellent comprehensive glossary worked out by M.E. Miles, *Real Estate Development. Principles and process*, 4th ed. (2007), pp. 625 -636.

[28] See H. Dieterich, E. Dransfeld and W. Voß, *Urban land and property markets in Germany* (1993), p. 128.

[29] See R. Coase, "The Problem of Social Cost" (1960) in *Journal of Law and Economics*, Vol. 3, No. 1.

[30] See R. Posner, *The Economic Analysis of Law* (1972), p. 29; H. Demsetz, "Towards a theory of property rights" (1967) 57 American Economic Review 347; R. Posner, "Creating a Legal Framework for Economic Development" in *The World Bank Research Observer* (1998), Vol. 13, No.1.

However, land value does simply not exist. Controversies about economic land value or about exchange value between Adam Smith, David Ricardo,[31] John Stuart Mill, John Locke or Karl Marx – the classical or neoclassical economists and political philosophers – mirror those difficulties in explaining the creation of land value or of ground rent. A land valuation system in Germany implements fair market value according to the International Accounting and Valuation Standard (IAS), and/or the valuation standards of the Royal Institution of Chartered Surveyors (RICS).[32]

Land valuation applications consist of two general families of German land valuers activities: appraisal and assessment. Both techniques are based on the same foundations and are thus subject to the same methods of valuation. Appraisal requires detailed expertise, while assessment is a mass-application through coded structures. Mass appraisal aims at private expertises, while assessment is ordered from governmental authority in view of territorial inventory and ad valorem taxation on immovable properties. Assessment is covered by law (i.e. land valuation ordinance) and submitted to a specific national policy, with such a policy limited to assessment practices.[33] Appraisal and assessment require market monitoring and data storage in a timely and updated manner for the purchase of prices, rent prices and statistics pertaining to construction materials. The land information system (LIS; cadastral maps and land registry) serves both as data storage and land valuation mapping, to combine property and site-related data; namely, size, location and condition). Actualisation of data should happen to secure the updating of databases and to ensure the integrity of the tax base on immovable properties to distinguish between data-assessed values. It is essential to actualise the existing Data Bases (DB).

The introduction of a concept of an open-market economy and the definition of "market value" strengthen good land governance and transparency. Most all participants in the land/real estate market in Germany have a uniform understanding of the "market value".[34] The Federal Building Code (Section 192) establishes committees (assessment boards) of valuation experts which are charged with the task of collecting data on the land market. One important task of these public land assessment service agencies is to define standard ground values, which means constituting average values for a standard plot of land based on the sales process for other comparable plots of land, depending on location[35] and physical characteristics.

The 2009 Real Estate Valuation Ordinance (ImmoWertV) contains internationally recognised and nationally owner-binding rules for determining the market value using three standardised valuation methods: comparative method, income (investment) method, and depreciated reconstruction (cost) method.[36] The ImmoWertV describes the necessary data, and refers to the data recorded by committees of valuation experts. Publicly-appointed valuation experts refer to these methods and the data provided to guarantee a level of comparability and transparency on the land market (as per European Valuation Standards).[37]

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[31] See D. Ricardo, *On the Principles of Political Economy and Taxation*, (3rd ed., 1817).

[32] See M. Blackledge, *Introducing Property Valuation* (2009), pp. 124 - 132.

[33] Appraisal Institute of Canada and Appraisal Institute, "The Appraisal of Real Estate" in *Real Property Ownership and Interests* (2005), chapter 5.13/5.14/5.15.

[34] Section 194 of the German Federal Building Code.

[35] See W. Alonso, *Location and Land Use: Towards a general theory of land rent* (1970).

[36] See M. Blackledge, *Introducing Property Valuation* (2009), pp. 133 - 318.

[37] See H. Dieterich, E. Dransfeld and W. Voß, *Urban land & property markets in Germany* (1993), pp. 105 - 116.

Land valuation and property mapping are preliminary steps in assessment applications. Land valuation mapping is complementary to the cadastral system; in fact, it supports the GIS and fiscal cadastral system (see Figure 4). Land valuation mapping consists of the integration of maps as a copy of both the cadastral maps and of satellite images. It clearly defines units of neighbourhood, units of assessment, economic indicators, unit-rates of assessment and other statistical data to calculate the assessed values.

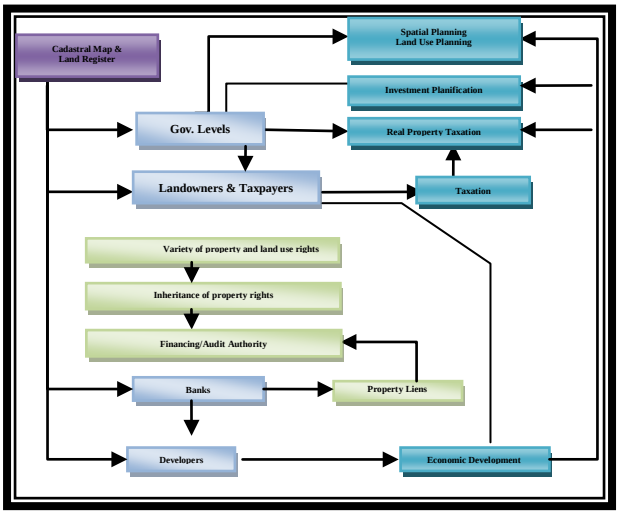


***Figure 4**: Land-Information-System (LIS) in Germany (simplified model)*

Different levels of government are highly dependent on shared taxes such as value-added-tax (VAT) and personal income tax. The legal basis of the German land (real) property tax is the Federal Land Tax Law of 7 August 1973 and its subsequent modifications. The tax code is uniform across the Federation although the tax is levied by the municipalities through different leverage factors. The objects of the land tax are domestic land and buildings, which includes agricultural land and forests, but it lacks actualisation of data (tax value at a specific date). The property tax value was fixed for the last time in 1964 in Western Germany (1935 in Eastern Germany), resulting in generally not more than 20 per cent of its fair market value. This unequal and outdated treatment of land valuation for real taxation purposes unethically, if not illegally, privileges landowners, when compared to the acquisition of other property assets. Worse, all categories of land are under-valued similarly.[38] The landowner or beneficiary of the property is liable to pay the property tax, although more often it is passed on to the tenants.[39] To sum up, the land market economy in Germany is determined by:

- the preferences of public and private landowners and tax payers;
- the rule of law and territorial planning regulations that are legally binding;

[38] See P.B. Spahn, "Land taxation in Germany" in *International Handbook of Land and Property Taxation* (2004), eds. R. Bird and E. Slack, pp. 98 - 106.

[39] See W. Usinger and H.-J. Schneider, *Real Property in Germany, Legal and Tax Aspects of Development and Investment*, (7th ed., 2009), p. 293.

- public and private finance institutes, real estate banks and insurance companies;
- the land market, based on land and business valuation methods to identify land rental value;
- agreements meeting international leasing tenure standards for urban and rural agricultural state public and private land; and
- land taxation.

## Land Value Increment Taxation: Source of Government Income

A proper land and property taxation system is crucial for a successful and sustainable land use policy. "Property tax is, economically speaking, a combination of one of the worst taxes – the part that is assessed on real estate improvements (...) and one of the best taxes – the tax on land or site value".[40] The burden of a land tax falls entirely on landowners; while land tax remains neutral.[41] It does not distort economic decisions and thus does not generate an excess burden. A land tax has no impact on the timing of land development, and instead helps to support an inner-city land policy, e.g. the Brownfield (re-)development, reduced housing and land prices, and decreased urban sprawl.[42] Although land taxation remains one of the most misunderstood concepts in public finance, German legislators have an opportunity to shape the ideas and advantages of land value taxation. An opportunity should arise in the near future to discuss this transition in political discourse, particularly when it comes to a new round of tax reforms (especially income taxation and property taxation.)

For these and other reasons, the site value tax could be accompanied by a land value increment tax (LVIT). For LVIT, acquiring only site (land) values for public purposes is characteristic. This tax was highly influenced by the book "Progress and Poverty" from Henry George (1879).[43] George developed a "single tax"-approach as a value capture instrument based on land value only, without improvements or salaries, meaning a recurrent tax by which annual "windfall for wipe-out" profits on land ownership from community growth or public investment are consequently taxed away.[44] George considered the land and its commodities (oil, gas, minerals, etc) as a gift of nature and as such owned by the whole community.[45] Hence, the value of a site is calculated from the net present value of the extra surplus – a surplus which normally can be achieved through public land use planning without requiring additional investment

[40] W. Vickrey, cited in *Land Value Taxation. Theory, Evidence and Practice* (2009), eds. R.F. Dye and R.W. England, p. 3.

[41] John Stuart Mill: The property tax supports utilitarian justice. It helps to maximise the "greatest happiness of the greatest number" (in the sense of Jeremy Bentham), since the utilitarian moral is the use of the individual utility plus the social utility. Additionally, Mill supported the idea of the taxation for windfall profits and increased values of real estates through a house-tax: "A house tax is a nearer approach to a fair income tax than a direct assessment on income can easily be". J.S. Mill, *Principles of Political Economy with Some of Their Applications to Social Philosophy*, 1848, reprinted (1987), p. 834. See also B. Priddat, „John Stuart Mills Theorie der Freiheit" in *Studien zur Entwicklung der ökonomischen Theorie XIX*, Schriften des Vereins für Socialpolitik (2002), ed. E.W. Streissler, pp. 17 - 42.

[42] See W.E. Oates and R.M. Schwab, "The Simple Analytics of Land Value Taxation" in *Land Value Taxation. Theory, Evidence and Practice* (2009), eds. R.F. Dye and R.W. England, pp. 51 - 71; see also D. Netzer, *Land Value Taxation: Can It and Will It Work Today*? (1998).

[43] See H. George, *Progress and Poverty* (1879) (Online: http://www.progressandpoverty.org).

[44] See R.V. Andelson, *Land-Value Taxation Around the World*, (3rd ed., 2000).

[45] See M. Blackledge, *Introducing Property Valuation* (2009), p. 12.

by the landowner. Based on the theory of David Ricardo, the ground rent for agricultural land rises proportionally to the population and is therefore not directly related to the efforts and enterprise of landowners.[46]

The rate for the LVIT should be fixed, without being changed according to the actual use of the site. A fixed tax rate always results in the same tax burden for the landowner. The landowner cannot avoid the tax if it has the character of a fixed cost. The only way to lower the effective burden of the tax is to use the site efficiently. However, to implement LVIT, the national, regional and local public authorities would face the difficulties of partly skimming-off the potential rent-seeking gains (windfall profits) of the landowners to achieve an even distribution of wealth among the population. Windfalls are caused by increased land values and demand for land by private and institutional investors, e.g., insurance companies, (investment) banks or German Real Estate Investment Trusts (G-REITs).[47] Today, basic information on land and property sale prices records and on land valuation systems and techniques for real property taxation are given in Germany, but there are measurement problems and city-/country-specific peculiarities as well as political obstacles against LVIT. Surely, the theory and practice of land taxation, combined with the Ricardian rent in particular of unimproved land, is highly controversial. Much more detail is needed to justify about the sustainability of a future simple revenue generation system.

## Leasing Public Land

Private land use (i.e. land rights, and land tenure) need not automatically link with private property.[48] Private property-oriented Western states have effectively created a situation in which private property rights have negative consequences for land use planning, land allocation, and land distribution because of the incremental economic value of the land. A modern and sustainable agriculture policy needs to ensure access to land in a flexible and low-cost way that protects the liquidity of the land users, especially for farmers and low-income households. Condominium ownership with common property for important parts of the building, proprietary (sub-)lease or registered building/land lease are important and popular *rights in rem* similar to individual ownership in land under the German land and property laws.[49]

Land leasing arrangements via the Heritable Building Rights Act[50] secure income from assets for owners no longer engaged in agriculture, as well as providing access to this land for farming purposes. The holder of a registered hereditary building lease will become the unrestricted owner of such building or improvement, if erected in compliance with the leasing agreement between lessor and lessee. One in eight farms in Germany is a leased farm. In 2005, 63.9 percent of farmed land was secured by lease contracts. In Eastern Germany, the proportion of leaseholds for farms is even higher (81.2 percent). In most cases the Heritable Building Act is applied in fields beyond

[46] See D. Ricardo, *On the Principles of Political Economy and Taxation*, (3rd ed., 1821).

[47] G-REITs were introduced in Germany in 2007 after long and controversial discussions regarding the legal status, taxpaying responsibilities, and the general liability. G-REITs are tax-exempt companies holding and managing real property and – the most of them – distributing their profits amongst the shareholders.

[48] See S.C. Bourassa and Y.-H. Hong, *Leasing Public Land. Policy Debates and International Experiences* (2003).

[49] See the detailed leasing agreements (template) by F. Stellmann in W.Usinger and H.-J. Schneider, *Real Property in Germany, Legal and Tax Aspects of Development and Investment*, (7th ed., 2009), pp. 401 - 425.

[50] See the German Heritable Building Rights Act (ErbbauRG).

agriculture. The important underlying conditions for this kind of private land leasing, beside the Heritable Building Rights Act, are regulated within the Sections 585-597 of the German Civil Code. In general, German lease law does not stipulate durations for leasehold rights,[51] but registered hereditary building leases are usually granted for terms between 50 and 99 years. They may also be granted for an unlimited term. Leasehold models can be combined with property taxation. The Government could be able to partly skim-off the economic ground rent through incremental land value taxation, which must be constitutional prior to implementation.

Land use planning by the state would become neutral, should private property on land be replaced by public land leasing. This combination of public land leasing with private land use rights, with partly skimmed-off ground rents, reflects a land reformer's approach. Land reformers and economists such as Henry George, Adolf Damaschke,[52] Franz Oppenheimer,[53] Michael Flürscheim, John Stuart Mill, Léon Walras, so too political philosophers such as Immanuel Kant and Pierre Joseph Proudhon, have criticised the use of private property for land and natural resources. "*No man made the land*", diagnosed John Stuart Mill.[54] The main arguments for such a sceptical interpretation of private property for immovable, public and non-renewable goods such as land are:

- Should all property rights are left in the hand of private people, any land use plan is useless. Economic interests dictate, and the arrangement is not effective. Negotiations will often fail;
- Due to high opportunity costs, only a certain part of the possible investment can be executed;
- Land distribution is socially unequal, with access to land not guaranteed for the majority of the population. Low-income housing communities, housing cooperatives, and affordable housing programs are necessary for those economically disadvantaged. These properties remain underdeveloped and sidelined by politicians, developers, financiers, and landowners;[55]
- Land use is determined namely by the economic power of land-owners; so too by real estate developers.[56] One might argue that this is not a legitimate means of ensuring sustainable land use management.

That property on land should belong to the relevant municipality or commune, was the argument of Hans Bernoulli, a Swiss architect.[57] As he saw it, all citizens should have the equal access to land and its products via leasehold rights, auctions or competitive bidding processes based on clear land use objectives for private individuals.

[51] See German Land Lease Transaction Act; see Ordinance to the Land Lease Transaction Act.

[52] See A. Damaschke, *Die Bodenreform*, (19th ed., 1922).

[53] See F. Oppenheimer, *Gemeineigentum und Privateigentum an Grund und Boden* (1914).

[54] See J.S. Mill, *Principles of political economy and chapters on socialism* (1848), (reissued edition, 2008).

[55] Because of different, stricter financial regulations and control through the German Federal Financial Supervisory Authority with respect to equity capital or loan-to-value ratio etc. and products within the real estate banking sector, so called "subprime" loans (mostly mortgages) which were common in the USA and caused the global financial and property crisis of 2008, are very seldom in Germany. However, a few of the German banking institutes that have to be recognised as "global players" were (and still are) heavily involved in the US-subprime market, with risks and "toxic papers" that can hardly be calculated in the long run.

[56] See M.E. Miles, *Real Estate Development, Principles and process*, (4th ed., 2007).

[57] See H. Bernoulli, *Die Stadt und ihr Boden* (1949), (reprinted version, 1991).

However, such an innovative land allocation and distribution system creates higher rents, land values and thus higher leasehold fees, should adjustments to the ground rent be made. A revolving (local) land fund can solve this problem by pooling of the paid ground rents, then redistributing these in equal shares to the people.[58] The primary objective of the pooling and redistribution of land value capture (windfalls) comprises four key steps:

| | | |
|---|---|---|
| **Level 1** | Allocating | Neutral land use planning and implementing of a public land leasing system |
| **Level 2** | Sucking | Skimming off a portion of the ground rent through leasing fees |
| **Level 3** | Funding | Pooling the partly skimmed-off ground rents |
| **Level 4** | (Re)Distributing | Paying the skimmed-off and pooled ground rents in equal shares to the people |

***Table 1**: Granting and redistributing of incremental ground rents*

Public leasing rights may not be able to solve specific problems that threaten land tenure security, such as separation, divorce or abandonment of the land. However, leasehold tenure can reduce transaction costs for the access to agricultural and residential land since it is the market mechanism that offers the greatest near-term potential for increasing the affordable housing approach. Leasehold tenure regulations are excellent alternatives to private property rights and are deemed equivalent to secure land tenure rights. Those granted land use rights must be paid by the users, due to their economic capability. The lower the income per household, the lower the cost for the leaseholds and the transaction costs for this household. Hence, public land leasing is economically and legally "fair". Having a sound public land leasehold system, land hoarding for speculative purposes and "rent seeking" (windfalls) would no longer exist to that extent like that experienced in 2008 global financial crisis. The next property crisis is already under way.

## Concluding Remarks

A general overview of the pros and cons of private property rights – in particular as a back view compared with public land use rights and leasing rights in the former socialist system of the GDR – proves complex. Hence, a viable formula for a socially equal distribution of land as of paramount importance for a just and sustainable planning and property system (property policy) has yet to emerge in Germany. Property policy does not only consist of property rights and the attempts to balance private and public interests. A system combining alternate forms of property and governance may be better able to bridge the gap between the private "right to acquire" – which is easily exercised by those who understand the system, and those can bear the transaction costs that legal ownership entails – and the needs and actions of the Leviathan (real government

[58] See D. Löhr, "Public Land Leasehold Tenure Approaches – A Way towards an Efficient and Effective Land Use Management" in, *ERSEC International Conference Proceeding Sustainable Land Use And Water Management* (2009), ed. UNESCO, pp. 287 - 313.

efficiency) in order to divide land up in a comprehensive and equal way between the inhabitants. However, this is seldom the case within European states.[59]

Land property, planning mechanisms, and social land policy in Germany – and from the global perspective as well – include[60]:

- Just and equal distribution of property i.e. different property forms and tenure securities for land beyond the private property rights solution for the use of non-renewable natural resources and any immovable property;
- Effective and efficient state land management (as per Art. 15 of the German Constitution), with non-transferable public property;
- Leasehold tenure contracts eventually combined with innovative land taxation models (redistribution of the ground rent for the benefit of the people as an "add up");
- Rural development and village renewal as essential elements of land use planning policy;
- Property steering function of the spatial/land use planning policy (property policy); and
- Reduced transaction costs for the access to urban and rural land; avoiding the "tragedy of the commons".

My review allows a number of conclusions; some policy priorities and consequences follow. Formidable tasks for creative research questions on land tenure will surely arise: Will Germans know how to carry out such a (property) change – and will they be willing to do it? How then might better governance be achieved in view of uncontrolled land consumption, urban sprawl, and a socially still unbalanced distribution of property rights for land? Private landowners mostly hope to increase and acquire the ground rent ("rent seeking"). Neutral land use planning – hence bare of private speculative interests – can only be achieved by skimming-off the ground rent through land value taxation. Spatial and binding land use planning is to be developed as prime instruments of national property policy which perceives fair and equal land allocation, land distribution, and land use intervention.

Social land policy, public and private land property management and spatial/land use planning policy need framework arrangements guaranteed by the institutions responsible for land use and land property development. Different institutions for the management of the non-renewable resource land have to be built up in the future. In summary, this cross-cutting strategy comprises different public and common property forms and tenure securities for land far beyond the private property rights typical of current-day Germany.

[59] See V. Renard, "Property Rights Protection and Spatial Planning in European Countries" in *Property Rights and Land Policies* (2009), eds. G.K. Ingram and Y.-H. Hong, pp. 216 - 229.

[60] See F. Thiel, "Land Law and Planning Law in Cambodia: Problems and Perspectives" in *Cambodian Yearbook of Comparative Legal Studies* (2010), Vol. 1, pp. 71 - 85.

# Proceeding Principles and Guarantees in the Law of the European Union

**Bartosz Makowicz***

## Introduction

In a state system based on the rule of law, effective proceeding principles, to which government agencies are subjected, are a matter of course. The same applies for constitutional proceeding principles in national laws which are of decisive significance, given they ensure the effective protection of fundamental rights against state interventions. In the construction of the European Union (EU) as a supranational organisation, which can affect fundamental rights of individuals by enacting legal acts with directly binding legal force, the existence of such proceeding principles is as much essential as in any single Member States of the EU, which themselves would not have obtained membership without upholding these proceeding principles. Such principles and guarantees are significant as they can be seen to protect the fundamental rights and freedoms of individuals. Given said principles at the European level have emerged from their national counterparts, they may therefore provide additional protection of fundamental rights and freedoms than at the national level. Thus, they are interesting not only as such, but also provide a cross-reference to the national law systems. In the following, the author will address the issue of sources of legal principle in general, of the resultant general proceeding principles and finally of proceeding guarantees.

## Source of Legal Principles

While acting the relevant regulations of the primary and secondary Union law, officials of the European Union are obliged to follow both the implicit and explicit legal principles of the Union.[1] Out of the complexity of these sources arises the general proceeding principles of the Union, which lead into the general proceeding principles and the general proceeding guarantees of individuals.

## General Proceeding Principles

First of all it is to be pointed out that the general proceeding principles of the EU law apply to all kinds of administration procedures. However, certain modifications must be

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[1] See Arnold, R., "Vereinheitlichung des Verwaltungsverfahrensrechts in der EG", in *Vereinheitlichung des Verwaltungsverfahrensrechts in der EG* (1995), eds. Schwarze, J., Starck, C., Europarecht Beiheft I, p. 7.

considered due to specific characteristics of the control procedure, in which the rights and freedoms of individuals are usually affected in the most significant way. These modifications will be discussed in connection with the single principles.

## The Principle of Judicial Investigation

The *principle of judicial investigation* and the principle of official investigation are precepts of an administrative procedure in accordance with the rule of law.[2] They are recognised by the Court of Justice of the European Union (CJ).[3] In this context the state agencies are awarded a broad right to clarification and verification.[4] These rights come along with the obligation to complete ascertainment of facts. Great importance has to be attached to this principle since it is essential for judicial defence.[5] According to the CJ, the principle of judicial investigation effectively enacts the duty of careful and impartial fact-finding.[6] In connection with the principle of judicial investigation the right of the acting authorities to information (a) has to be discussed, as well as cases in which individual may withhold the information (b). Both of them are significant meaning according to the rule of fair administrative proceedings.

## The Right to Information and Verification

The principle of judicial investigation was concretised into provisions of primary union law: *the rights to information and verification*. According to article 337 TFEU[7] the Commission may collect any information and carry out any checks required for the performance of the tasks entrusted to it. This regulation is taken as basis for the Commission´s general right to access. Under the terms of article 377 TFEU, the Council lays down the limits of the right to information. The Commission thus was not authorised to collect information and carry out checks. In fact, this delegated power has to be stated in a secondary legal act.[8] Finally, both rights – the right to information and the right to verification – do exist independently. Their scope is limited to the legally relevant facts.[9] Last but not least the violation of these limits would be an offence against the principle of proportionality that would automatically make the act unlawful.

## The Right to Withhold Information

The CJ did identify, rather early on, that two significant differences must be taken to account whereby the *right to withhold information* is transferred from the law of criminal procedure to administration procedure. On the one hand, as per criminal law,

[2] See Gornig, G., Trüe, C., "Die Rechtsprechung des EuGH zum europäischen allgemeinen Verwaltungsrecht", in *Juristenzeitung* (1993), p. 887.

[3] The Court of Justice of the European Union is composed of the Court of Justice, the General Court and the Civil Service Tribunal.

[4] See Arnold, R., Vereinheitlichung, p. 7.

[5] See Schwarze, J., *Europäisches Verwaltungsrech* (2005), Band II, p. 1181.

[6] CJ decision, 21-11-1991, Case: Technische Universität München vs. Hauptzollamt München-Mitte, No C-269/90, *European Court Reports* (1991), p. I-05499.

[7] Treaty on the Functioning of the European Union has replaced the Treaty on European Communities (EC) when the Treaty of Lisbon came into force.

[8] See Bose, in *EU-Kommentar* (2009), ed. Schwarze, J., Art. 284 ref. 1.

[9] See Bose, in *EU-Kommentar*, Art. 284 ref. 2.

only physical persons are entitled to this right. In administration procedures all people, including legal persons, are subject to investigations. On the other hand, individuals maintain the right to withhold information to prevent self-incrimination (this right is granted in European administration law). Any person may be required to give the Commission all necessary information on facts known to him regarding ongoing proceedings. However, this obligation cannot apply to such responses, whereby the entity would have to concede the existence of an irregularity, for which the Commission should provide proof.[10] This idea was concreted insofar as neither natural nor legal persons can be obliged to give any self-incriminating information, if there is a possibility that the procedure may (in)directly lead to a criminal or administrative sanctions against him or her.[11]

## The Principle of Lawfulness

Directly related to principle of judicial investigation is the pri*nciple of lawfulness of administrative action*. According to this principle, investigating authorities are bound by the law. This is the most important outcome of the principle of the lawfulness of administration, which derives from the rule of law, namely the principle of legality. Again in Union law, this principle is divided into *reservation of statutory powers* and *the priority of higher-ranking European Union law*.[12]

The reservation of statutory powers must be examined in relation to the principle of conferral. A legally binding act of any European institution has to be grounded on either a contract provision or on a secondary legal act.[13] The primacy of higher-ranking Union law includes the prohibition of the violation of Union law and in particular of the Union´s fundamental rights, which nowadays obtains binding force as a result of references in Article 6 (1) of the Treaty on European Union (TEU).[14]

Due to the principle of lawfulness, all steps of an administrative procedure, especially of a control and investigating procedure have to be undertaken in accordance with the relevant procedural law. The principle of lawfulness complements the principle of judicial investigation insofar as the latter, acting authorities are obliged to investigate, but only within the limits of binding law.

## Legal Certainty and Legitimate Expectation

The existence of the principle of lawfulness contributes to the implementation of two other proceeding principles, namely the principle of *legal certainty* and *protection of legitimate expectation*. Since European officials are bound by the law, their actions can be foreseen, which leads to legal certainty. This is also ensured by the fact that legal acts as well as individual decisions must be drafted in a clear, understandable and precise way. At the same time the citizens are entitled to protection, for the administrative body acts in such a way as is provided by law. Thus, as a complementary to the principle of legal certainty there is the principle of legitimate expectation. The most important

[10] Decision 18-10-1989, Case: Orkem vs. Commission, No 374/87, No C-269/90, *European Court Reports* (1989), p. 3283.
[11] CJ decision 10-11-1993, Case: Otto vs. Postbank, No C-60/92, *European Court Reports* (1993), p. 5683.
[12] See Weber, in *Europäisches Verwaltungsrecht*, ed. Schwarze, J., Band I, p. 73.
[13] See Gornig, G.,Trüe, C., Rechtsprechung, p. 890.
[14] United Kingdom and the Republic of Poland are excluded.

derivation of legitimate expectation is the *prohibition of retroactivity*.[15] The prohibition of retroactivity arose from the simple consideration, that an individual may be convicted only if his conduct was prohibited and punishable at the date on which it was carried out.

However, the principle of legitimate expectation has its limits. The individual may invoke the protection of his confidence only, if the officials have created a reliable situation, which legitimates the individual´s confidence. The CJ has accepted the principle of legitimate expectations in the context of a decision on revocation of a favourable administrative decision.[16] As a conclusion, the Union´s institutions may change the legal situation retroactively, in case that they change it in the people´s favour exclusively.

The principle of legal certainty is completed by the *principle of speeding up of the proceedings*, which is a part of the fair-trial rule. It obliges the public officers, to conduct investigations within a reasonable time. The complexity of the case, the distribution of competences between Member States' and the Union's authorities as well as other essential circumstances of the case have to be taken into account. The principle of speeding up of the proceedings has several objects: First, the individual´s stressful situation shall be finished as soon as possible. On the other hand, this should discipline the officers to carry out their acts rapidly and effectively.

## The Obligation to Give Reasons

Another basic legal principle of procedural administrative law is the *obligation to give reasons*. The principle of reasonable justification of administrative decisions directly derives from the principle of legal certainty and the consequent rule to draft individual decisions in a clear and understandable way. The obligation to give reasons is directly laid down in primary law in Article 296 (2) TFEU, according to which a decision must be justified with reasons. The scope of that obligation is based on the circumstances of the case, such as the legal nature of the action, the overall context of the regulation as well as the knowledge of the person concerned.[17] The obligation to give reasons plays a significant role for the ability to react of the entity concerned, as in generally not the result of the investigation itself is contested, but the reasons which have led to it.

## The Non-Discrimination Precept

In the primary Union law, the *principle of equal treatment* exists in particular specifications, such as the prohibition on discrimination based on nationality. The contracts, however, do not contain a general rule of equal treatment. This was developed by the CJ instead.[18] Furthermore, the principle is stated in the now binding charter of fundamental rights in Article 20 and 21. For the administrative process the non-discrimination principle means that the administrative authority in principle is bound by

[15] See Weber, in *Europäisches Verwaltungsrecht*, Band I, p. 75.

[16] Decision 12-07-1957, Case: Algera and others vs. Common Assembly, No 7/56, *European Court Reports* (1957), p. 81.

[17] See Callies, C., in *Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtscharta, Kommentar* (2002), eds. Callies, C., Ruffert, M., Art. 253 ref. 6.

[18] CJ decision 19/10/1977, Case: Ruckdeschel and others vs. Hauptzollamt Hamburg-St. Annen, No 117/76, *European Court Reports* (1977), p. 1770.

its previous decisions,[19] with the only reservation, that there should be no equality in injustice. This means individuals cannot rely on a previous illegal practice of an authority. Rather, the authority is obliged to correct its illegal acts.

## The Principle of Discretion and the Prohibition of Disproportionate Measures

Although according to the principle of equal treatment, as stated above, the EU institutions are bound by their previous decisions, they are often able to make use of their powers of discretion, with the result that they differ from their own past practice. This is to mention another more general procedural principle: the *principle of discretion*.

Strictly speaking, there is the principle of discretionary free of abuses, i.e. that discretion has to be performed within its legal limits. Those may not be neither exceed, nor undercut, nor shall the authority abuse the discretion, that is to use law for another purpose as the law (legislator) intended. In case of an abusive use of discretion, which in general is introduced by words like "may" or as "is allowed to", the decision is not taken properly. Thus, as a legal consequence the decision is illegal.

In cases whereby the administrative entity is entitled to make use of discretion, the action chosen may not be disproportionate to its purpose. In other words, the disadvantages caused by the action may not outweigh the advantages. The *principle of proportionality* therefore constitutes the limits of discretion and is of fundamental meaning in all actions undertaken by Union's officials. At Union level, the CJ first recognised the proportionality principle for the first time in 1970.[20] Since then, the principle applies in the Union as a fundamental right, which significantly influences the acting of the administrative bodies.[21] The sources of the proportionality principle can be found in both primary and secondary legislation. For example, under Article 5 (4) TEU the measures of the Union shall not exceed what is necessary to achieve the objectives of the Treaty. The principle of proportionality therefore represents one of the most important principles of administrative procedural law, which is anchored at different levels in the hierarchy of law.

## The Duty to Observe Secrecy

As a further procedural principle of Union law, the principle of confidentiality is to be mentioned. The general duties of confidentiality arise directly from the TFEU. At the one hand, under Article 339 TFEU the public officers and other servants of the Union are obliged to observe secrecy concerning information, which is object to professional confidentiality, even when they no longer hold office. This obligation applies in particular to information about enterprises and their business connection or cost units. These principles laid down in primary legislation are specialised in secondary legislation and several regulations.

[19] See Weber, in *Europäisches Verwaltungsrecht*, Band I, p. 77.

[20] CJ decision 17-12-1970, Case: Internationale Handelsgesellschaft mbH vs. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, No 11/70, *European Court Report* (1970), p. 1125.

[21] See Weber, in *Europäisches Verwaltungsrecht*, Band I, p. 75.

## The Principle of *ne bis in idem*

Due to the nature and structure of the European Union the originally criminal principle *Ne bis in idem* has found a specific expression. According to it no one can be punished twice, if there are cases pending in a Member State as well as in the Commission.[22] This principle gains a specific meaning in control procedures in form of the prohibition of double control. Nevertheless, it should be noted that the principle does not preclude a criminal lawsuit with possible criminal penalties as an addition to an administrative proceeding.

## Proceeding Guarantees of Individuals in European Law

From the general principles of EU law derive the so-called reciprocal privileges of individuals. Against the background, that the importance of the general proceeding guarantees for legal certainty is generally accepted, it is justified to see the reciprocal privileges as subjective-legal procedural safeguards of fundamental rights and freedoms.[23] For this reason, the general proceeding principles are presented as reciprocal privileges of individuals in administrative proceedings. In this respect, these rights of individuals can restrict the officials' actions. The most important safeguards are presented hereafter.

## The Right to Be Heard

*The right to be heard* says that the addressee of a decision involving a burden is allowed to express his stand concerning the incriminating evidence before the decision is adopted and comes into force. This right is a fundamental proceeding principle. On the Union level, this principle is gathered from regulations such as those in Article 108 (2) TFEU, which states, that the Commission shall fix a time for comments. The CJ has since recognised the right to be heard and ensured that the addressees of decisions be given the opportunity to present their point of view, if their interests are affected significantly by the decision.[24] This does also apply in an administrative proceeding.[25]

The right to be heard is granted in an administrative proceeding by the *right of audience*.[26] Thus the person concerned is to be heard not only in court, but also in the administrative process. The right of audience, however, goes further as the right to be heard insofar as the former includes the agency´s duty to take the statement into consideration.[27] In this context it is worth underlining that for granting the right of audience, it is sufficient that the individual be provided with the opportunity to give a statement. Accordingly, it is not necessary that the person actually express a

[22] CJ decision 13-02-1969, Case: Walt Wilhelm and others vs. Bundeskartellamt, No 14/68, *European Court Report* (1969), p. 1.

[23] See Gassner, U., "Rechtsgrundlage und Verfassungsgrundsätze des Europäischen Verwaltungsverfahrens-rechts", in *Deutsches Verwaltungsblatt* (1995), p. 17.

[24] CJ decision 23-10-1974, Case: Transocean Marine Paint Association vs. Commission, No 17/74, *European Court Reports* (1974), p. 1063.

[25] CJ decision 13-02-1979, Cae: Hoffmann-La Roche vs. Commission, No 85/76, *European Court Reports* (1979), p. 461.

[26] See Gornig, G., Trüe, C., Rechtsprechung, p. 886.

[27] CJ decision 16-05-1984, Case: Eisen und Metall Aktiengesellschaft vs. Commission, No 9/83, *European Court Reports* (1984), p. 2074.

statement.[28] In case a statement has already been given, the extent of the right of audience is matched in particular against the intensity of the intervention.[29] The right of audience is finally linked to the obligation to give reasons, as the person concerned is able to state his point of view only if he knows the facts he is charged with.

The right of audition is subject to certain limits. This concerns cases in which the party is not given any opportunity to comment, although his rights are affected significantly by a state measure. However, these are absolute exceptions. In this context, two main categories of exceptions should be mentioned. The first category concerns actual circumstances of the case. In the first place, the opportunity to be heard does not have to be given, if the party simply cannot be reached.[30] Secondly, the hearing is dispensable, if the process was initiated by the party and the authority grounds its decision only on facts that the party has reported.[31] The second category derives from the legal perspective of the situation that occurred. The hearing is unnecessary if the request to give a statement could thwart the decision´s purpose.

## The Right to Inspect Records

The second also fundamental procedural right of the entities is *the right to inspect records*. The right of access to documents of the European Union, which in administrative procedures is referred to as the right to inspect records, is considered an important constitutional principle of active participation and as such settled in primary law in Article 15 (3) TFEU. According to it, "any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies". This right is restricted in accordance with sec. 2, by secondary legislation and in accordance with sec. 3, by internal regulations of the European institutions. The right of access to documents was implemented through a set of secondary legal documents, in particular Regulation No. 1049/2001 regarding public access to European Parliament, Council and Commission documents.[32] In this way the transparency requirements of Article 15 (1) TFEU are compliant with and the duties which derive from sec. 2 are performed.

The substantial provisions of Regulation No 1049/2001, however, determine the permissible exceptions, i.e. those cases in which the right to inspect records may be denied. The exemptions are stated in Article 4 of Regulation No. 1049/2001. According to it, the access to documents may be refused in order to protect public interests or privacy, or to protect a court trial or investigation procedures.

## The Right to a Lawyer

[28] CJ decision 7-07-1977, Case: Guillot vs. Commission, No 43/74, *European Court Reports* (1977), p. 1309.

[29] CJ decision 28-05-1980, Case: Kuhner vs. Commission, No 75/79, *European Court Reports* (1980), p. 1677.

[30] CJ decision 29-03-1979, Case: NTN Toyo Bearing vs. Council, No 113/77, European Court reports 1979, p. 1185.

[31] See Schwarze, J., *Europäisches Verwaltungsrecht*, Band II, p. 1285.

[32] Regulation No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *Official Journal of the European Communities*, L 145/43.

The *right to a lawyer*, which also derives from criminal law, was recognised by the CJ in the control phase of the preliminary investigations in Union administrative law.[33] In its decision, however, the CJ has preferred the principle of judicial investigation and the undisturbed control to the right to an attorney. The consultation of a lawyer shall not lead to any delay and obstruction of the proceedings.[34]

## Fundamental Rights

The fundamental rights are recognised as general principles of law, which nowadays is expressed even more strongly by the legally binding scope of the Charter of fundamental rights. Herein lie some of the most important fundamental rights of individuals. There also perceptible guarantees for fundamental rights of individuals during administrative and other proceedings on the Union level.

Before the Treaty of Lisbon came into force, the Charter of Fundamental Rights of the European Union was a written catalogue of fundamental rights but being a non-binding law. One of the goals of the Treaty of Lisbon was therefore to create a binding force of the Charter. This effect has been eventually reached by introducing a new article 6 (1) TEU in which there is a direct reference originating in the binding Treaty which is a primary law of the EU toward the Charter. By these means the Charter became law binding[35] and the EU became a written catalogue of fundamental rights and freedoms. Placing the provision in the Treaty saw that the Charter became a primary law, equal to treaties themselves.

The most important article regarding the proceeding principles is the right to good administration.[36] According to this provision every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. This right includes the right of every person to be heard, before any individual measure is taken which may affect him or her in an adverse manner. Furthermore, as per this article, the right is provided that every person have access to his or her records, while respecting the legitimate interests of confidentiality and of professional and business secrecy. Finally there is an obligation put on the administration to give reasons for its decisions. One can see directly that the Charter is just a declaration of principles that already existed as unwritten general principles, as per the typology and terms in previous decisions made by the CJ. As a result, it may be referred to the previous text in latter enquiries.

Important to mention is the next article of the Charter, enacted beside the right to good administration, which provides the right of access to documents.[37] According to the provisions of this article any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State of the EU, has a right of access to European Parliament, Council and Commission documents. It is to be underlined that this regulation may prove problematic, given its wide application.

## Summary

[33] CJ decision 21-09-1989, Case: Hoechst vs. Commission, No 46/87 and 227/88, *European Court Reports* (1989), p. 2859.

[34] CJ decision 26-06-1980, Case: National Panasonic vs. Commission, No 136/79, *European Court Reports* (1980), p. 2033.

[35] Excepting very few countries like Republic of Poland and United Kingdom.

[36] See Article 41 of the Charter.

[37] See Article 42 of the Charter.

The primary Union law and the Charter of Fundamental Rights, as well as a set of several regulations originating from the secondary Union law, and finally those laws 'unwritten', catalogue a series of legally binding system of rules and principles that may be seen to protect fundamental rights and freedoms of individuals, at the Union level. In summation, this system has extended over the years by the Court of Justice as well as the Union's legislators who are the representatives of the Member States. Given that this legal institutions are of significant meaning regarding active proceedings it must be stated that no fair administrative trial and no protection of human rights would be possible without them. A very positive mark is also to be given to the enforcement of the Charter of Fundamental Rights which created more transparency since there is no more necessity to base several rules on unwritten law. In general terms the increasing meaning of mentioned principles has helped also the EU come out from the political crisis of the recent years, in which the main argument against the Union was the lack of democracy. The most important elements of democracy are the fundamental rights and freedoms and the rule of law. Without them the democracy cannot exist. It must be therefore the aim of the European Union and its Member States to maintain the level of protection of the human rights and freedoms on good existing level and even to extend it in the future.

# Freedom of Expression in the German Basic Law

**Gunnar Pohl***

## Introduction

*"Je désapprouve ce que vous dites, mais je défendrai à la mort votre droit à le dire".*

*"I disapprove of what you say, but I will defend to the death your right to say it".*

These words allow a view on *Voltaire's* opinion on freedom of expression in the late 18th century and give an idea of the development of fundamental rights that the Era of Enlightenment initiated. Less emotional but of elementary value the right of free expression has entered into today's legal framework as fundamental right set forth in German Basic Law.[1] The following shall give an idea of how and to which extent the individual's opinion is protected and legally enforceable in Germany and how the Federal Constitutional Court resolves conflicts between free expression of opinion and colliding constitutional law.[2] Art. 5 Section 1 Sentence 1 of the Basic Law[3] constitutes: Every person shall have the right freely to express and disseminate opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. As part of the group of rights that provide for free communication[4] the right of free expression of opinion plays an essential role not only in the system of the German Basic Law, but also for a free and democratic society as such.[5] The Federal Constitutional Court considers this right to play a '*constituting role'*.[6]

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[1] An English translation of the German Basic Law can be accessed via http://www.gesetze-im-internet.de/englisch_gg/index.html.

[2] In German legal terminology "colliding constitutional law" is usually referred to as all colliding, constitutionally protected legal interests, especially colliding fundamental rights of others.

[3] The German Basic Law entered into effect 23 May 1949, see Bundesgesetzblatt, p. 1.

[4] The rights protected in Art. 5, Art. 8, and Art. 9 Basic Law are sometimes referred to as "fundamental rights of communication". Art. 5 provides for freedom of information, opinion, press, broadcast, film, arts and science and a prohibition of censorship. Art. 8 Basic Law guarantees freedom of assembly and Art. 9 Basic Law guarantees the freedom of association.

[5] Remarkably, numerous constitutions worldwide protect this right, whereas the effectiveness of protection often shows considerable discrepancies.

[6] BVerfGE 7, 198 (208), 15 January 1958, 1 BvR 400/51; Constitutional Court Decisions (from 1998 till today) can be accessed via: http://www.bundesverfassungsgericht.de/entscheidungen.html.

The very first codification of freedom of opinion in Germany was provisioned for the so-called *Paulskirchenverfassung*, a draft for a German Constitution that was enacted March 27, 1849.[7] The following day the National Assembly elected the Prussian King Friedrich Wilhelm IV as the *German Emperor*.[8] Friedrich Wilhelm IV. refused the Crown and rejected the Constitution. Prussia and Austria forced their Members of the National Assembly to resign from office and officially deprived the Assembly from any and all legitimacy.[9] While this reversed German constitutional process for some decades, the individual's rights in the *Paulskirchenverfassung* became an ideal that set a standard for all German constitutions to come. In 1919, Art. 118 of the Constitution of the Weimar Republic came into force and provided a similar wording for the right of free expression. This right was – as all fundamental rights in that Constitution – reserved solely for Germans[10] - given these rights were tied to the right to elect and this right was borne solely by citizens of the German Reich. In 1933 the political reality in Germany entirely overtook constitutional reality; On March 23, 1933 the former German Parliament (Reichstag) under democratically dubious circumstances[11] passed the so-called Authorisation Act.[12] It allowed a strong constriction of constitutional rights whereas the Executive (*Reichsregierung*) was extensively empowered to pass laws without participating the Legislative (*Reichstag* and *Reichsrat*). In the aftermath of World War II the Parliamentary Council[13] (*Parlamentarischer Rat*)[14] finally shaped today's phrasing of the Basic Law.

## Scope of Protection

Art. 5 Section 1 Sentence 1 alternative 1 of Basic Law grants the right freely to express or disseminate opinions in speech, writing and pictures. In consequence, the object of protection is not the expression *as such*, but the expression of an *opinion*. An opinion according to the Constitutional Court is characterised by elements of positioning, supporting and evaluation.[15] This is a personal opinion that the individual forms with respect to circumstances, occurrences, ideas or individuals. The characteristic element of any opinion is hence the subjective relation between the individual and the object of his expression.[16]

Art. 5 Section 1 Basic Law is not restricted to specific opinions; opinions of any value enjoy protection, the Law does not differentiate between good, bad, superior or inferior opinions.[17] Any form of expression is protected, therefore a free choice of the medium of expression is guaranteed likewise.

[7] The name "Paulskirchenverfassung" is used because the Constitution was worked out in the "Paulskirche", a church in Frankfurt am Main and seat of the Frankfurt National Assembly.

[8] See W. Frotscher/B. Pieroth, *Verfassungsgeschichte*, (9th ed., 2010), marginal 347.

[9] See A. Laufs, "Die Frankfurter Nationalversammlung 1948/1949" in *Juristische Schulung* (2008), pp. 385 - 392.

[10] See R. Wernsmann, "Das Demokratische Prinzip und der Demographische Wandel" in *Der Staat* (2005), 44 (1), pp. 43 - 47.

[11] See C. Bickenbach, "Vor 75 Jahren: Die Entmächtigung der Weimarer Reichsverfassung durch das Ermächtigungsgesetz" in *Juristische Schulung* (2008), pp. 199-201.

[12] Officially named "Act for the Elimination of Adversity of the People and Reich" the Act is generally referred to as "Authorisation Act", German: "Ermächtigungsgesetz".

[13] See C. Bickenbach in *Juristische Schulung* (2008), pp. 199-200.

[14] The Parliamentary Council was appointed to work out a new German Constitution.

[15] BVerfGE 61, 1 (8), 22 June 1982, 1 BvR 1376/79.

[16] BVerfGE 33, 1 (14), 14 March 1972, 2 BvR 41/71.

[17] BVerfGE 30, 336 (347), 23 March 1971, 1 BvL 25/61 and 3/62.

However, the above defined scope regarding the expression of opinions is restricted whenever an expression of facts is concerned. The expression of facts is not protected by the freedom of expression as such. Facts rather enjoy protection in close context with opinions. This is because opinions are usually not expressed without any relation. They use to correspond with certain facts, which are the subject or the support of an evaluation. In consequence, any expression of facts is protected *because* but only *as far as* the facts stand in close relation to an opinion and hereby contribute to the development of opinions.[18]

The above demonstrated rule generally applies to facts that are true, just as to facts that are not true. This synchronism is significant because the answer to *true* or *false* can often not be given immediately, but is the result of a progressive communicational process.[19] The process of communication would be trimmed to a minimum, if only undoubtedly true facts enjoyed protection and if an error regarding the alleged trueness of a fact deprived the expressing party of its protection.

One exception must be made. The expression of untrue facts that are disseminated in full awareness of them being not true, or the dissemination of facts that are obviously untrue, are not protected. In other words the conscious lie is excluded.[20] This result is acceptable because the exclusion of *conscious lies* from the freedom of expression cannot hamper the process of opinion-making by any means.

A differentiation between fact and opinion is nonetheless difficult whenever opinions are expressed with facts in the same context. If a separation of fact and opinion is not possible, the expression as a whole must be treated as expression of opinion and is subject to the full scope of protection. These cases, where elements of fact and opinion prove inseparable, are treated in their entirety as opinion by the Constitutional Court. Otherwise not only the factual element but also the judging element would be excluded from the protection that the Basic Law provides.[21]

In summation, the term *opinion* must be interpreted in a wide sense. Facts are not protected as such, but as part of an opinion. This does not apply to conscious lies.

## Interference

Secondly, Constitutional Court must examine whether the fundamental right has been interfered with. Generally speaking, any act of state authority that rules out or restricts the individual's behaviour within the scope of protection of a fundamental right constitutes interference. Projected to the freedom of expression, interference is any inhibition to undertake or repeat a certain statement, as with any order to withdraw such a statement.[22] Since the above outlined scope of protection does not only comprise the content of the expressed statement but also the modality of expression, consequently a prohibition of a certain modality also constitutes interference. Even sanctions correlating with such prohibitive acts must be treated as interference. Any such interference must be justified in order not to infringe the Basic Law. In other words, the interference itself imposes an obligation on state authority to justify its conduct.

[18] BVerfGE 61, 1 (8), as above.
[19] See D. Grimm, "Die Meinungsfreiheit in der Rechtsprechung des Bundesverfassungsgerichts" in *Neue Juristische Wochenschrift* (1995), pp. 1697-1699.
[20] BVerfGE 61, 1 (8), as above.
[21] BVerfGE 85, 1 (15 f), 9 October 1991, 1 BvR 1555/88; Grimm, *Neue Juristische Wochenschrift (*1995),
[22] BVerfGE 42, 143 (149), 11 May 1976, 1 BvR 671/70.

## Limits

Thirdly, the Constitutional Court examines whether the interference is justified on the basis of the limitations that the Basic Law sets to in regards to fundamental rights. In order to balance the individual's interests with the interests of general public and others, limits to the exertion of fundamental rights are put in place. The limits to the freedom of expression are set forth in Art. 5 Section 2 Basic Law: "these rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons and in the right to personal honour". According to the Court's permanent jurisdiction since the so called *Lüth–decision*[23] limitations to freedom of expression are permissible, if they are based on a law that stands in accordance with the constitutional requirements and that additionally has been interpreted and applied in accordance with the significance of Art. 5 Section 1 of the Basic Law itself.[24] The first condition – accordance with constitutional requirements – has not played any significant role in the jurisdiction of the Constitutional Court. Far more often the Court has ruled that the interpretation and application of laws that limit the freedom of expression of opinions or that have a limiting effect hereon impermissibly infringe Art. 5 Section 1 Sentence 1 of the Basic Law.[25]

## "General Provisions"

The wording "general provisions" is very wide. In its interpretation of this limitation the Court has ever since followed a reading that was developed for the similar phrasing of the Constitution of the Weimar Republic. Essentially, the Court today requires such provision not to prohibit a *certain* opinion. This means that "*general provisions*" must serve the protection of another legal interest and may not restrain the expression of an opinion *as such*.[26] The Court today requires the limiting law to be neutral with respect to the limiting effect on the opinion.

In a very recent but exceptional decision the Constitutional Court had to render this requirement more precisely.[27] It had to rule on the constitutionality of Section 130 Subsection 4 of the German Criminal Code.[28] According to this provision anyone who publically or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism […] in a manner capable of disturbing the public peace shall be liable to imprisonment […] or a fine. The Court ruled that this provision was not a general provision in the above sense because it explicitly referred to the expression of opinions on a certain mindset regarding the German National Socialism. But the Court made clear that Section 130 subsection 4 German Criminal Code nevertheless *does* stand in accordance with Art. 5 Section 1 and 2 Basic Law. It sets forth a singular exception from the rule that a general provision may not prohibit a certain opinion. Due to the severe injustice that the National Social regime brought over Europe and parts of the world and due to the Federal Republic of Germany being an alternative model to that regime, Art. 5 Section 1 and 2 Basic Law bear an imminent exception for

[23] BVerfGE 7, 198, as above.
[24] See D. Grimm, *Neue Juristische Wochenschrift* (1995), pp. 1697-1700.
[25] ibid.
[26] BVerfGE 7, 198 (209), as above.
[27] BVerfGE 124, 300, 4 November 2009, 1 BvR 2150/08.
[28] An English translation of the German Criminal Code can be accessed via: http://www.gesetze-im-internet.de/englisch_stgb/index.html.

provisions that limit the propagandist approvals of that era. In this decision the Court infers a justification from limitations that the Basic Law bears within itself. This result may be contradictory and disputed[29] from a dogmatic point of view, nevertheless arguably satisfactory[30] considering the special German historic circumstances that the Court had to take account of. Due to the very exceptional extent of injustice caused by Germany though, such a dogmatic discrepancy is very likely to and must remain an exception.

In its *Lüth-decision* the Constitutional Court has set up another requirement for laws that limit the freedom of expression. The Court ruled that any "*general provision*" itself must be limited in its restraining effect with respect to the right of free expression of opinion.[31] This *principle of interdependency*[32] in other words safeguards the constitutionality of any limiting law.

Practically – on the level of interpretation and application of a law – this leads to the requirement of a comprehensive examination between the fundamental law on one side and the legally protected interest that the limiting law is meant to serve on the other side. Here, the collision of fundamental rights becomes virulent. The Court's objective is to proportionally allocate the colliding rights and to avoid an excessive limitation of one fundamental right. By defining this requirement the Court continues its modus operandi for any examination of rights. It applies the *principle of proportionality* to its jurisdiction, which is one fundamental essence of Art. 1 Section 3 and Art. 20 Section 3 Basic Law.

## "Provisions for the protection of young persons and the right to personal honour"

The same requirement applies not only to the *"general provisions"* but also to the limits set forth by the provisions for the protection of young people and for the right to personal honour. Here, according to the Court, the legislative power and public administration ought to closely observe the constrained fundamental right and must avoid any excessive constriction. The implementation of this guiding principle requires the same examination of rights that a limitation by a *"general provision"* in the sense of Art. 5 Section 2 Basic Law demands.

Most decisions held by the Constitutional Court did not concern an interpretation of limiting *laws* but the *application* of limiting laws. Difficulties usually arise in the challenge to balance the freedom of expression on the on hand and the right to personal honour on the other hand. The Court has often been criticised for rather favouring the freedom of expression at the expense of the right to personal honour.[33] Apart from this, it was criticised that the result of the process of examination was

[29] See M. Askaryar, "Die Entscheidung des Bundesverfassungsgerichts zu § 130 Abs. 4 StGB" in *Kommunaljurist* (2010), pp. 405-408.

[30] See U. Volkmann, "Die Geistesfreiheit und der Ungeist – Der Wunsiedel-Beschluss des BVerfG" in *Neue Juristische Wochenschrift* (2010), pp. 417-420.

[31] BVerfGE 7, 198 (208), as above.

[32] Precisely, this is a term that is not expressly used by the Court but it is widely spread in connection with Art. 5 Section 2 Basic Law.

[33] See M. Kiesel, "Die Liquidierung des Ehrenschutzes durch das BVerfG" in *Neue Zeitschrift für Verwaltungsrecht* (1992), p. 1129; H. Sendler, "Liberalität oder Libertinage? " in *Neue Juristische Wochenschrift* (1993), p. 2157; R. Stürner, "Die verlorene Ehre des Bundesbürgers – Bessere Spielregeln für die öffentliche Meinungsbildung? " in *Juristenzeitung* (1994), p. 865; dissenting opinion of Judge Haas in BVerfGE 93, 266 (313), 10 October 1995, 1 BvR 1476, 1980/91 and 102, 221/92.

unforeseeable. Such uncertainty was said to bear a high risk of litigation. This criticism however is contradictory. If the court was prejudiced on the one hand for the benefit of the freedom of expression, the risk of litigation on the other hand can logically not be as high as it is claimed to be.[34]

## Examination of Rights

Any limiting act of state authority, especially every limiting law and every limiting single act based hereupon must be constitutional. This rule is inferred from Art. 1 Section 3 and Art. 20 Section 3 Basic Law. Laws in the sense of Art. 5 Section 2 Basic Law and single actions based directly hereupon usually meet this criterion. Way more often the Court had to deal with other limiting single acts, such as criminal or civil judgments.

The American Supreme Court has consequently and categorically conceded priority to freedom of expression. The German Constitutional Court has always followed a different path. The Court requires for every single case a comprehensive examination of colliding rights that has to be made within the framework of the provisions that are to be applied, whereas none of the colliding positions enjoys priority ex ante. Despite the Court attributes the freedom of expression a "*constituting role*" as mentioned above, it points out that neither Art. 5 Section 1 Sentence 1 Basic Law nor the right to personal honour nor the constitutionally protected general right of personality hold a privileged position within the system of fundamental rights when it comes to a collision of rights.[35]

As noted, the expression of opinions is characterised by the subjective relation of the speaker and the nature of his commentary, whereas the expression of fact is characterised by the objective relation between the speaker's expression and reality. The recipient can therefore recognise the expression of an opinion as personal, subjective assumption, and is easily able to distance himself from it, he keeps his right to an own – possibly diverging – evaluation of the opinion.[36] Any expression of *fact*, however, claims to be objectively true, independent from the disseminating subject. This makes it difficult for the recipient to keep a distance to it. Should he not have any better or superior knowledge, the recipient enters into a conflict of having to accept the expressed fact or otherwise. Therefore, expressed facts bear a higher risk for a collision of rights; consequently, there is a higher need for protection.[37] The Court has developed a couple of case groups in order to facilitate the difficult examination of colliding fundamental rights.

## Expression of Facts

Following this valuation the Court assumes that only for the expression *true facts* the freedom of opinion regularly prevails over colliding constitutional rights. However, this rule does not apply without exceptions: information on the private sphere of third parties does not enjoy any legitimate interest, even if the piece of information is true. For the single case this requires a thorough differentiation between private sphere and social

[34] See D. Grimm, *Neue Juristische Wochenschrift* (1995), p. 1697.
[35] See D. Grimm, *Neue Juristische Wochenschrift* (1995), pp. 1697-1702.
[36] Ibid.
[37] See D. Grimm, *Neue Juristische Wochenschrift* (1995), pp. 1697-1702.

sphere. The same applies to information that was retrieved by breach of confidence or to cases of special public interest;[38] here, the free opinion must step back.

*Untrue facts* on the other side that are nonetheless covered by the protection of the freedom of opinion which affront someone's honour or harm someone do not have to be accepted at all. Here, colliding rights, namely the right of personality and the right to personal honour enjoy priority.[39]

## Expression of Opinions

The freedom of opinion can never prevail and must always step back when the expression infringes human dignity, because human dignity, as cause of any and all fundamental rights, can never be subject to a examination.[40] Further on, the protection of personality prevails over the freedom of opinion if the expression constitutes a formal defamation or a verbal abuse. A formal defamation is an expression that bears a defamatory character not due to the expressed content itself but due to the circumstances that accompany the expression. This would regularly apply for insults. An opinion becomes a verbal abuse when the dispute on the merits steps back and the defamation of a person comes to the fore. One must mention though, that the demands that the Court has set up for an expression to qualify for a verbal abuse are relatively high.

For all remaining cases the examination must include all particular circumstances of the case. The seriousness of the infringement of the freedom of opinion must be brought into an adequate relation to the collision of constitutionally protected rights. The individual's interests are weighed up, whereas for any allocation of weights the specific situation is decisive for the result. A "first verbal attack" for instance enjoys less protection than a "defensive verbal attack".[41]

It must also be further determined whether a private dispute is fought out as a merely continuation of individual or economic interests, or whether it is a dispute involving questions of the public interest. In the latter – due to the higher public interest in open communication – a *general rule of presumption* was developed by the Court that lets the freedom of opinion usually prevail.

Surmised, we may say that the right of free expression finds its limits in general provisions that stand in legal accordance with the Constitution and in the predominate legal positions of others. Which right prevails in the single case remains subject to a thorough balancing of interests. By all means, the Court has developed preferential rules to systemise the process of examination and to reduce uncertainties for litigation.

## Freedom of the Expression and Democratic Institutions

In a number of its decisions, the Court has rendered more precisely the relation between free expression and constitutionally protected democratic institutions, federal bodies and symbols. This is worth mentioning, given this relation is dealt with very differently in the international sphere. The range is wide and extends from very liberal approaches, as per the USA, to very rigid approaches in countries with legal systems that are more

[38] BVerfGE 35, 202, 5 June 1973, 1 BvR 536/72.
[39] See D. Grimm, *Neue Juristische Wochenschrift* (1995), pp. 1697-1702.
[40] *BVerfGE* 75, 369 (372), 3 June 1987, 1 BvR 313/85.
[41] BVerfGE 12, 113 (126 f), 25 June 1961, 1 BvR 9/57.

strongly influenced by tradition and religion. Yet any tendency that can be derived from the German Federal Constitutional Court decisions proves illustrative for constructive international comparisons.

The German Criminal Code sanctions infringements of – amongst other protected values – constitutional bodies and democratic institutions, such as the Federal Armed Forces, the Federal President, Federal Symbols, etc. Their existence, reputation and their capacity to act effectively and unharmed is essential for the existence of a sovereign and democratic country as such. This bears potential for conflict whereby it comes to the individual exercising his constitutionally protected rights on the one hand; and the state's demand to safeguard the interest in protecting itself on the other hand.

One particular decision[42] pertaining to this subject matter concerns the relation between free communication (in this case freedom of artistic expression protected under Art. 5 Section 3 Basic Law[43]) and the disparagement of the Federal Flag[44], sanctioned under Section 90 a Subsection 1 no. 2 German Criminal Code. The plaintiff was fined for having sold books that showed a caricatured person on its cover, urinating on the Federal Flag. He sought his right by means of an *individual constitutional complaint*[45] referring to the freedom of artistic expression. The Constitutional Court had to examine whether the Criminal Courts in this case had thoroughly examined the individual's right to freely distribute pieces of art[46] and the state's legitimate right to protect the Federal Flag as state symbol which represents a free and democratic order. The Constitutional Court came to the conclusion that the Criminal Courts had not taken into consideration these conflicting positions, and gave the right to the plaintiff. Furthermore, it ruled that the object of legal protection reflected in Section 90 a Subsection 1 Criminal Code, a free and democratic order, does not enjoy any priority ex ante over the freedom of art.[47] This decision demonstrates exemplarily that the only way to give fundamental rights an effective character of protective rights against state authority is to actively bring them into a just balance with other constitutionally guaranteed interests by means of ponderation.

In a similar context stands Section 90 German Criminal Code. The provision sanctions the disparagement of the Federal President. The Weimar Republic had to deal with the phenomenon of presidential disparagements quite often. Remarkably, President Friedrich Ebert initiated criminal prosecution about 170 times from 1919 to 1924.[48] As democratically legitimated President he was insulted and defamed repeatedly. The need for prosecution seems to correlate with political and democratic instability though. First, any disparagement of the Federal President is prosecuted only upon his explicit authorisation, *cf.* Section 90 Subsection 4 Criminal Code. And second, in German post-

[42] BVerfGE 81, 278, 7 March 1990, 1 BvR 266/86 and 913/87.

[43] Unlike Art. 5 Section 1 Sentence 1 Basic Law (free expression of opinion), Art. 5 Section 3 Basic Law guarantees free artistic expression without limitations. The limitations of Art. 5 Section 2 Basic Law are not applicable here. Yet the limits are set to free artistic expression by the Constitution itself, namely by colliding constitutional law. The Court therefore has to thoroughly ponder freedom of artistic expression and other constitutionally protected interests in every single case.

[44] The existence and the colours of the Federal Flag are determined in Art. 22 Basic Law.

[45] See below under VI.

[46] Art. 5 Section 3 Basic Law protects the process of creating art just as any act of displaying or distributing pieces of art, see B. Pieroth/ B. Schlink, *Grundrechte Staatsrecht II* (25th ed., 2009), marginal 663.

[47] The Court recently followed this line, *cf.* decision dated Sep. 15, 2008. The document can be accessed in the Federal Archive via:
http://www.bundesarchiv.de/cocoon/barch/x001/k/k1951k/kap1_2/kap2_23/para3_2.html.

[48] See *Sturner*, Juristenzeitung (1994), p. 865.

war history Federal Presidents have exercised this option restrictively. In 1951 Federal President Theodor Heuss declared to generally refrain from initiating criminal prosecution in case of insults to his person.[49] This line has been followed until today. In a stable and sturdy democracy this seems to be a reasonable procedure for it allows the Federal President to embody a democratic authority that rests in office in a context of a rather self-reliant capacity.

In the Weimar Republic the limits of constitutionally legitimate free expression were definitely exceeded, and this is only one example of its vulnerability. The cause for its failure is a complex multitude of factors.[50] External and economic factors, structural deficits in state-organisation and a wide spread lack of acceptance within the German population are the most mentioned ones.[51] The Parliamentary Council that worked out the Basic Law in 1949 was therefore eager to identify the deficits within the Weimar Constitution and to shape the Basic Law accordingly. Lessons learned concerned mainly state-organisational details. Political parties were accepted explicitly (Art. 21 Basic Law) and under very specific conditions unconstitutional parties and associations can now be dissolved (Art. 21 Section 2 and Art. 9 Section 2 Basic Law). Anchor points to create a more stable democracy were also set in Art. 18 (exceptional forfeiture of fundamental rights) and Art. 81 (legislative emergency) and Art. 115a (state defence) Basic Law. The result is what is today known as the concept of a *resistant democracy*[52], which restricts the freedom of those, who abuse their freedom to combat the free and democratic basic order.[53] Certainly, this concept is not undisputed[54] for it first bears potential for misuse and second abets the argument that a democratic order acts against its own principles of freedom and democracy once it deprives its enemies of such rights. In order to resolve this dilemma the Constitutional Court has followed a restrictive line and has been tending to liberalism rather than to banning extremism.[55]

Another crucial decision[56] concerned freedom of opinion and the honour of members of the Federal Armed Forces. The ruling bundles a number of constitutional complaints against fines that were imposed for the expression and variations of the expression: "*soldiers are murderers*". The Criminal Courts had ruled that such an expression was an insult to (certain) soldiers of the Federal Armed Forces and sentenced them according to Section 185 Criminal Code for criminal insult. The Constitutional Court had to examine whether these decisions stood in accordance with the Basic Law. It ruled that the expression as such was protected by Art. 5 Section 1 Sentence 1 Basic Law. The Court interpreted Section 185 Criminal Code and came to the conclusion that the provision not only protected personal honour but also served the public reputation

[49] This document can be accessed at the Federal German Archive via: http://www.bundesarchiv.de/cocoon/barch/x001/k/k151k/kap1_2.html

[50] See W. Frotscher/B. Pieroth, *Verfassungsgeschichte* (9th ed., 2010) , marginal 571.

[51] See W. Frotscher/B. Pieroth, *Verfassungsgeschichte* (9th ed., 2010) , marginal 571f.

[52] See W. Frotscher/B. Pieroth, *Verfassungsgeschichte* (9th ed., 2010), marginal 818.

[53] Additionally, according to Art. 79 Section 3 Basic Law, amendments to the Basic Law affecting the following principles are unconstitutional: inviolability of human dignity, principle of democracy, principle of federalism, the rule of law, and the Federal Republic of Germany being a social state.

[54] See R. Wassermann, "Aktivierung der wehrhaften Demokratie – Zum Antrag auf NPD-Verbot" in *Neue Juristische Wochenschrift* (2000), p. 3760.

[55] See R. Wassermann, "Aktivierung der wehrhaften Demokratie – Zum Antrag auf NPD-Verbot" in *Neue Juristische Wochenschrift* (2000), pp. 3760-3762.

[56] BVerfGE 93, 266, 10 October 1995, 1 BvR 1476, 1980/91 and 102, 221/92.

that is necessary to enable federal institutions as the Armed Forces to fulfill their ascribed function properly. Once this protective purpose stands in a conflict with the right of free expression, the latter is of very high importance because the fundamental right of free expression originally evolved from the need of protection that criticism on governmental power enjoys. In the next step the Court interpreted the sanctioned expression in order to identify its meaning correctly. It came to the conclusion that the Criminal Courts wrongly and too strictly had interpreted the word *murderers* in the expression "*soldiers are murderers*" in a legal light and in a technical sense that the Criminal Code ascribes to this term. Such interpretation lacked the ordinary person's understanding of that term which usually is characterised by attributing any wrongful killing to the word *murder*. The Court found this misinterpretation to be unconstitutional and gave right to the plaintiffs.

These decisions indicate that a constitutionally legitimate coexistence of the individual's fundamental rights and a state's comprehendible interest in safeguarding its own existence is not necessarily an antagonism. It can and must be achieved by a careful balancing of rights.

## Judicial Review

Fundamental rights within the German Basic Law are the individual's protective rights against state authority. In this sense they have a vertical effect. As a further dictum of the *Lüth-decision*, fundamental rights can also have effect in the field of civil law, wherever general provisions play such an essential role, that they function as gateways for fundamental laws.[57] The ambit of the Court's jurisdiction here stretches to the review of civil jurisdiction, wherever specific fundamental rights are allegedly infringed. In this sense fundamental rights have effect in a horizontal ambit.

Constitutional procedure admits a review of infringements in form of a so called "*individual constitutional complaint*"[58], provided all conditions for an admission are met. Thus, the competence of the German Constitutional Court is limited to the review of infringements of constitutionally guaranteed rights only. It is no Supreme Court or body of final appeal. The Court reviews infringements in the above described three step examination and thus rules accordingly.

The objective criteria that prove decisive in the process of examination, include those such as the expression of facts, expression of opinion, formal defamation, verbal abuse and private or public dispute. All of which remain fully subjected to judicial control, given they set the limits to freedom of expression.

## Final Remarks and the European Dimension

Legal protection of free expression of opinion is warranted within the Basic Law as part of the rights that provide for free communication. Practically it is safeguarded by the Federal Constitutional Court that has developed a multilayer examination including an examination of rights in the single case. This also applies to the relation between the individual's fundamental rights and democratic institutions, whereas no priority is given to the one or the other ex-ante and the judiciary is bound to ponder rights just as thoroughly. If need be, the Court continues to develop its jurisdiction. Notwithstanding,

[57] See e.g. Section 242 German Civil Code that codifies the principle of equity.
[58] See Art. 93 Section 1 no. 4a Basic Law.

the individual enjoys protection of his fundamental rights on a supranational level as well. The freedom of expression of opinion is guaranteed by Art. 10 of the European Convention of Human Rights. This right is legally enforceable by means of an *individual complaint* according to Art. 34 ECHR to the European Court of Human Rights in Strasbourg, France.

German national law is increasingly influenced by the European Union's legislation and jurisdiction. Parallel to the European Court of Human Rights the European Court of Justice, the highest judicial body of the European Union and based in Luxembourg, is bound to review fundamental rights within the scope of its competence. Art. 6 Section 1 of the Treaty on the European Union refers[59] to The Charter of Fundamental Rights of the European Union. It guarantees freedom of expression in Art. 11 Section 1 and addresses the institutions and bodies of the European Union and the Member States when they are implementing Union law, *cf.* Art. 51 Section 1 Sentence 1 of the Charta. Therefore, from a European perspective, the individual's right of expression may become virulent in two cases only: first, when the European Union acts originally as legislator that creates secondary European law and, second, when a Member State incorporates a European directive into national law. In these two constellations the European Union and Member States are bound to the protective effect of Art. 11 of the Charta. Significantly, the European Court of Justice did not have to deal with European legislative acts that violated fundamental European rights often yet.[60] Reasons for this can be seen in a relatively high level of protection of fundamental rights within legislative acts of the European Union and in the European Court's tendency to demand an interpretation and application of European legislative acts that is conform to fundamental rights, rather than demanding a cassation of such acts.[61]

[59] Technically, the Treaty refers to the Charta but does not incorporate it. This solution was preferred due to heavy disputes among the Member States. Its binding character is now undisputed but was modified for Great Britain and Poland upon their continuous insistence.

[60] See F. C. Mayer, "Der Vertrag von Lissabon und die Grundrechte" in *Europarecht* (2009), pp. 87-97.

[61] See F. C. Mayer, "Der Vertrag von Lissabon und die Grundrechte" in *Europarecht* (2009), pp. 87-97.

# Translation

Ruling No. 12-13/2551

Case No. 19/2551
Case No. 29/2551

**The Constitutional Court**

**Dated 9th September B.E. 2551 (2008)**

**Mr. Ruangkrai Leekitwattana, senator, and others comprising 29 persons** — **the first applicant**

**Between**

**The Prime Minister (Mr. Samak Sundaravej)** — **the respondent**

**Re: The President of the Senate referred the application of senators to the Constitutional Court for a ruling on the termination of the Prime Minister's ministerial office.**

**The Election Commission** — **the second applicant**

**Between**

**The Prime Minister (Mr. Samak Sundaravej)** — **the respondent**

**Re: The Election Commission requested for a Constitutional Court ruling on the termination of the Prime Minister's ministerial office.**

The President of the Senate submitted a letter dated 2 June B.E. 2551 (2008) referring the application of Mr. Ruangkrai Leekitwattana, senator, and a group of senators comprising a total of 29 persons to the Constitutional Court for a ruling that the ministerial office of the Prime Minister (Mr. Samak Sundaravej) terminated in accordance with section 91, section 182 paragraph one (7) and paragraph three and section 267 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). In a separate application, the Chairman of the Election Commission submitted a letter dated 29 July B.E. 2551 (2008) which referred the application of the Election Commission to the Constitutional Court for a ruling that the ministerial office of the Prime Minister terminated in accordance with section 91, section 182 paragraph one (7) and section 267 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). A total of two applications were thus submitted.

As both applications raised the same issues for consideration, the Constitutional Court therefore issued an order on 5 August B.E. 2551 (2008) to consolidate the trial of both applications as one case. Mr. Ruangkrai Leekitwattana, senator, and others comprising a total of 29 persons are hereinafter referred to as the first applicant, the Election Commission as the second applicant, and the Prime Minister (Mr. Samak Sundaravej) as the respondent.

**First application.** The first applicant submitted an application dated 2 June B.E. 2551 (2008). The facts in the application and supporting documents may be summarized as follows.

The respondent was a state official holding a political office in the capacity of the Prime Minister and was therefore subject to the application of section 267 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), which provided that the Prime Minister and Ministers could neither hold any position in a partnership, company or business entity for profit or revenue sharing, nor be an employee of any person. It appeared, however, that the respondent had hosted for Phase Media Company Limited in several programmes. In this respect, the word "host" corresponded to holding a position or being an employee, which were prohibited under section 267 of the Constitution. The respondent was well aware of the intentions behind section 267 of the Constitution but continued to persistently act in contravention of such provisions and only ceased his role as a host once a complaint was filed with the Election Commission. The Election Commission did not have the authority to issue a warning since section 182(7) of the Constitution provided for the termination of the ministerial office upon the commission of a prohibited act under section 267. Therefore, in order to carry out investigations on the termination of the respondent's ministerial office of Prime Minister, the first applicant exercised the right under section 91 of the Constitution to request the President of the Senate to refer the application to the Constitutional Court for a ruling on whether or not the respondent's ministerial office of Prime Minister had terminated.

The President of the Senate, after consideration, found that the application was made by not fewer than one-third of the existing number of senators in the Senate, which was in accordance with section 91 in conjunction with section 182 paragraph one (7) and paragraph three and section 267 of the Constitution. The application was therefore referred to the Constitutional Court for a ruling pursuant to the provisions of the Constitution.

**Second application.** The second applicant submitted an application dated 29 July B.E. 2551 (2008). The facts in the application and supporting documents may be summarized as follows.

On 17 April B.E. 2551 (2008), Mr. Ruangkrai Leekitwattana sent a complaint letter to the Chairman of the Election Commission stating that the respondent, while holding the office of Prime Minister, co-hosted in the "Chim Pai Bon Pai" programme and other programmes produced by Phase Media Company Limited, a private company which carries out businesses for profit or revenue sharing. The programmes appeared to the public on several occasions through the mass media. These acts were prohibited under section 267 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), and as a result thereof, the ministerial office of the Prime Minister terminated under section 182(7) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) as from the commission date of the prohibited act. The second applicant had appointed an investigation committee. The following findings of facts were made. Phase Media Company Limited was established in the year B.E. 2537 (1994) with Mr. Sakchai

Kaewwaneekul as the managing director. The company's objects were to accept hires to produce various programmes for advertisements, entertainment, press releases, and sales promotions through radio and television broadcasts, printed matters and all forms of advertising media. In the year B.E. 2543 (2000), Mr. Sakchai Kaewwaneekul invited the respondent to act as a host in the "Chim Pai Bon Pai" programme which was broadcasted by ITV Television Station. The respondent continued to perform such hosting duties and was remunerated for acting as a host in the amount of 5,000 baht on each occasion. On some occasions, the respondent received supplemental sums as allowances for the expenses of acquiring raw materials used in cooking preparations in the programme in the amount of approximately 1,000 – 2,000 baht on each occasion. While the respondent was holding office as the Prime Minister, he continued to accept hosting roles in the programmes "Chim Pai Bon Pai" and "Yok Kayong Hok Mong Chao" for Phase Media Company Limited. There was no evidence, however, of whether or not the respondent received remuneration from the company. As regards the "Chim Pai Bon Pai" programme, a picture depicting the Prime Minister's face and a rose apple nose, captioned by the respondent's name, was used in advertisements as a cartoon trademark. The picture became a symbol for the programme which was remembered by viewers generally. Such cartoon would be displayed at intervals throughout the programme. Mr. Ruangkrai Leekitwattana later saw the respondent acting as a host in such programme and therefore exercised his rights under section 62 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) in filing a complaint with the Election Commission that the respondent, in his capacity as the Prime Minister, had participated in hosting the programmes "Chim Pai Bon Pai" and "Yok Kayong Hok Mong Chao", a profit-seeking business, or had become an employee of a person, thus resulting in the termination of the Prime Minister's office. The respondent, on the other hand, submitted a letter explaining that in acting as a host for Phase Media Company Limited the respondent received remuneration as car fuel allowances for travelling to the recording sessions. However, once the respondent became Prime Minister, he declined to accept any remuneration from Phase Media Company Limited. The respondent further insisted that he had never entered into any employment contract with the company. In addition, in the year B.E. 2550 (2007), the Company filed an withholding income tax return (Phor Ngor Dor 3), which declared payment of performance fees to the respondent, as follows:

(1) In May B.E. 2550 (2007), two sums were paid in the amount of 147,368.42 baht, from which taxes were withheld in the amount of 7,368.42 baht, and 105,263.16 baht, from which taxes were withheld in the amount of 5,263.16 baht.

(2) In June B.E. 2550 (2007), payment was made in the amount of 105,263.16 baht, from which taxes were withheld in the amount of 5,263.16 baht.

(3) In November B.E. 2550 (2007), payment was made in the amount of 147,368.42 baht, from which taxes were withheld in the amount of 7,368.42 baht.

As for the withholding income tax return (Phor Ngor Dor 3) filed by Phase Media Company Limited from January B.E. 2551 (2008) till present, which was the period when the respondent held office as Prime Minister, documents and evidence had not yet been received from the Revenue Department.

The investigation committee, by majority vote, therefore found it appropriate to submit the matter pertaining to the respondent's performance of duties as a host in the "Chim Pai Bon Pai" programme and "Yok Kayong Hok Mong Chao" produced by

Phase Media Company Limited to the Constitutional Court for a ruling on whether or not the acts of being hosts in such programmes amounted to the holding of a position in a partnership, company or entity for profit or revenue sharing which would result in the termination of the respondent's Prime Ministerial office as provided under section 182(7) and section 267 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The second applicant considered the investigations undertaken by the investigation committee as well as various evidence and documents and concurred with the opinion reached by the investigation committee. A resolution was therefore passed to submit the matter to the Constitutional Court for a ruling on whether or not the respondent's Prime Ministerial office terminated.

The preliminary issue which was considered by the Constitutional Court was whether or not the Constitutional Court had the power to admit both applications for trial and adjudication under section 182 paragraph one (7) and section 267 in conjunction with section 182 paragraph three and section 91 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

Section 182 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) provided that "a ministerial office terminates upon… (7) the commission of a prohibited act under section 267, section 268 or section 269." Section 267 provided on acts which constituted a conflict of interests that "the provisions of section 265 shall also apply to the Prime Minister and Ministers, except the holding of office or proceedings pursuant to provisions of law, and that the holding of a position in a partnership, company or business entity for profit or revenue sharing or being an employee of any person was prohibited." Section 182 paragraph three provided that "the provisions of section 91 and section 92 shall apply to the termination of ministerial office under (2), (3), (5) or (7) or paragraph two, in which case the Election Commission shall also have standing to submit the matter to the Constitutional Court for ruling." Finally, section 91 paragraph one provided that "members of the House of Representatives and senators constituting no fewer than one-tenth of the existing members of each House shall have the right to enter their names in a motion to the President of their corresponding House of membership that the membership of any member of such House terminated under section 106(3), (4), (5), (6), (7), (8), (10) or (11), or section 119(3), (4), (5), (7) or (8), as the case may be, and the President of the House receiving the motion shall refer the motion to the Constitutional Court for a ruling on whether or not whether or not the membership of such person terminated."

Upon a consideration of such provisions of the Constitution, it was found that there was intent to scrutinize acts that would constitute a conflict of interests of political office holders, especially the Prime Minister and Ministers who were governed by special provisions under section 267. In other words, such persons could neither hold positions in any partnership, company or profit-seeking or revenue-sharing business organization nor become an employee of any person. If the Prime Minister or a Minister committed such an act, the result would be the termination of ministerial office as provided under section 182 paragraph one (7) of the Constitution. In this regard, section 182 paragraph three of the Constitution provided the empowerment of senators in the number provided in section 91 to have the right to enter their names in a motion to the President of the Senate, and the empowerment of the Election Commission to submit the matter to the Constitutional Court in order to request for a ruling of the Constitutional Court on the termination of a particular ministerial office under section 182 paragraph one (7) of the Constitution. In the cases of these applications, it appeared

that the first applicant comprised 29 senators, which was a number not fewer than one-tenth of the existing number of senators in the Senate, who entered their names in a motion to the President of the Senate, and the second applicant was the Election Commission, who had submitted an application to the Constitutional Court for a ruling on whether or not the respondent's ministerial office terminated. The cases were therefore already in accordance with the conditions under section 182 paragraph three in conjunction with section 91 of the Constitution. The Constitutional Court thus had the power to try and adjudicate such applications.

The Constitutional Court directed the respondent to give a statement in reply to the allegations and summoned evidence in the possession of agencies, companies and related persons. Upon examination of evidence summoned by the Court and evidence adduced by the respondent, the following findings were made.

1. The respondent submitted a total of 3 letters in reply to the allegations, dated 30 June B.E. 2551 (2008), dated 14 August B.E. 2551 (2008), and dated 25 August B.E. 2551 (2008), which could be summarized as follows.

1.1 The respondent was the author of the book entitled "Chim Pai Bon Pai". Mr. Sakchai Kaewwaneeskul, the owner of Phase Media Company Limited, later invited the respondent to act as a speaker or presenter for a food programme entitled "Chim Pai Bon Pai." The respondent's invitation to such programme never involved the execution of any contract or the signing of any document in relation to a hire for work. The respondent received a 5,000 baht travel allowance for the acceptance of the first invitation. The travel allowance was received only on days when the respondent appeared on the programme.

The respondent did not have any interest, was not a shareholder or held any position that was remunerated or on a fixed payroll, and never received a share of profits from the business operations of Phase Media Company Limited. Moreover, the invitation of the respondent to appear on such televised programme was not undertaken in the capacity of an employee as per the definition of employees under the Labour Protection Act B.E. 2541 (1998) and under the definition of the Notification of the Ministry of Interior Re: Labour Protection No. 111 since the respondent did not agree to work for a wage.

The broadcast of such programme subsequent to the respondent's taking office as Prime Minister on 6 February B.E. 2551 (2008) was a pre-recorded video. After certain persons expressed opinions on the inappropriateness of appearing on such programme, the respondent ceased to be involved in the programmes of Phase Media Company Limited and never acted as a speaker or presenter of the food programme entitled "Chim Pai Bon Pai". The invitation of the respondent to act as a speaker or presenter for the food programme entitled "Chim Pai Bon Pai" was therefore not prohibited under section 267 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

1.2 The application submitted by the second applicant to the Constitutional Court relied mainly on facts in the complaint filed by Mr. Ruangkrai Leekitwattana. Mr. Ruangkrai had also joined with senators in submitting a similar motion to the President of the Senate in view of the submission of an application to the Constitutional Court. The respondent was of the opinion that the facts and evidence adduced by Mr. Ruangkrai were documents from the internet and newspapers, which were hearsay documents acquired by Mr. Ruangkrai, and were false documents without any element of truth.

In relation to the holding of a position in Phase Media Company Limited, the respondent was not a promoter, executive director or shareholder of Phase Media Company Limited as evidenced by the copy of the memorandum of association, copy of company registration certificate and copy of the register of shareholders, and the term "host" was not a position existing in the structure of Phase Media Company Limited. The respondent's hosting of a programme for the Company therefore only resembled the capacity of an invitee.

1.3 As for the parts pertaining to being an employee of Phase Media Company Limited, the respondent was not an employee of the company since upon consideration of the definitions of the words "employee" and "wage" under the Dictionary of the Royal Institute B.E. 2542 (1999) and under the Labour Protection Act B.E. 2541 (1998) in conjunction with Title 6 on Hire for Work of the Civil and Commercial Code, the respondent was of the opinion that the act of being a host or speaker were not undertaken in the capacity of an employee or hired worker. Furthermore, the respondent never received a fixed monthly payment in the amount of 80,000 baht per month as alleged by Mr. Ruengkrai, and Mr. Sakchai Kaewwaneeskul, the owner of Phase Media Company Limited, also confirmed that such monthly payments were not made to the respondent.

The respondent motioned for the investigation files of the second applicant's investigation committee and the statement letter submitted by the respondent to the Chairman of the Election Commission submitted with this statement in reply to the allegations to be deemed as constituting a part of this statement.

1.4 A determination of whether or not the respondent was an employee of Phase Media Company Limited must also take into account section 425 of the Civil and Commercial Code which provided on the relationship between an employer and employee that "the employer must be jointly liable with the employee for acts of negligence committed by the employee in the course of employment." This should be so since in the case of income tax deducted from the employee by the employer for remittance to the Revenue Department, the Revenue Department also took account of circumstances under section 425 of the Civil and Commercial Code in its collection of taxes. As for the circumstances of this case, there was no evidence that the respondent and Phase Media Company Limited had any employment relationship.

2. The Revenue Department submitted documentary evidence of income tax returns filed by the respondent and Phase Media Company Limited which could be summarized as follows.

2.1 The respondent had filed personal income tax returns for general incomes (Phor Ngor Dor 90) for the tax year B.E. 2543 (2000), and tax year B.E. 2546 (2003) to tax year B.E. 2550 (2007), a total of 6 years, which showed that during such periods, the respondent had only one other category of taxable income which was not derived from employment as per section 40(1) of the Revenue Code, as follows:

2.1.1 In the tax year B.E. 2543 (2000), there was income under section 40(3), namely royalty fees for a book paid by Phase Media Company Limited in the amount of 80,000 baht.

2.1.2 In the tax year B.E. 2546 (2003), there was income under section 40(8) for hosting shows paid by Phase Media Company Limited in the amount of 842,105.20 baht.

2.1.3 In the tax year B.E. 2547 (2004), there was income under section 40(8) for hosting shows paid by Phase Media Company Limited in the amount of 1,086,289.46 baht.

2.1.4 In the tax year B.E. 2548 (2005), there was income under section 40(8) as speaker fees paid by Phase Media Company Limited in the amount of 2,044,305.67 baht.

2.1.5 In the tax year B.E. 2549 (2006) and tax year B.E. 2550 (2007), there were incomes under section 40(1), i.e. salaries, wages, etc., and under section 40(8), i.e. performance fees, but there was no accompanying document to indicate the identity of the tax withholder.

2.2 Phase Media Company Limited filed withholding income tax returns (Phor Ngor Dor 3) in relation to the respondent with the Revenue Department, as follows:

(1) In B.E. 2547 (2004), in the month of June, taxes were withheld from the respondent for hosting fees in 3 items; in the month of July, taxes were withheld from the respondent for a hosting fee in 1 item; in the month of August, taxes were withheld from the respondent for hosting fees in 2 items; in the month of September, taxes were withheld from the respondent for hosting fees in 3 items; in the month of October, taxes were withheld from the respondent for a hosting fee in 1 item; in the month of November, taxes were withheld from the respondent for a hosting fee in 1 item; and in the month of December, taxes were withheld from the respondent in a hosting fee in 1 item.

(2) In B.E. 2548 (2005), there were only items in the months of January to April, where in the month of January taxes were withheld from the respondent for a hosting fee in 1 item; in the month of February the respondent was not stated as a recipient of income subject to withholding tax; in the month of March taxes were withheld from the respondent for performance fees in 3 items; and in the month of April the respondent was not stated as a recipient of income subject to withholding tax.

(3) In B.E. 2550 (2007), there were only items in the months of April to June, and the months of October to December, where taxes were withheld from the respondent for performance fees in the months of April to May, 2 items in each month, and in the month of October taxes were withheld from the respondent for performance fees in 3 items.

(4) In B.E. 2551 (2008), there were only items in the month of May, and the respondent was not stated as a recipient of income subject to withholding tax.

3. Phase Media Company Limited, by Mr. Sakchai Kaewwaneeskul, managing director, submitted documentary evidence relating to the "Chim Pai Bon Pai" programme and the "Yok Kayong Hok Mong Chao" programme which could be summarized as follows.

3.1 As regards the "Chim Pai Bon Pai" programme, the company had entered into an airtime lease agreement with the Department of Public Relations pursuant to Contract No. 195/2550 on 17 September B.E. 2550 (2007). The broadcast was made by ITV television station as a variety show on food and tourism. The duration of each episode, including advertisements, was 25 minutes. Broadcasts were made every Saturday, at 10.04-10.30 hours. The contract term commenced on 6 October B.E. 2550 (2007) and ended on 29 September B.E. 2550 (2007). Payment conditions for service fees stipulated the issuance of a cheque payable to the Department of Public Relations at least 5 working days prior to the broadcast date.

3.2 The Company sent a letter dated 15 December B.E. 2550 (2007) to consult the respondent in relation to the latter's role as an honorary host in the "Chim Pai Bon Pai" programme as the Company became aware that the respondent was going to apply for candidacy in the election of members of the House of Representatives and

was therefore concerned as to whether or not the respondent would continue to act as a host for the programme. In this respect, the company was under an obligation of responsibility owed to large numbers of customers and employees as regards their well-being and wages. In any event, the company was ready to accept the respondent's decision regardless. The respondent sent a letter notifying a reply which could be summarized as follows. If the respondent remained a member of the House of Representatives, there would probably not be any problem in producing the programme. However, if subsequently the respondent was required to work in the executive, which was governed by rather strict rules, regulations and prescriptions, despite the legal division's opinion that show hosting works resembling occasional hires for works were unlikely to be within the prescribed rules, the respondent still insisted on the inclusion of two terms in accepting works as previously performed, firstly that from then onwards the respondent wished to accept invitations to perform the duty of introducing cooking methods that would be beneficial to the public, and secondly that from then onwards Mr. Sakchai should start his search for a replacement of the respondent as host since in the event of the respondent joining the government performing executive duties, time would probably be more difficult to find than was previously the case.

4. The Director of the National Library of Thailand submitted a copy of Sakul Thai Magazine, volume number 2453, year 47, Tuesday, 23 October B.E. 2544 (2001), in an article entitled "An Interview of Mr. Samak Sundaravej, Governor of Bangkok Metropolitan Administration, the Opening of His Private Home and a Home for Bangkok Residents by Rice Grain." It appeared that during the interview, there was an extract stating that "as for the performance of duties as an honorary host for the television programme 'Chim Pai Bon Pai' which was broadcast every Saturday between 10.30-11.00 hours on ITV, produced by Phase Media Company Limited, which pays a monthly salary of 80,000 baht per month, the sums were donated to the Stray Dogs and Cats Fund of Bangkok Metropolitan Administration for use in sterilization and the fitting of green collars."

5. The Director of the National Broadcasting Services of Thailand submitted a copy of a tape recording and transcripts of the tape recording for the "Sonthana Prasa Samak" (Conversation Samak-Style) programme on 18 May B.E. 2551 (2008), which revealed the words of the respondent during the programme in relation to his hosting of the "Chim Pai Bon Pai" programme, in one segment stating "…2-3 days and here they come again; there are people; this group of people who are searching for a replacement of this Mr. Samak who is all over the headlines; these people are the ones trying to remove Samak. They have discovered once again that the production of the 'Chim Pai Bon Pai' is illegal since prior to becoming Prime Minister or a Minister one was required to sign lengthy documents stretching over numerous pages; committing to not be this or that; heaps and heaps. They have discovered that I am an employee of a company. They told me that I am an employee of a company. And you know what? One cannot be a temporary employee, cannot be a permanent employee, cannot receive or not receive monies, and even cannot accept an honorary, complementary or distinctive role. These are all prohibited. That's what they said. That's how the employee was written. But you must hear this. The work I have done for 3 months when I was Prime Minister, I still do that work since I have asked a distinguished lawyer on the situation, and whether or not I was an employee of this company. He/she replied that every time you perform they will give you car fuel allowances and other expenses on a case by case basis. If you did not perform you would not receive anything, is that right? I replied correct. He/she then said that a hire for work would not

be in the definition. An employee within that definition must be registered; his/her name accounted for, and also has social security filed. However, that is not required in this case. If they hire you then you perform. If they do not hire you they can terminate. This is called a hire for work. It can be done…"

6. Mr. Wisit Limprana, the general manager of Nguansoon Group (1974), who was invited to the "Chim Pai Bon Pai" programme broadcast on the Royal Thai Army Radio and Television (Channel 5) on 26 April B.E. 2551 (2008), verified his testimony and affirmed the stated facts or opinions as well as gave a further testimony which could be summarized as follows. The witness held positions in social activities and a position in a state enterprise, i.e. a director of Thai Airways International Public Company Limited. The witness was selected by a selection committee to become a director in the witness' capacity as Deputy Secretary-General of the Federation of Thai Industries. The selection was made in accordance with the regulations of Thai Airways International Public Company Limited without any relevance to the witness' private business undertakings. The witness was a sponsor of Phase Media Company Limited, the producer of the "Chim Pai Bon Pai" programme and "Yok Kayong Hok Mong Chao" programme. An advertising contract was entered with Phase Media Company Limited every 6 months with the objective of disseminating and publicizing products of the shop by sponsoring the "Chim Pai Bon Pai" programme since B.E. 2544 (2001) and the "Yok Kayong Hok Mong Chao" programme since B.E. 2550 (2007). Nonetheless, the company did not specifically sponsor this only one company. Sponsorships were also given for programmes of other companies, such as "Rai Kan Krob Jakrawal" (Universal Programme). In considering the extent of benefits, regard was given to the appropriate timing of the programme. As for payment of programme sponsorship, a lump sum monthly payment would be made. In the case of the "Chim Pai Bon Pai" programme, 90,000 baht per month was paid, and the "Yok Kayong Hok Mong Chao" programme 50,000 baht per month. The sponsorships given by the witness' shop for the "Chim Pai Bon Pai" programme and "Yok Kayong Hok Mong Chao" programme were undertaking pursuant to contracts with the owner company of the programmes. The witness was not privy to any other activities and had no relationship with the respondent whatsoever.

7. The respondent testified as a witness, in summary as follows. The respondent had hosted the "Chim Pai Bon Pai" programme since B.E. 2543 (2000) while he held office as the Governor of Bangkok Metropolitan Administration. Phase Media Company Limited had contacted the respondent to offer the hosting role in relation to which the respondent had never demanded any remuneration and had never obtained or received salaries from such company. Prior to becoming Prime Minister, the company would remunerate the respondent in the amount of over one hundred thousand baht per appearance. After becoming Prime Minister, no further remuneration was received. The Company would, instead, pay a car fuel allowance and expenses for purchasing the ingredients used in the programme in the amount of 3,000 or 5,000 baht, whereby payment was made to the respondent's driver, whom apart from being responsible for driving, was also in charge of filling the car's fuel. The prerecording would last for half a day before being broadcasted for about 4 times in the entire month. The programme was not a live broadcast. The respondent did not have any awareness of or was related to the advertisement of products on the programme as they were made under agreements between Phase Media Company Limited and such sponsors. The respondent was not acquainted to most of the sponsors. When inviting promoters or sponsors to participate in the programme, the company would send the invitations. The

respondent was not the person making the invitations. Prior to the election towards the end of B.E. 2550 (2007), the company sent a letter to consult the respondent as to whether or not the latter would continue to accept the role of hosting. The respondent made inquiries to lawyers and was informed that he was not an employee, but that this was a hire for work. Nevertheless, the respondent sent a letter replying that Phase Media Company Limited should find a new host to replace the respondent. Subsequent to the respondent taking office as Prime Minister on 6 February B.E. 2551 (2008), about 2-3 recordings of the programme were made and the respondent did not in any way withheld the broadcast of such programmes. Once there was an objector around the month of May B.E. 2551 (2008) that such acts were in violation of the law, the respondent thus ordered the suspension of broadcasts and requested the return of the programme recordings from the television station. As for the programme's symbol, there was a depiction of a cartoon illustration of a chef as well as a rose apple nose representing Mr. Samak Sundaravej, who had already produced the programme for approximately 7 years. As for the event around the year B.E. 2544 (2001), when Sakulthai Weekly Magazine published an interview with the respondent, stating that the respondent received a monthly salary of 80,000 baht, this was a case where the company wished to advertise its programme. The sum was calculated from the 20,000 baht fee per appearance, with 4 broadcasts each month, resulting in a total of 80,000 baht. As for the "Yok Kayong Hok Mong Chao" programme, the respondent also did not demand any remuneration.

8. Mr. Sakchai Kaewwaneeskul, managing director of Phase Media Company Limited, verified the statement affirming facts or opinions and testified further, in summary as follows. The witness produced the "Chim Pai Bon Pai" programme since the end of B.E. 2541 (1998). After the witness read the "Chim Pai Bon Pai" book written by the respondent, he conceptualized the idea of producing a television programme based on the book. At that time, the respondent was not yet Governor of Bangkok Metropolitan Administration. In the year B.E. 2542 (1999), the witness requested a meeting with the respondent to propose an offer and enquired as to whether he could produce a cooking programme based on such book and broadcast the programme on television. After approximately 3-4 months, the witness met the respondent and explained the details on the adaptation of the book into a television programme in order to benefit the Thai society. The respondent accepted the offer for consideration and subsequently notified his acceptance. No mention was made whatsoever of any remuneration and no contract of employment was executed. Furthermore, the respondent did not hold any position in the company and was not in any sense deemed as an employee of the company as no salary or social security payments were made. The respondent received a similar fee to actors generally. The recording would be made on a single day, which would be broadcasted 4 times. On approximately 15 December B.E. 2550 (2007), the company sent a letter to enquire the respondent as to whether or not he was still able to continue as a cooking actor. The respondent replied that he had sought the advice of lawyers and was informed that the continuance of such a role was allowed, but no monies whatsoever would be received. After the respondent became Prime Minister, recordings of the "Yok Kayong Hok Mong Chao" were made on about one or two occasions. No other recordings were made after that. As for remuneration of the respondent, no demands of remuneration were ever made. The matter was left to the discretion of the company. Subsequent to becoming Prime Minister, the respondent did not request for remuneration. The

company therefore did not pay any remuneration, but only made payments as car fuel expenses, such payment made to the driver and on only one occasion.

The Constitutional Court, after consideration of the application, statement in reply to the allegation, supporting documents, other relevant evidence, and the testimonies of witnesses, found that both cases contained sufficient evidence for a ruling. It was therefore determined that the issue which had to be ruled upon was whether or not the ministerial office of the respondent terminated under section 182 paragraph one (7) in conjunction with section 267 of the Constitution due to the respondent holding a position in Phase Media Company Limited, which was a company carrying out a profit-seeking or revenue-sharing business, or being an employee of such company.

The first question which has to be ruled upon is whether or not the respondent was an employee of Phase Media Company Limited. After due consideration, the Constitutional Court finds that section 26 of the Constitution prohibited the Prime Minister and Ministers from being employees of any person in order to enable the proper exercise of functions by the Prime Minister and Ministers, preventing acts which gave rise to a conflict of interests that would cause an ethical conflict and difficulties in decision-making, as well as a dilemma between personal interests and public interests once the office holder has regard more to his/her personal interests than the public interest. The conflict between personal interests and the exercise of functions was therefore a conflict which had the character of the acquisition of personal interests at the expense of public interests.

The realization of such spirits of the Constitution cannot not therefore be achieved by merely defining the word “employee” in section 267 of the Constitution as meaning an employee under the Civil and Commercial Code, labour protection law or tax laws. Each law contains different intents in accordance with the rationale for enacting such laws. Also, those laws have lower statuses than the Constitution, which is the supreme law applied to the national administration, also intended to prevent acts that would give rise to a conflict of interests in a different manner from such other laws. The Constitution is a law which provides rules on national administration with the objective of recognizing the statuses of institutions and the rights and liberties of the people, laying down the fundamentals in the undertakings of the State, in order to enable the State to apply those spirits as principles to various situations or events properly and in accordance with the spirits.

Therefore, the word “employee” under section 267 of the Constitution has a wider meaning than the definitions in other laws. The general definition must be applied. Under the Dictionary of the Royal Institute B.E. 2542 (1999), the word “employee” is defined as “a person hired to perform work; a person who has agreed to perform work for an employer for wages regardless of any specific names.” No regard is given as to whether or not there was a written contract of employment, or whether or not remuneration was paid as wages, fees or remuneration in the form of other properties. If there was an agreement to become a person hired to perform work, such a case would always fall within the meaning of the word “employee” under section 267 of the Constitution. Otherwise, an employee receiving a monthly salary under an employment contract would be able to continue work upon appointment as a Prime Minister or Minister by altering the monthly salary to wages as per work performed. For instance, a medical practitioner could alter his/her salary into treatment fees according to the number of patients, or a legal advisor could alter his/her salary into a consultancy fee or opinion fee according to the number of advises given, in both cases a

relationship in terms of interests is still maintained between the owner of the business and the person performing the works. It is clear that the law does not intend to open up channels for the easy avoidance of the application of such prohibitions.

A finding of facts was made from the enquiry of the respondent that subsequent to the respondent taking office as Prime Minister, the respondent continued to act as a host in the "Chim Pai Bon Pai" and "Yok Kayong Hok Mong Chao" programmes for Phase Media Company Limited. Upon scrutiny of the characteristics of the business activities carried out between Phase Media Company Limited and the respondent throughout the five year period, it is found that Phase Media Company Limited has undertaken profit-seeking activities which were not public charities, and the respondent received remuneration commensurate to his standing and tasks. Once the acts were undertaken while the respondent was in office as the Prime Minister, the acts and legal relationships were therefore within the scope which section 267 intended to combat to prevent overlapping interests with private businesses. It also appeared from the interview of the respondent in Sakulthai Magazine, Volume No. 47, published on Tuesday, 23 October B.E. 2544 (2001), page 37, that from the performance of duties as an honorary host in the television programme "Chim Pai Bon Pai" broadcast every Saturday, during 10.30-11.00 hours on ITV Television, produced by Phase Media Company Limited, the respondent received a monthly salary of 80,000 baht per month from Phase Media Company Limited. As for Mr. Sakchai's letter that was sent to the respondent, dated 15 December B.E. 2550 (2007), consulting the respondent on the latter's future actions with respect to being a guest host in the "Chim Pai Bon Pai" programme, and the respondent's letter sent to Mr. Sakchai, dated 25 December B.E. 2550 (2007), informing that the respondent would work gratis without receiving remuneration in the form of car fuel expenses as was previously the case, the respondent never presented these two letters prior to being summoned by the Election Commission. The respondent gave a statement on 22 May B.E. 2551 (2008) and still maintained as if prior to December B.E. 2550 (2007) the respondent received only car fuel expenses as remuneration, which was inconsistent with the testimony of Mrs. Darika and the tax evidence mentioned above indicating that the respondent had received performance fees, and not car fuel expenses. This raised a suspicion that evidence was retroactively fabricated to conceal facts pertaining to the remuneration of the respondent. Furthermore, the respondent himself testified that he did not receive car fuel expenses and other expenses, which were more likely paid to his driver. Such testimony was contrary to the respondent's statement dated 30 June B.E. 2551 (2008) which stated that by being invited to the "Chim Pai Bon Pai" programme, the respondent received a travel allowance, which was only paid when the respondent appeared on the programme, and if the respondent did not appear on the programme as invited, he would not receive any travel allowance. A finding was thus not possible either way. All the evidence were credible for a finding that the respondent performed duties as a host in the "Chim Pai Bon Pai" programme after taking office as Prime Minister where the respondent continued to receive remuneration in the form of properties from Phase Media Company Limited. The respondent's role as a host for Phase Media Company Limited was therefore a hire for performance of work under the definition of the word "employee" in accordance with the essence of section 267 of the Constitution. As a result, it has to be deemed in this case that the respondent was an employee of Phase Media Company Limited, being an act prohibited under section 267 of the Constitution. Thus the individual ministerial office of the respondent therefore terminates under section 182 paragraph one (7) of the Constitution.

In the deliberation of this case, 6 Justices of the Constitutional Court held that the respondent was an employee of Phase Media Company Limited, being an act prohibited under section 267 of the Constitution. A ruling on the question of whether or not the respondent held any position in Phase Media Company Limited was therefore not required. 3 other Justices of the Constitutional Court held that the act of being a host, the use of the programme name "Chim Pai Bon Pai", and the use of the respondent's face in the programme of Phase Media Company Limited constituted agreements to jointly undertake a profit-sharing activity in the form of a partnership. Therefore, the respondent's acts undertaken for Phase Media Company Limited amounted to the holding of a position in a partnership for profit or revenue sharing. Thus a ruling on the question of whether or not the respondent was an employee of Phase Media Company Limited, being a prohibited act under section 267 of the Constitution, was not required.

By virtue of the foregoing reasons, the Constitutional Court, by unanimous resolution, finds that the respondent has committed an act prohibited under section 267 of the Constitution, resulting in the termination of the individual ministerial office of Mr. Samak Sundaravej, the Prime Minister, the respondent, pursuant to section 182 paragraph one (7) of the Constitution, and upon the Constitutional Court's finding that the Prime Minister, the respondent, has committed an act prohibited under section 267 of the Constitution and that the ministerial office of the Prime Minister terminates under section 182 of the Constitution, in consequence thereof the offices of the entire Council of Ministers terminates under section 180 paragraph one (1) of the Constitution. However, as the ministerial office of the Prime Minister terminates individually, the remaining Ministers in the Council of Ministers shall remain in office to perform functions until a newly appointed Council of Ministers takes office under section 181 of the Constitution.

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|---|---|
| Mr. Chat Chonlavorn | President of the Constitutional Court |
| Mr. Charun Pukditanakul | Justice of the Constitutional Court |
| Mr. Jaroon Inthajarn | Justice of the Constitutional Court |
| Mr. Chalermpol Ake-uru | Justice of the Constitutional Court |
| Mr. Nurak Mapraneet | Justice of the Constitutional Court |
| Mr. Boonsong Kulbupar | Justice of the Constitutional Court |
| Mr. Wasan Soipisut | Justice of the Constitutional Court |
| Mr. Supoj Kaimook | Justice of the Constitutional Court |
| Mr. Udomsak Nitimontree | Justice of the Constitutional Court |

# Remarks on Ruling of the Thai Constitutional Court No.12-13/2551

# "Cookery Show"

**Kittisak Prokati***

On September 9, 2008 a decision of the Thai Constitutional Court caught the attention of worldwide public media. The Thai Prime Minister (PM) was dismissed as the Court found that he has violated a constitutional prescription on conflict of interests by hosting a TV show. BBC News said "Court says Thai PM 'must resign"; CNN quoted "Thai PM fired over cookery show". While the media may focus on the consequences in Thai political arena, this decision proves important for lawyers given it invokes various legal issues, especially the application, interpretation, reasoning and implication of the principle of conflict of interests, as per the Thai constitution. While the decision may well have been accepted by the majority opinion in Thailand, for some critical minds, it remains a questionable decision of whether the Court both theoretically and practically, interpreted and applied the law correctly.[1]

## Background of the Case

Thailand's political atmosphere proved increasingly volatile following a rally against Prime Minister Thaksin Shinawatra in early 2006. Thaksin dissolved the parliament in February and called for general elections in April. The opposition parties did not join the election and called for a general boycott, consequently the election could not be undertaken. In some southern provinces where there were no opponent candidates, the votes for the "one-horse race" candidates did not reach the 20% of eligible threshold in those constituencies as required by law.[2] The election could not be deemed complete and the House of Representatives could not be held in session. On the occasion of taking the oath of senior judges in April, King Bhumibol called for the judiciary to do their duty to resolve the political crisis. In May 2006 the Constitutional Court declared void

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[1] See Pornsant Liangboonlertchai, "Rip the Constitutional Court Decision No.12-13/2551 (2006)" via http://www.pub-law.net/publaw/view.aspx?id=1280;

"Five Law Professors suspected disqualification of some Constitutional Court judges", in *Matichon Online* (Thai language), via:http://www.matichon.co.th/news_detail.php?newsid=1228045726;

Verapat Pariyawong, "Three-Course Recipe for the Court's Cookery: A Critique on Thai Democracy and Judicial Review", Harvard Law School LL.M. paper, May 2010, at http://sites.google.com/site/verapat/master-of-laws-paper.

[2] Section 74 of the Organic Act on Election of Members of the House of Representatives and Senators, 2541 (1998), *Royal Thai Gazette*, Vol. 115, pt. 35 (kor), p.39, 60.

the general elections for violation of the principle of secret ballot.[3] As the nation was waiting for a new election, the Criminal Court held in July that the then members of the Election Commission were liable for abuse of power, and therefore, to be imprisoned. Members of a new Election Commission were recruited. Despite this, instead of fresh elections, a military coup d'état took place in September 2006. The constitution of 1997 was abolished, and Thaksin's administration was overthrown.

According to the Interim Constitution promulgated by the junta, a Constitutional Tribunal was established and carried out the task of the former Constitutional Court.[4] Members of the Constitutional Tribunal were not nominated by the junta, but instead included representatives from the Judiciary, namely the President of Supreme Court and the President of Supreme Administrative Court. So too an additional seven judges were elected to the assembly of judges of the highest courts, and an additional five Supreme Court judges, and other two Supreme Administrative Court judges recruited. In May 2007 the tribunal found that the former ruling "Thai Rak Thai" party were responsible for committing election fraud in 2006[5] and declared that the party be dissolved, prohibiting all members of the executive committee from participation in political activities. The 111 members of the party's executive committee were thereby deprived of their political rights. The Constitutional Tribunal stated that the party's executive committee members did nothing to prevent the party from committing frauds, and had failed to punish the misconduct of its members. Therefore, they were to be held responsible for election fraud. In the eyes of the majority of the Tribunal, this measure was applicable despite its retroactive effect as it did not belong to criminal punishment.[6]

A new start began with the new Constitution of 2007 promulgated after approval by nation-wide referendum.[7] It was followed by general elections at the end of the same year. And the former dissolved "Thai Rak Thai" party, renewed as "People's Power Party", won the election. The chairman of the party, Samak Sundaravej, was elected as Prime Minister in January 2008. He also held the office of Defence Minister. But after a few months in office, his term in office faced several challenges. He was accused by his opponents of being a proxy to the former Prime Minister Thaksin, and then faced massive street protests as he declared his intention to revise the 2007 constitution. In July 2008 his Minister of Foreign Affairs, Nopadol Patama, resigned from his post, after the Constitutional Court ruled that the cabinet resolution approving the signing of an international agreement was void as it was carried out without parliamentary approval as the Constitution so requies. His deputy party leader, Yongyut Tiyapairat, the then speaker of parliament, was banned from politics after the Supreme Court upheld the vote buying charges against him.[8] His Minister of Public Health,

[3] Constitutional Court Decision 9/2549 (2006), *Royal Thai Gazette*, Vol.123, pt.171 (kor), p.1ff., in Thai language.

[4] Section 35 of the Interim Constitution of the Kingdom of Thailand (2006), *Royal Thai Gazette*, Vol.123, pt.102 (kor), p.1 ff., in Thai language.

[5] Constitutional Court Decision 3-5/2550 (2007), *Royal Thai Gazette*, Vol.124, pt. 33 (kor), p.1 ff. in Thai language.

[6] According to the Announcement of the Council for Democratic Reform No.27, Section 3: In case that Constitutional Court or other organisation acting as the Constitutional Court issues order dissolving political party owing to the infringement of the Organic Act on Political Party BE 2541 (1994), the executive members of such political party shall be banned from elections for five years as from the date the dissolution order is issued.

[7] See English translation at http://www.senate.go.th/index-of-parliament/Infoes/ThailandConstitution2007.pdf.

[8] Thai Supreme Court Decision/Dika 5019/2551 (2007), in Thai language.

Chiya Sasomsub, was removed from office by a Constitutional Court ruling for illegally concealing his wife's assets.[9]

## The Case

It began with the Senate President's complaint in June 2008, which followed similar charges made by the Election Commission of Thailand (ECT) in July that requested that the Constitutional Court decide whether Prime Minister Samak Sundaravej had violated Section 267 of the Constitution. If found guilty, the PM would ostensibly be removed from office.

According to Section 267 the Prime Minister and Ministers are prohibited from having any position in a partnership, a company or an organisation carrying out business aiming at sharing of profits or income, or to be an employee of any person. However, after Prime Minister Samak Sundaravej entered his office, though well aware of this principle, he still hosted a television program presenting a cookery show. The show carried his signature "Tasting and Grumbling" and a teasing figure symbolised by his rose apple nose. This popular cookery show had been televised through the military-owned TV-channel in cooperation with and under promotion of a private company called Face Media Co., Ltd. many years before he became Prime Minister. On the ground that this television program was under control and promotion of a private company and that Prime Minister Samak Sundaravej did not cease from such an activity until the Election Commission received the complaint, he was accused for having breached the constitution.

In response to the complaint, despite his interview given to a magazine in 2001 saying that he received a monthly payment of some 80,000 baht for his performance, Prime Minister Samak Sundaravej later argued that he received no remuneration for his activities other than reimbursement for travel expenses. He held neither interests nor shares or positions in the mentioned private company, nor did he receive salaries or other benefits from the company. He gave this televised presentation on invitation, not under contract of employment and not for payment. As he was not under contract of hire for labour nor was he under the control of his contractual partner, therefore, he could not be considered as employee as prohibited by the constitution.

The Constitutional Court, as to its main decision, took the following into its consideration:

The spirit of the 2007 Constitution, especially of the Section 237 forbidding the Prime Minister and Ministers to hold any position in a profit-based private organisation or being employee of any person, is to prevent conflicts of interest, a difficult and unethical situation in which these office holders may fall into, that leads them to make choice between self and public interest. This is necessary to ensure public trust upon important office holders that they carry out their offices mindful of serving public interest, beyond any doubt of pursuing their own private interests. It remains questionable, however, whether the televised activities of Prime Minister Samak Sundaravej would fall under activities of an "employee". According to the term, "employee" means "a person who agrees to render services for payment of employer upon the duration of services". This is a legal meaning defined by the Civil and Commercial Code or the law on labour protection or the law on taxation. Such an

[9] Constitutional Court Decision No. 9/2551 (2007), *Royal Thai Gazette*, Vol.125, pt. 113, p.1 ff., in Thai language.

interpretation distinguishes an "employee" from a "contractor". The latter means a person who works for another person in exchange of payment, not upon duration of service, but upon the result of the work. The Court, however, disagreed to interpret the term "employee" in such a technical meaning as it would be too restrictive and come too short to capture the spirit of the Constitution. The Court also argued that the technical meaning of the Civil and Commercial Code, as well as that of the law on labour protection are not relevant for the interpretation of the Constitution, as they are lower in their hierarchy and do not correspond to the constitutional meaning of the term. According to the spirit of the Constitution, the Court maintained that the term "employee" shall not be limited specifically to person rendering service for payment which is technically understood by lawyers, but shall also be extended to cover "contractor" as typically understood; so too to cover any person who agrees to work for other person, irrespective of what he is referred to. According to the Court, the definitive meaning of such terms can be found in dictionaries. Following to the Official Dictionary of Thai Words, given by the Royal Institute, edition 1999, "employee" means "a person who works for any job; a person who agrees to work for other person, irrespective of how he is called". For the Court, it would be an absurd interpretation or ridiculous, if a Prime Minister were to be forbidden to serve a private person as an employee, but be allowed to serve the same person or to serve any person seeking for profits as contractor. The decision states that:

> (o)therwise, an employee receiving a monthly salary under an employment contract would be able to continue work upon appointment as a Prime Minister or Minister by altering the monthly salary to wages as per work performed. For instance, a medical practitioner could alter his/her salary into treatment fees according to the number of patients, or a legal advisor could alter his/her salary into a consultant fees or opinion fees according to the number of advises given, in both cases a relationship in terms of interests is still maintained between the owner of the business and the person performing the works. It is clear that the law does not intend to open up channels for the easy circumvention of the application of such prohibition.

b) As to the claim made by Prime Minister Samak that after he entered into office, he did not hold any position in any private company, that he conducted his televised presentation only on basis of invitation, and that he did not receive any payment other than reimbursement for his travelling expenses, the Court remained convinced. In weighing these considerations against witnesses' testimonies pertaining to evidence of taxation in the past, together with an documented interview given to a well-known magazine in 2001, the Court declared that Mr. Samak Sundaravej had been paid for his performance (rather than receiving reimbursement only for his travel expenses, as he so suggested). Additionally, the letter dated December 25, 2007 stated that, given his role as Prime Minister, his performance shall be conducted without any reimbursement, as asserted as evidence by Mr. Samak Sundaravej himself, was written in such a manner as if he had been only reimbursed for traveling expenses; so too suggesting that he had never been paid for such performances in the past. Such a suggestion contradicted to all other evidence, thereby dismissing the credibility of the letter. It could be suspected that the letter was even retrospectively constructed to distort

the evidence that Mr. Samak Sundaravej had been paid for his performance. This led to the conclusion that his argument for not being paid was unfounded.

c) Six of the nine Constitutional Court judges concluded that, according to the facts, Mr. Samak Sundaravej had conducted the televised program as an employee to the said private company. Another three judges held that Mr. Samak Sundaravej had engaged in the televised activities not only as “employee”, but as a partner of commercial activities; given he performed not only as a cook, but allowed the company to use the well-known "rose apple" symbol, which mocks his nose as a logo of the televised “Tasting and Grumbling” program.

As such, the Constitutional Court unanimously held that Mr. Samak Sundaravej breached Section 257 of the Constitution. Consequently they ruled that his office as Prime Minister be terminated in accordance with Section 182, I, (7). Furthermore, as a result of such termination according to Section 182 in combination with Section 180, I, the whole Cabinet shall be discharged. However, as the termination of the premiership has an effect on Mr. Samak Sundaravej personally, he shall not be qualified to remain in office as a caretaker Prime Minister, but all other Ministers may stay as caretaker government until the new Cabinet would be sworn into office.

## Responses and Remarks

The first controversial response focuses on a claim that the Court did not apply Section 267 of the Constitution correctly, as the wording “employee” is clear enough and therefore, the Court should not extend its meaning to include “contractor”, or to “person who agrees to work for another person”. Such an extensive interpretation would lead to a borderless application of Section 267. Criticism concentrated especially on the point that the Court quoted the dictionary definition of the word instead of applying the law according to its technical meaning. Such an application of the dictionary definition would lead to public confusion that dictionaries had legal force or could be considered a source of law.

This criticism is not very convincing, as the Court also pointed out that the interpretation is a result of a construction in spirit of the Constitution to prevent ministers from conflicts of interest and the abuse of their power. Therefore the court did not limit its interpretation to the technical meaning of the term, as understood in the Civil and Commercial Code or in law on labour protection or taxation. It is clear that conflict of interest is a condition which could emerge in a wide range of circumstances, relating to the elements of prohibition in Section 267, especially by holding any position in any profit-based organisation or being “employee” of any person. As the spirit of the Constitution is more extensive than the technical meaning of the term, it is justified that the Court shall not restrict itself to the strict technical meaning. This is not a provision restricting or disadvantaging individuals in their fundamental rights and freedoms whereas a restrictive interpretation shall be applied, but it concerns a high requirement for the holder of highest public offices, therefore the extensive interpretation prevails. By applying the ordinary meaning of the term “employee” in its broader sense as it is understood in everyday life, it is, therefore, acceptable to look into dictionary meaning of the term. In such a case, the use of a dictionary by the Court does not imply that a dictionary is a source of law; it is merely an application of law in accordance with the ordinary meaning of the term. As the spirit of law is underlying this extensive interpretation, it is justified as far as it does not go beyond the boundary of the word itself. In this concrete case, it would be absurd if a Prime Minister is forbidden to be

deemed an "employee" in the sense of hire for labour in any business organisation but be allowed as a "contractor", such as a counsellor or lobbyist, in similar circumstances.

As a general rule, the court take the spirit of law seriously into account, and not restrict itself to the mere wording of terms. Even in England, where the doctrine of parliamentary supremacy prevails and judicial review exists only in few exceptional cases, it is well-known that the spirit of law shall prevail over the wording. The court shall "go behind the words which confer the power to the general scope and objects of the Act in order to find out what was intended".[10] This was applied in a case by which the Minister of Agriculture rejected a request of a milk producer, who was suffering from price control regulations, to appoint an inquiry committee to investigate on the real price. The reason behind the rejection was that the Minister was afraid of bad publicity. Even though under Agricultural Marketing Act 1958 the Minister has the discretion power on the appointment of an inquiry committee, the court deemed his refusal unlawful, nothing that the Minister shall apply his discretionary power reasonably in accordance with the purpose of the Act. In the given case, this referred to the appointment of an inquiry committee. In that case the Court per Lord Reid stated that:

> Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by constructing the Act as a whole… [I]f the Minister … so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.[11]

Extensive interpretation according to the spirit or purpose of the law is widely realised in Germany. Through the decisions of the German Federal Constitutional Court, interpretation of the term "ownership" as a fundamental right has never been restricted to rights on corporeal objects as per the German Civil Code (§90 BGB), but also extended to include all rights, susceptible of having a value and of being appropriated, or including the term "property" in technical sense. Ownership in the sense of the German constitutional law is therefore, due to its extensive purpose of constitutional protection, much wider than in German private law. It covers almost all property rights and titles which could be disposed of and appropriated according to decision made by the entitled person for his/her own benefit and in his/her own liberty and responsibility.[12] Many German Constitutional Court decisions are exemplary, not only for extensive interpretation, but also for their weighing and balancing of relevant interests.

[10] Padfield v. Minister of Agriculture, Fisheries and Food [1968], A.C. 997 at 1033, per Lord Reid.

[11] Ibid., at 1030; In another further exemplary case – rather fit for teleological interpretation than for extensive interpretation, a statue prohibited the creation of an obstruction 'in the vicinity of a prohibited place' namely the Royal Air Force station, the accused gained access into the station and created an obstruction, not 'in the vicinity of', but inside the station. He argued that, as he was actually in the prohibited place, he could not be said to be "in the vicinity" of the prohibited place. Although the words of the provision did not fit, the accused was nevertheless convicted. See Adler v George [1964] 2 QB 7: Lord Parker CJ stated in the case (at 10) that confining criminal liability to acts outside the station would be absurd, so that the case is rightly seen as an application of the golden rule (the rule against literal meaning being allowed to occasion absurd result), see also DC Pearce and RS Geddes, *Statutory Interpretation in Australia I*, (5th ed., 2001), 2.4.

[12] BVerfGE 89, 1, 6 [1993]: The case is known as Besitzrecht des Mieters (Landlord-Tenant Case), see D. P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, (2nd ed., 1997), p. 255.

Among many interesting cases, a famous one in 1993 whereby the German Constitutional Court decided whether a landlady could lawfully terminate a lease of one of her apartments and evict the tenant. The ground for termination was that she, who also lived in another apartment on the higher floor of the same house felt old and unwell, therefore, she wanted her son who lived next door to move in the leased apartment, so that he would be closer at hand when she would need him. She justified her termination with the need of that apartment for her own use as recognised by the tenant protection law. The tenant refused to move out. He asserted that the move of the son from the apartment next door into the tenant's apartment was not reasonable; her claim to terminate the lease for her own use based on the tenant protection law was in this case an abuse of right. They then moved into litigation. The German Court of Justice in Civil Matters declared the termination as lawful and granted an eviction order. The tenant launched a constitutional complaint, arguing that the eviction order of the court infringed his property right and was therefore unconstitutional. In a series of earlier cases the German Court of Justice in Civil Matters had required that the landlord's termination for his or own use had to be reasonable. But in 1989 the Constitutional Court decided that it was unconstitutional when the civil courts scrutinise their investigations deeply into the motives of the landlord for their need of use.[13]

In the 1993 decision the German Constitutional Court had to adjudge, whether the right of tenant, which is just a contractual right against the landlord, shall be protected under the fundamental right of ownership. The Court certified the tenant right as ownership to be protected by the constitution. The Constitutional Court then reconfirmed that the landlord's need had to be respected, but also indicated that a bare declaration of the landlady to use her property for her own use would have been insufficient to justify the termination of lease. Although the courts shall limit their review of the owner's motives, it shall verify the purpose for her own use that it shall be reasonable and feasible, and therefore the court could to a certain extent enquire into the landlord's prospective use of her property. As this had been correctly done, the Constitutional Court decided that the eviction order of the Civil Court was constitutional.

In the Thai case however, the Constitutional Court went too far beyond an extensive interpretation; by pointing out that the meaning of the term defined in Civil and Commercial Code or the law on labour protection or on taxation is not applicable to the case as those laws are of lower hierarchy. This statement of the Court was strongly criticised and could not be followed as it is against the principle of systematic interpretation. According to the well accepted juristic methodology, all the laws are to be seen as a whole unity, they are rationally and logically linked to each other in a systematic way understandable through scientific explanation. The Constitutional Court has binding force for all State-organs, and such a statement would lead to an understanding that constitutional law, in its highest hierarchy, had its own separate meaning isolated from other laws. This would mislead application of constitutional law

[13] BVerfGE 79, 292 [1989]: The landlord, as owner, shall be allowed to take his or her own decisions to control and realise his or her own life through the use and disposal of his or her own property, the court shall not make decisions on the owner's need. The Constitutional Court in 1989 pointed out that although the tenant protection laws placed restrictions on ownership of rental property, however an interpretation of these laws without taking account of the landlord's interest to use the property for his or her own purposes would be in conflict with the constitutional guarantee of ownership. Therefore, the review of the owner's need shall be done in a certain restrictive manner, to verify whether the landlord's need is real and not just an expediency to get rid of the tenant.

in the future. Instead of justifying the broader meaning of the term by asserting its constitutional hierarchy, it would be enough and also much easier, if the Court would have justified the broad meaning by merely clarifying the purpose or the spirit of the Constitution.

Another point of criticism is related to the lack of taking the principle of separation of powers seriously when interpreting the term "employee". According to this principle the court shall limit itself not to intervene into the realm of the other branches of power, unless the law clearly authorises the court to do so.[14] By interpreting law the court shall restrict itself to a certain extent, that it would not break the boundary of the word. The court shall discover what the law is, but not create a new law. Although the Constitutional Court decision has binding force, the Court shall not interpret the law in a manner that it would establish a new rule, as this shall be left to the parliament. In case of ambiguity or uncertainty or inexactness of the meaning of the word, the court has to take the principle of separation of powers seriously into account by defining a clear border line or a certain extent of the meaning through interpretation. The Thai Constitutional Court dismissed the relevance of legal definition of "employee" under Civil and Commercial Code, employment law and tax law, and accepted a broad ordinary meaning used in the dictionary of the Thai language by mentioning the spirit of the Constitution, however, without justifying how far such a broad meaning fit into the spirit of the Constitution. Although the Court discussed the purpose behind Section 267 that this is to ensure proper performance of Ministers and prevent them from conflict of interests, the decision did not point out how far the term "employee" of any person would reflect the conflict of interests. Assertion of such a high general meaning in the Constitutional Court decision might lead to misconception, if one would apply the same meaning of "employee" to ban a wide range of relationship and all activities of Ministers and holder of those highest offices possibly covered by such a term. It would be worse, if one would use such a broad term to bring down those holders of highest offices on political purpose. Instead of ensuring ethical conducts and public trust, this broad meaning might be used for political battles. This would be a backlash against conflict of interests as spirit of the Constitution.

This is the case in which a judge of the Constitutional Court, who also has to be subject to Section 267 of the Constitution, had been criticised of being "employee" at the moment he gave a lecture and received honorarium at private educational institutions.[15] Had the Constitutional Court clarified this at the beginning, it might have been less problematic. It is a pity that the Court failed to do this in its decision. Although such a discussion existed in separate opinions of individual judges, but

[14] However, we shall bear in mind that there is a deep difference between the role of the German Constitutional Court and the American Supreme Court. German law does not provide the German Constitutional Court with the possibility of not settling a dispute on grounds of its political nature. Whereas the political doctrine makes it possible for the American Supreme Court not to decide cases due to the 'extralegal factors', such a 'political question doctrine' does not exist in the German Constitutional jurisprudence. See Russell A. Miller, "German Basic Law and the Use of Force", in *Journal of Global Legal Studies* (2010), pp. 197, 204; Elke Luise Barnstedt, "Judicial Activism in the Practice of the German Federal Constitutional Court: Is the GFCC an Activist Court?" in *Juridica International, Vol. XIII* (2007), Political Questions in Constitutional Review, pp. 38, 41f.

[15] See "Five Law Professors doubt at qualification of some Constitutional Court judges", in *Matichon Online* (Thai language), at http://www.matichon.co.th/news_detail.php?newsid=1228045726; "From 'Tasting and Grambling' to 'Jaran Pakditanakul' – can a Constitutional Court judge be an honorary lecturer at a private university?", in *Matichon Online* (Thai language), at http://www.matichon.co.th/news_detail.php?newsid=1221138135.

unfortunately these considerations did not appear in the main decision. In general they mentioned the aim of Section 267 as to "prevent the exercise of authority for personal gain". Judge Charoon Intachan mentioned the purpose of law as to support good governance and proper performance of the office, prevention of abuse of power. He even pointed out that a sponsor of the TV presentation of the Prime Minister had been appointed to a high position in a State enterprise and therefore suspicious for irregularity.[16] Judge Supoj Kaimook noted that the Prime Minister was also holding office of Defence Minister, and the TV program was aired on a network operated by the Thai Army, therefore, the fact that Prime Minister joined a private company's program bearing his signature and using his mocking figure as its symbol led to a conclusion that the Prime Minister abused his authority or tolerated exploitation of his authority for his or others' personal gain.[17]

A comparable case emerged in the United States, concerning the Ethics in Government Act of 1978; enacted as a consequence of the Watergate scandal. The law requires that public officials disclose their finances, and restricts former government employees engaging in lobbying activities.[18] The most significant revision of this Act occurred in the Ethics Reform Act of 1989.[19] The Ethics Reform Act modified post-employment restrictions, revised and consolidated the financial disclosure requirements for all three branches, changed the rules on the acceptance of gifts and amended the criminal ethics provisions. The law prohibits federal and government employees as well as members of Congress from accepting honorarium for making appearance, speech, or writing an article independent of any connection between the employee's official duties and the content of the speech or article or the person or group paying for it.[20] The National Treasury Employees Union challenged the constitutionality of those provisions arguing that such a general honorarium ban would come into conflict freedom of speech as protected by the First Amendment.[21]

The Supreme Court voted 6:3 that the ban violated freedom of speech, and the government cannot rely on the prohibition if there is no connection between the job of the employee and the "subject matter" of the speech or the party that paid for the speech. The Supreme Court carefully balanced the benefits of the ban and the disadvantages of speech freedom restriction, and declared that "the speculative benefits the honoraria ban may provide the Government were not sufficient to justify this crudely crafted burden on respondents' freedom to engage in expressive activities". In this decision the Supreme Court also took into consideration the separation of powers and noted that "(the Court's) obligation to avoid judicial legislation also persuades (the Court) to reject the Government's second suggestion – that we modify the remedy by crafting a nexus requirement for the honoraria ban… (That) the Court of Appeals

[16] Separate opinion of Judge Charoon Intachan, Thai Constitutional Court decision No. 12-13/2551, September 9, 2008, in *Thai Royal Gazette*, Vol.125 pt.122 (kor), p.29-35.

[17] Separate Opinion of Judge Supoj Kaimook, Thai Constitutional Court decision No. 12-13/2551, September 9, 2008, in *Thai Royal Gazette*, Vol.125 pt.122 (kor), p.54-58.

[18] 5 U.S.C. App.

[19] Public Law 101-194 (Nov. 30, 1989).

[20] 5 U.S.C. App. § 501 (b): "An individual may not receive any honorarium while that individual is a Member, officer, or employee". According to the Act "officer or employee" include almost all kinds of employees of the federal government. An "honorarium" is defined as "a payment of money or anything of value for an appearance, speech or article". §505 (3). Federal employees are therefore prohibited from receiving compensation for a wide variety of expressive activities, whether or not these are related to their official duties.

[21] United States v. National Treasury Employees Union, 513 U.S. 454 (1995).

properly left to Congress the task of drafting a narrower statute".[22]

Turning back to the Thai case, the court should have mentioned the need to safeguard political discipline and ethics as well as good public morals as principles binding public officers, and that the prohibition of conflict of interests has priority over their freedom of expression or freedom of profession. Additionally, from the perspective of fair competition, the Court could have taken into account the impact of the air-time distribution of a state-owned television being given to a public figure, especially to the Defence Minister, in order to limit possible influence or abuse of authority of such a public figure. The Constitution itself makes an explicit limitation of fundamental rights and freedoms in case of Government officials that their rights and freedoms can be restricted by law or by-law issued by virtue of the law specifically enacted in regard to politics, efficiency, disciplines or ethics.[23] If the Court in this controversial case could have pointed out that the prohibition to be an "employee" in broader sense shall be applied only in such a case being suspicious of abuse of power, especially in case that such an employment stands in connection to possible abuse of authority aiming at personal gain, then the Court would have been in a better position to communicate to the public as well as to State-officials, how far their rights and freedom would be recognised and limited by the Court.

[22] However, Chief Justice Rehnquist, joined by Justices Scalia and Thomas dissented from the majority and insisted that the honoraria ban was consistent with the First Amendment. Chief Justice Rehnquist noted that even if he agreed with the majority's conclusion that the ban violated the First Amendment, he would not accept the majority's failure to include a nexus requirement in its remedy.

[23] Thai Constitution 2007, Sec. 31.

# Translation

Ruling No. 15/2553

Case No. 14/2553

**The Constitutional Court**

**Dated 9th September B.E. 2551 (2008)**

**The Political Party Registrar the applicant**

**Between**

**The Democrat Party the respondent**

**Re: The Political Party Registrar filed for an order of the Constitutional Court to dissolve the Democrat Party.**

The Political Party Registrar, as the applicant, submitted an application dated 26th April B.E. 2553 (2010) to the Constitutional Court for an order to dissolve the Democrat Party, as the respondent, pursuant to section 65 of the Organic Act on Political Parties B.E. 2541 (1998) or section 93 of the Organic Act on Political Parties B.E. 2550 (2007). The application was filed due to facts appearing before the applicant that the respondent violated the provisions of section 62 of the Organic Act on Political Parties B.E. 2541 (1998) or section 82 of the Organic Act on Political Parties B.E. 2550 (2007).

The facts under the application and supporting documents submitted by the applicant could be summarised as follows.

The respondent was a political party under section 92 of the Organic Act on Political Parties B.E. 2541 (1998) and section 135 of the Organic Act on Political Parties B.E. 2550 (2007). Section 62 of the Organic Act on Political Parties B.E. 2541 (1998) and section 82 of the Organic Act on Political Parties B.E. 2550 (2007) provided that a political party which received funding from the Fund for Development of Political Parties had to expend those funds in accordance with the provisions on state sponsorship of political parties and political party expenditures. The political party was also under an obligation to prepare an accurate and truthful report on the expenditure of political

party sponsored funds in any calendar year period. The report should be submitted to the Election Commission within the month of March of the following year.

The Committee of the Fund for Development of Political Parties passed a resolution in meeting no. 11/2547 (69), on 19th November B.E. 2547 (2004), authorizing the Fund's budget with respect to sponsorship of the respondent party pursuant to the projects and schemes stated in the application for sponsorship. A total of 21 projects were approved in a total value of 68,798,400 baht. Only 2 projects were concerned in this case, namely:

(1) Roadside Billboard Project in the amount of 10,000,000 baht for 2 billboards (10 billboards being the correct amount);

(2) Future Board Project in the amount of 175,115 future boards (100,000 future boards being the correct amount) valued at 37,999,955 baht (30,000,000 baht being the correct amount). The party filed for sponsorship from the Fund for Development of Political Parties in the amount of 19,000,000 baht, to be supplemented by the party in the amount of 18,999,955 baht (11,000,000 baht being the correct amount).

Thereafter, on 4th January B.E. 2548 (2005), the Office of the Election Commission transferred funds from the Fund for Development of Political Parties to the respondent party as sponsorship for the first quarter. The funds were remitted to the Democrat Party (Fund for Development of Political Parties) Account, Krung Thai Bank Pcl., Ministry of Finance Sub-Branch, account number 068-1-03199-9, in the amount of 55,738,400 baht.

The respondent submitted letter number Por Chor Por 4800020/2548, dated 10th January B.E. 2548 (2005), proposing revisions of the projects and schemes of the political party, in regard to which an application had been filed for sponsorship from the Fund for Development of Political Parties for the year B.E. 2548 (2005), and that appropriations had already been made therefor, in 2 projects, *viz.* Project (1) and Project (2). Under the proposed revisions, the appropriation of 10,000,000 baht for Project (1) Roadside Billboard would be reduced by 8,000,000 baht to 2,000,000 baht, and the appropriation of 19,000,000 baht for Project (2) Future Board would be increased by 8,000,000 baht to 27,000,000 baht – such increase to be funded by a reallocation of the 8,000,000 baht cut from Project (1). The secretarial staff of the Fund for Development of Political Parties issued an urgent circular letter no. EC 0402/Cir119, dated 17th January B.E. 2548 (2005) seeking the approval of the Committee of the Fund for Development of Political Parties. The application for changes in Project (1) and Project (2) were deliberated and approved by the Committee of the Fund for Development of Political Parties, after which the secretarial staff notified the respondent of the said decision in urgent letter no. EC 0402/905, dated 21st January B.E. 2548 (2005).

On 28th March B.E. 2549 (2006), the respondent, by Mr. Abhisit Vejjajiva, reported expenditures of the Democrat Party's sponsorship funds for the annual period of B.E. 2548 (2005) to the Election Commission.

The Election Commission was notified by the Department of Special Investigations that a complaint had been filed in the case of circumstances pertaining to offences committed by TPI Polene Public Company Limited under the Securities and Exchange Act B.E. 2535 (1992) and offences under other related laws. Upon an examination of the complaint along with the facts and evidence obtained from investigations, it was found that references were made to the respondent in 2 allegations. The first reference was in the case of the respondent's receipt of donations in the form of monies and assets with money value from TPI Polene Public Company Limited through Mesiah Business and Creation Company Limited by means of a hire contract for the production of promotional media under various projects, which was alleged to be a concealed juristic act concluded in order to evade the reporting of donation receipts required by law. The second reference was in the case the respondent's failure to expend the sponsorship funds received from the Office of the Election Commission in accordance with the law and the failure to report the party's expenditure of sponsorship funds accurately and truthfully to the Election Commission. In addition, Mr. Kietudom Menasawas, Member of the House of Representatives for Udon Thani Province, Pheu Thai Party, submitted a letter petitioning for an investigation and proceedings against the respondent and the respondent party executives on 2 similar allegations, i.e. that the respondent concealed, disguised or failed to disclose political party sponsorship funds from TPI Polene Public Company Limited by way of money laundering, with Mesiah Business and Creation Company Limited acting as a front in the sham advertising contract and disbursing fees for remittance and transfer to the accounts of Mr. Pradit Pataraprasit's close relatives and executives of the respondent party for expenditures in other political activities without any advertising for TPI Polene Public Company Limited as provided under the hire contract, and that the respondent received such sponsorship funds and failed to apply the funds for producing billboards in accordance with the items authorised by the Election Commission. Moreover, it was alleged that the respondent endorsed and reported false balance sheets and financial statements on expenditures of sponsorship funds to the Election Commission.

On 30th April B.E. 2552 (2009), the Election Commission passed a resolution in meeting number 48/2552 stating that a matter had appeared before the Election Commission with reasonable cause to suspect that an alleged act in violation or non-compliance of the law had been committed. Therefore, in order to obtain facts for consideration in a prudent and fair manner to all parties concerned, it was resolved that an investigation committee be appointed for such matter. Subsequently, on 17th December B.E. 2552 (2009), in meeting of the Election Commission no. 144/2552, the report of the investigation committee was considered and a resolution passed by a majority vote to refer the matter to the applicant for proceedings under section 95 of the Organic Act on Political Parties B.E. 2550 (2007) on both allegations.

The applicant issued Order No. 9/2552, dated 29th December B.E. 2552 (2009), to appoint a Review Committee for Proceedings under the Organic Act on Political Parties B.E. 2550 (2007), tasked with the review of investigations conducted by the

investigation committee on the respondent party's case. The Review Committee carried out the review and compilation of evidence and submitted an opinion to the applicant. The applicant submitted an opinion to the Chairman of the Election Commission on 12th April B.E. 2553 (2010), stating that an act under section 94 of the Organic Act on Political Parties B.E. 2550 (2007) might have been committed, and as this was of great significance, it was suggested that the matter be urgently submitted to the Election Commission via the Chairman of the Election Commission for resolution. The Chairman of the Election Commission thence submitted the matter to the meeting of the Election Commission.

The Election Commission examined the summary of facts prepared by the Review Committee for Proceedings under the Organic Act on Political Parties B.E. 2550 (2007) as well as other relevant evidence and found that the respondent had committed wrongdoings according to both allegations. On the second allegation, it was found that the respondent had not expended sponsorship funds received from the Office of the Election Commission in accordance with provisions of law and had filed a report of expenditure of the political party's sponsorship funds which was not factually accurate to the Election Commission, thus constituting a probable cause of an offence under section 62 and section 65 of the Organic Act on Political Parties B.E. 2541 (1998) and section 82 and section 93 of the Organic Act on Political parties B.E. 2550 (2007). It was decided that the applicant should notify the Attorney-General so that the latter could file an application with the Constitutional Court for an order to dissolve the respondent political party as provided under section 94(3) and (4) and section 95 of the Organic Act on Political Parties B.E. 2550 (2007) on both allegations.

Thereafter, on 21st April B.E. 2553 (2010), the Election Commission passed a resolution in meeting no. 43/2553 approving the applicant's filing of an application with the Constitutional Court for the dissolution of the respondent party pursuant section 93 of the Organic Act on Political Parties B.E. 2550 (2007). The applicant therefore filed an application with the Constitutional Court for the following decisions.

1. An order to dissolve the respondent party pursuant to section 62 in conjunction with section 65 of the Organic Act on Political Parties B.E. 2541 (1998) or section 82 in conjunction with section 93 of the Organic Act on Political Parties B.E. 2550 (2007).

2. An order to the effect that executives of the respondent party, which should be dissolved due to noncompliance with section 62 of the Organic Act on Political Parties B.E. 2541 (1998) thus constituting a cause for dissolution of a political party as provided under section 65, be prohibited from forming a new political party or from becoming a political party executive or being involved in a filing for the formation of a new political party under section 8 for a period of five years as of the day of the respondent's dissolution under section 65, or that due to the noncompliance with section 82 which constituted a cause for dissolution of a political party as provided under section 93 of the Organic Act on Political Parties B.E. 2550 (2007), the said persons be prohibited from filing for the formation of a new political party or from becoming a

political party executive or being involved in a filing for the formation of a new political party for a period of five years as from the day of the respondent's dissolution under section 97.

3. An order to revoke the election rights of the respondent party's executives for a period of five years as from the day of the Constitutional Court order to dissolve the party pursuant to article 3 of the Announcement of the Council for Democratic Reform No. 27 Re: Amendment of Announcement of the Council for Democratic Reform No. 15, dated 21st September B.E. 2549 (2006), dated 30th September B.E. 2549 (2006), or in the alternative, an order to revoke the election rights of the respondent party's leader and executives for a period of five years as from the day of Constitutional Court order to dissolve the party pursuant to section 98 of the Organic Act on Political Parties B.E. 2550 (2007).

The Constitutional Court ordered the admittance of the application for trial and adjudication pursuant to article 17(20) of the Rules of the Constitutional Court on Procedures and Decisions B.E. 2550 (2007).

The respondent submitted a reply statement together with supporting documents to the Constitutional Court, which could be summarised as follows:

1. The facts invoked by the applicant in this Constitutional Court case were facts which occurred during the years B.E. 2547-2548 (2004-2005). The legislation in force at the time was the Organic Act on Political Parties B.E. 2541 (1998), which provided specific rules and procedures for the receipt of donations or sponsorships of political parties, as well as the disclosure of the political party's receipts and expenditure account. Therefore, the receipt of donations or sponsorships from various persons and the disclosure of an account of receipts and expenditures for such period had to comply only with the conditions provided under the Organic Act on Political Parties B.E. 2541 (1998).

2. The respondent had never received funds from TPI Polene Public Company Limited. The respondent had no knowledge of and no involvement with the allegation that TPI Polene Public Company Limited had entered into a contract with Mesiah Business and Creation Company Limited in order to carry out promotional advertising. Such matters were exclusive and private to the two companies. In addition, Mesiah Business and Creation Company Limited had never remitted any funds received from TPI Polene Public Company Limited to the respondent, its party leader or executives, in the elections.

3. In regard to the hire of Miss Wasinee Tongjeua for the production of election campaign billboards, the respondent purchased materials for the billboards pursuant to the request of Miss Wasinee Tongjeua, namely future boards from Ecoplas Company Limited (the correct name being Ecoplas Industries Public Company Limited) for the sum of 4,697,128.80 baht, and from Popular Interplas Company Limited for the sum of 1,284,160.50 baht. Purchases of ink and oil mixtures were made from Winson Screen Company Limited for the sum of 1,013,102.23 baht. All three companies delivered the materials for production of billboards as ordered and paid for by the

respondent to Miss Wasinee Tongjeua. Kerdmek Advertising and Group Company Limited then produced campaign billboards for the respondent in the correct amount consistent with the declaration made by the respondent in the account of election expenditures submitted to the Election Commission. Kerdmek Advertising and Group Company Limited and Miss Wasinee Tongjeua received a fee from the respondent in the amount of 2,154,108.60 baht (inclusive of value added tax). Upon an aggregation of the fee for hire of billboard production and the material costs for the billboards, the total sum was 9,148,500.13 baht.

4. The respondent hired Mesiah Business and Creation Company Limited to produce future boards for a fee of 23,986,725 baht (inclusive of value added tax). Mesiah Business and Creation Company Limited produced and delivered the billboards to the respondent in the correct amount. The respondent thence paid the fee after tax deductions on 10th January B.E. 2548 (2005) in the amount of 23,314,200 baht. The respondent used funding received from the Fund for Development of Political Parties, and not monies received from TPI Polene Public Company Limited as alleged by the applicant. As for whom Mesiah Business and Creation Company Limited would pay the monies received as fees from the respondent and for what obligation, the respondent had no knowledge of the payment nor the obligation since they were private matters of Mesiah Business and Creation Company Limited in regard to third parties. The respondent never received any funding from such persons for use in the elections.

5. The respondent had drawn up projects and schemes in connection with its application from funding from the Fund for Development of Political Parties, which was submitted to the Office of the Election Commission in August B.E. 2547 (2004). There were 2 projects under the election expenditure budget which were relevant to this case. The Committee of the Fund for Development of Political Parties passed a resolution in meeting no. 11/2547(69) on 19th November B.E. 2547 (2004) to approve the budget pursuant to such projects and plans.

Thereafter, the Election Commission transferred the sponsorship funds in the first quarter, on 4th January B.E. 2548 (2005), to the account of the Democrat Party (Fund for Development of Political parties), account number 068-103199-9, in the amount of 55,738,400 baht, which included both of the aforementioned projects. On 7th January B.E. 2548 (2005), the respondent transferred the amount of 43,798,400 baht from such account to the account of the Democrat Party for Elections, account number 068-6-00254-7, Krung Thai Bank (the correct name being Krung Thai Bank Public Limited, Ministry of Finance Sub-Branch).

On 10th January B.E. 2548 (2005), the respondent submitted a letter requesting a revision of project (1) for the production of highway billboards and project (2) for the production of future boards, in which case funds would be reduced in the amount of 8,000,000 baht from project (1) and applied to project (2). The Committee of the Fund for Development of Political Parties approved the project changes and notified the respondent in a letter dated 21st January B.E. 2548 (2005).

The respondent had carried out advance preparations in the same manner as other political parties in anticipation of elections. Thus, upon approval of the project plans for elections by the Committee of the Fund for Development of Political Parties on 19th November B.E. 2548 (2005), the respondent contacted the person who would be responsible for implementing the project and plans in the elections. A third party accepting advertising and campaigning work for a political party would essentially depend on trust. The respondent's advance preparation for the production of billboards was therefore not irregular in any way. Upon the respondent's obtaining of funding from the Fund for Development of Political Parties, the respondent therefore arranged for private parties, in this case being Mesiah Business and Creation Company Limited and other private companies, to prepare future boards in the said amount. The respondent subsequently knew that Mesiah Business and Creation Company Limited had also made advance arrangements for the production of billboards by procuring the necessary materials and equipment at that time. In the following period, the respondent contracted for additional production in the amount of 8,000,000 baht, which was the amount it expected to receive as a result of the project revision. When the Fund for Development of Political Parties transferred funds to the respondent on 4th January B.E. 2548 (2005), the sum was therefore remitted to Mesiah Business and Creation Company Limited on 10th January B.E. 2548 (2005), which was not an irregular transaction as the billboards had to be produced and transported to candidates throughout the country, thus requiring time for transport and installation in various locations.

Moreover, in regard to the expenditure of funds obtained from the Fund for Development of Political Parties, the respondent filed a report on the expenditure of sponsorship funds from the Fund for Development of Political Parties for the year B.E. 2548 (2005) pursuant to section 62 of the Organic Act on Political Parties B.E. 2541 (1998) on 28th March B.E. 2549 (2006). The Election Commission later reviewed the expenditure of funds pursuant to the projects which the respondent received sponsorship for the year B.E. 2548 (2005) and passed a resolution that the respondent had already fully complied with regulations. The investigation was therefore concluded as evidenced by letter no. Lor Tor (Thor Phor Bor) 0402/7212, dated 11th June B.E. 2550 (2007). The respondent's actions were therefore not in contravention of the regulations. If the Fund for Development of Political Parties had found that there was a loss or a contravention of the regulations, it could have ordered the respondent to reimburse the funds as provided under section 63 of the Organic Act on Political Parties B.E. 2541 (1998) or section 83 of the Organic Act on Political Parties B.E. 2550 (2007).

6. In the submission of project plans in the application for sponsorship from the Fund for Development of Political Parties for the Fiscal Year B.E. 2548 (2005), as evidenced by a letter from the respondent party leader which requested appropriations of the Fund for Development of Political Parties, dated 30th August B.E. 2547 (2004), a specification was made in regard to the size of the future boards as comprising of PP plastic boards of 1.30 meters in width and 2.40 meters in height. The party's policies would be printed for dissemination in Bangkok and in all regions throughout the

country. The approval given by the Fund for Development of Political Parties, however, did not specify the size of future boards, but merely the amount of boards. On 3rd August B.E. 2547 (2004), a meeting was held between the Election Commission and representatives of political parties. At that time, the mean price of future boards had not yet been determined. At a later time, another meeting was held between the Election Commission and political party leaders on 17th January B.E. 2548 (2005). In that meeting, a price of 300 baht per board was specified for printed future boards having the size of 1.20 meters by 2.40 meters. Nonetheless, in the B.E. 2548 (2005) election, the Election Commission had not yet issued a regulation on the size of future boards. As for the size of boards according to the receipt of payment issued by Mesiah Business and Creation Company Limited, the size specified was 1.20 meters by 2.40 meters – being an error of the person preparing such receipt of payment. The actual size of boards as delivered to the respondent was 1.30 meters by 2.40 meters, which was in all respects consistent with the application for sponsorship from the Election Commission.

7. According to the applicant's submission which sought the revocation of election rights, it appeared from evidence that the party leader and executives of the respondent had not committed the acts as alleged. Moreover, even if the prohibited acts were committed, the Constitutional Court had the discretion as to whether or not to order the revocation rights of the leader and executives of the political party. Due regard could be given to the circumstances and severity of the act in each case. There was no absolute legal presumption that upon a finding that a political party had committed a wrongdoing, the party leader and executives should be deemed as having participated or acquiesced, or failed to exercise proper duty of care, or had knowledge of the act and failed to restrain or remedy such wrongdoing, or that such persons should be jointly liable with the political party.

The respondent therefore motioned for the Constitutional Court to dismiss the application.

Prior to the hearing, the respondent filed a motion with the Constitutional Court for a preliminary ruling on a legal question. The substance of the motion could be summarised as follows.

1. Section 93 paragraph two of the Organic Act on Political Parties B.E. 2550 (2007) provided the person who had the authority to submit an opinion pertaining to the dissolution of a political party, i.e. the Political Party Registrar, had the exclusive power to determine whether or not there were reasonable grounds for the dissolution of a political party pursuant to a complaint. The same provisions were stated in section 67 of the Organic Act on Political Parties B.E. 2541 (1998) and section 95 of the Organic Act on Political Parties B.E. 2550 (2007). The Election Commission had no authority to give an opinion pertaining to such matter. The Election Commission only had the duty of giving approval to the Political Party Registrar's submission of an application to the Constitutional Court for the dissolution of a political party.

According to the facts in the application, proceedings did not follow the procedural steps and failed to comply with the rules provided by law. As a

consequence, the opinion and resolution of the Election Commission on this matter was inconsistent with section 65 of the Organic Act on Political Parties B.E. 2541 (1998) and section 93 of the Organic Act on Political Parties B.E. 2550 (2007). The applicant, therefore, did not have the power to submit an application to the Constitutional Court for an order to dissolve the respondent party. Although the Chairman of the Election Commission participated in the meeting of the Election Commission on 12th April B.E. 2553 (2010) as mentioned above, such participation was undertaken in the capacity of an Election Commissioner, and not as a Political Party Registrar. On this legal question, the Constitutional Court had already laid down a precedent as evidenced by Ruling of the Constitutional Court Nos. 1-2/2550 and Ruling Nos. 3-5/2550.

For the foregoing reasons, the resolution of the Election Commission to dissolve the respondent party was therefore unlawful under section 65 of the Organic Act on Political Parties B.E. 2541 (1998) and under section 93 of the Organic Act on Political Parties B.E. 2550 (2007). As a result, the applicant did not have the power to submit an application to the Constitutional court for an order to dissolve the respondent party in this case.

2. The applicant did not have the authority to conduct an investigation and did not have the power to submit an application in this case since proceedings had not been undertaken within the period prescribed by law. In other words, the applicant's allegations stated there was improper use of monies from the Fund for Development of Political Parties. Under section 50 of the Organic Act on Election of Members of the House of Representatives and Obtaining Senators B.E. 2550 (2007), such expenditures were deemed as election expenses. Hence, a protest must be filed within one hundred and eighty days as from the date of announcement of election results. Similarly, in the allegations of the applicant, despite a claim on the grounds of reasonable suspicion, an investigation had to be conducted within one hundred and eighty days. The amount of time required for deliberations thereafter was a separate matter.

Moreover, the Election Commission had already audited the expenditures for the year B.E. 2548 (2005) and found the accounts to be in proper order as well as passed a resolution to conclude the investigations. In this connection, the Office of the Election Commission submitted the review of the report on expenditures of political party development funds for the year B.E. 2548 (2005) to the Election Commission for acknowledgment in meeting no. 61/2550, on 27th July B.E. 2550 (2007). The meeting acknowledged the report. If it was claimed that the Election Commission, on its own accord, had reasonable grounds of suspicion, such causes should also be raised within one hundred and eighty days. For the said reasons, the applicant therefore lacked the authority to conduct an investigation and did not have the power to submit an application in this case.

The applicant filed an objection to the respondent's motion for preliminary ruling on a legal question. The substance of such objection could be summarised as follows.

1. When the Department of Special Investigations and Mr. Kiatudom Menasawat notified the applicant of cause, the matter thereby appeared before the applicant. The applicant thereafter considered the matter and found that in order to obtain facts for consideration in a meticulous manner and in fairness to all parties, the Election Commission therefore approved the appointment of the 10th Sub-Committee on Determination of Protests and Questions or Objections as the investigation committee which should report to the applicant pursuant to section 95 of the Organic Act on Political Parties B.E. 2550 (2007).

Thereafter, on 17th December B.E. 2552 (2009), the Election Commission considered the factual investigation report and found that Mr. Prapan Naigowit, as the person ordering the submission of the factual investigation committee's findings to the Election Commission, was not the Political Party Registrar. Also, in such case, the Political Party Registrar had not yet given an opinion. The proceedings were therefore inconsistent with section 95 of the Organic Act on Political Parties B.E. 2550 (2007). The Election Commission, by a majority vote, therefore resolved to refer the matter to the applicant for a preliminary consideration of the two allegations as provided under section 95 of the Organic Act on Political Parties B.E. 2550 (2007). Later, the applicant issued an order appointing an investigation committee to act under the Organic Act on Political Parties B.E. 2550 (2007). The committee was tasked with the review of the findings of the 10th Sub-Committee on Determination of Protests and Questions or Objections. Upon completion of the review, an opinion was submitted to the applicant. After consideration, the applicant gave the opinion that the matter should be urgently submitted by the Chairman of the Election Commission to the Election Commission for a resolution. The Election Commission considered the matter on 12th April B.E. 2553 (2010) and passed a unanimous resolution to dissolve the respondent party, and by a majority that the applicant should notify the Attorney-General together with evidence, so that the Attorney-General could file an application to the Constitutional Court for a dissolution order against the respondent pursuant to section 95 of the Organic Act on Political Parties B.E. 2550 (2007) on the basis of both allegations. On the second allegation, a minority of 2 Election Commissioners, one of whom was the Chairman of the Election Commission or the Political Party Registrar, was of the opinion that the Political Party Registrar with the approval of the Election Commission should submit an application to the Constitutional Court within fifteen days as provided under section 93 paragraph two of the Organic Act on Political Parties B.E. 2550 (2007).

Once it appeared before the Election Commission that the applicant held such an opinion on the second allegation, an additional issue which had to be determined by the Election Commission on the second allegation was whether or not this was a case to which section 93 of the Organic Act on Political Parties B.E. 2550 (2007), in addition to section 94 and section 95, also applied. The meeting of the Election Commission found that the opinion of the Chairman of the Election Commission or Political Party Registrar was an opinion given under section 94 paragraph two of the Organic Act on Political Parties B.E. 2550 (2007). Therefore, in order to satisfy all procedural requirements in

relation to the cause of action on the wrongdoing and in accordance with provisions of the law, the Election Commission passed a unanimous resolution in meeting no. 43/2553, on 21st April B.E. 2553 (2010), concurring with the applicant's opinion on 12th April B.E. 2553 (2010), thereby directing the applicant to file another application with the Constitutional Court for an order to dissolve the respondent party.

Thus, the vote of Mr. Apichart Sukhagganond, Chairman of the Election Commission, on 12th April B.E. 2553 (2010), on the second allegation that the respondent had committed a wrongdoing and that an application for party dissolution should be filed under section 93 paragraph two, was also deemed to be an opinion of the Political Party Registrar. Therefore, the deliberations on 21st April B.E. 2553 (2010) and the Election Commission's unanimous opinion directing the applicant to file an application with the Constitutional Court in the case of the respondent's violation of section 82 for an order of the Constitutional Court to dissolve the respondent party, were lawful proceedings under section 93 paragraph two of the Organic Act on Political Parties B.E. 2550 (2007).

2. The causes of action in this case related to the wrongful expenditure of monies from the Fund for Development of Political Parties and the submission of a false account of expenditure of monies from the Fund for Development of Political Parties, constituting violations under section 62 of the Organic Act on Political Parties B.E. 2541 (1998) or section 82 of the Organic Act on Political Parties B.E. 2550 (2007), which was a cause for dissolution of a political party under section 65 of the Organic Act on Political Parties B.E. 2541 (1998) or section 93 of the Organic Act on Political Parties B.E. 2550 (2007). This was not a case of a protest on election expenses as argued by the respondent. As a result, this case was not subject to the time limit on the submission of a protest within 180 days as from the day of announcement of election as provided under section 94 of the Organic Act on Election of Members of the House of Representatives and Senators B.E. 2541 (1998) or section 114 of the Organic Act on Election of Members of the House of Representatives and Obtaining Senators B.E. 2550 (2007). Moreover, a case on wrongful or false expenditure of monies from the Fund for Development of Political Parties was not subject to any time limitation. If the Election Commission found a cause or facts, or if there was an act constituting a violation of laws relating to the Election Commission, the Election Commission would have the competence to raise the issue for consideration as provided under section 12 of the Organic Act on Political Parties B.E. 2550 (2007) and section 236(5) of the Constitution.

During the inquisitorial proceedings, the applicant adduced evidence that the respondent had expended funds and prepared an account of expenditure of political party sponsored funds in the year B.E. 2548 (2005) submitted to the Election Commission, which was false in 2 items, namely:

The first item was the case of the instrument for payment of billboard production fees to Kerdmek Advertising and Group Company Limited, in which the respondent ordered payment under a cheque on 10th January B.E. 2548 (2005) in the

amount of 2,093,713.04 baht. Around the month of September B.E. 2547 (2004), prior to the general election of Members of the House of Representatives, Miss Wasinee Tongjeua upon the persuasion of Mr. Suchart Kerdmek contacted Mr. Nippon Bunyamanee to request for payment of campaign billboard production fees to the respondent. Thereafter, Mr. Nippon Bunyamanee gave notice that a meeting of the respondent party agreed to hire Miss Wasinee Tongjeua to produce future boards for publicizing the party's policies. It was agreed that 10,000 boards would be produced for each of the 5 different designs, a total of 50,000 boards, at the price of 180 baht per board. The board size was 1.20 metres by 2.40 metres. The boards were distributed in areas of the northern, northeastern and certain parts of the eastern region. The hire was for a lump sum, including labour and material costs. The contract was not concluded in writing. The respondent would pay for the hire charges in advance installments. Miss Wasinee Tongjeua admitted that she did not produce the future boards herself but subcontracted to 5 other companies at the price of around 40-50 baht per board, consisting of Kerdmek Advertising and Group Company Limited producing 10,000 boards for a sum of 400,000-500,000 baht and Lucky One Commpany Limited, Titikan Design Company Limited, Mr. Kritpol, or Hea Tua, and Mr. Sathit each produced one design in the amount of 10,000 boards each. Miss Wasinee Tongjeua used the advance payment received from Mr. Thongchai Colsichai for the purchase of materials from Popular Interplas Company Limited, Eco-Plas Industries (Thailand) Company Limited and Winson Screen Company Limited and for the payment of hire charges to such subcontractors. The boards produced by a factory would be 3 millimeters thick, 1.30 metres wide and 2.45 metres long. However, the dimensions that came into use were only 1.20 metres by 2.40 metres so the boards would not be cut to the said size. Upon completion and delivery of the boards by the subcontractors, Miss Wasinee Tongjeua hired trucks for distribution of the boards to different points as notified by Mr. Thongchai Colsichai at end of October B.E. 2547 (2004), and works and deliveries were completed between the end of November till around mid-December B.E. 2547 (2004). Miss Wasinee Tongjeua prepared a delivery note and invoiced the respondent as a separate expense that was not included in the agreed hire charge. The total amount of boards delivered was 49,940 and the total transport cost was 223,800 baht.

Later, around the middle of December B.E. 2547 (2004), Mr. Thongchai Colsichai informed Miss Wasinee Tongjeua that the respondent needed a receipt for billboard production hire charges as evidence of expenses in the respondent's account. Miss Wasinee Tongjeua was of the opinion that the issuance of such a receipt was contrary to their original agreement since Miss Wasinee Tongjeua would have the bear the burden of tax deductions at the rate of 3 percent after having reduced prices to the lowest level as previously agreed. In the normal course of a business, a supplier of goods would include such taxes in its calculation of costs. The respondent would thus not be able to hire Miss Wasinee Tongjeua to produce boards at such prices. Mr. Thongchai Colsichai therefore provided a guideline for issuance of receipt by Miss Wasinee Tongjeua so that the respondent would not have to bear an additional burden

which exceeded the agreed sum. The receipt was to be separated into two slips, i.e. (1) in the receipt for material costs for the production of boards, all the items for production material costs that had already be paid in advance should be removed from the total hire charge and the distributors of such materials should issue receipts directly to the respondent, consisting of a receipt from Popular Interplas Company Limited, dated 10th January B.E. 2548 (2005), for 1.30 metres by 2.45 metres future boards in the amount of 8..890 boards priced at 135 baht per board, a total sum of 1,284,160.50 baht, a receipt from Eco-Plas Industries (Thailand) Company Limited, dated 23rd December B.E. 2547 (2004), for 33,768 boards priced at 130 baht per board, a total sum of 4,697,128.80 baht, and a receipt from Winson Screen Company Limited, dated 11th January B.E. 2548 (2005), for future board screening ink and printing oil in a total sum of 1,013,102.23 baht, where all three receipts specified the respondent as the purchaser; and (2) a receipt for labour costs in the production of 50,000 boards, at a rate of 40-50 baht per board, pursuant to the receipt of Kerdmek Advertising and Group Company Limited, dated 10th January B.E. 2548 (2005), for the production of future boards, a total sum of 2,154,108.60 baht, specifying the respondent as the purchaser.

Subsequently, when Miss Wasinee Tongjeua submitted the receipts to Mr. Thongchai Konsichai, Miss Wasinee Tongjeua received 3 cheques, dated 10th January B.E. 2548 (2005), from the respondent, as follows: (1) a cheque as payment for future boards payable to Popular Interplas Company Limited in the amount of 1,284,160.50 baht, such amount being consistent with the delivery note dated 28th December B.E. 2537 (2004) issued by the company; (2) a cheque as payment for future boards payable to Eco-Plas Industries (Thailand) Company Limited in the amount of 4,697,128.80 baht, such amount being consistent with the delivery note dated 23rd December B.E. 2547 (2004) issued by the company; and (3) a cheque as payment for future boards payable to Kerdmek Advertising and Group Company Limited in the amount of 2,093,713.04 baht. Miss Wasinee Tongjeua also received another cheque dated 12th January B.E. 2548 (2005) as payment for future board screening ink and printing oil payable to Winson Screen Company Limited in the amount of 1,013,102.23 baht. The latter had issued 14 delivery notes between 2nd-30th December B.E. 2547 (2004).

The second item was the instrument for payment of the board production fees charged by Mesiah Business and Creation Company Limited, which the respondent paid by order under a cheque dated 10th January B.E. 2548 (2005) in the amount of 23,314,200 baht. The cheque was payable to Mesiah Business and Creation Company Limited by the respondent's order as payment for future board production fees. No hire contract and no real business were, however, concluded. The payment from the respondent's account was merely evidence for inspection purposes that the respondent had disbursed funds for payment to a public relations company, consistent with the receipt determined by the respondent for Mesiah Business and Creation Company Limited which was issued by Mr. Kanapiti, or Prajuab, Sangkao as evidence of payment. The cheque payment for such board production fee was made pursuant to the intention of a senior member of the respondent party. Upon receipt of the cheque by

Mr. Kanapiti, or Prajuab, Sangkao, the funds were deposited in the bank account of Mesiah Business and Creation Company Limited on the same day. Thereafter, Mr. Kanapiti, or Prajuab, Sangkao transferred the funds to various persons pursuant to the order of Mr. Thongchai Colsichai, then withdrawn as cash handed to the respondent. Mesiah Business and Creation Company Limited recorded the cheque payments to persons in its account as lump sum payment for services rendered, i.e. Chaichawaroj Company Limited, PGC International Company Limited and Sinwattana Asia Enterprise Limited Partnership, in order to fabricate evidence of business operations. Such evidence was used in the filing of income tax assessment under Phor. Ngor. Dor. 53, under which income tax deductions were made and remitted to the Revenue Department. With regard to all these three companies, the Revenue Department and revenue officers responsible for reviewing the operations of such companies during the years B.E. 2547-2548 (2004-2005) affirmed that those companies did not show any real operations and the tax invoices thereof were revoked without further review as already stated above.

Apart from carrying out the withdrawal and transfer of the aforesaid funds, Mr. Kanapiti, or Prajuab, Sangkao was also hired to produce campaign billboards for candidates in the election of Members of the House of Representatives from the respondent party. Mr. Kanapiti, or Prajuab, Sangkao carried out the design of campaign billboards and produced future boards, pamphlets, candidate number cards and posters. If the works could not be performed in time, he would subcontract to others. Billboards had to be prepared for a total of 366 constituencies (366 candidates), in the amount of approximately 250-300 boards for each constituency, at around 260 baht or so per board. Production commenced towards the end of November B.E. 2547 (2004). The said hire was not concluded by a written contract since the funds used for board production were funds transferred by TPI Polene Public Company Limited to the account of Mesiah Business and Creation Company Limited. When an expense was incurred in whichever amount, Mr. Kanapiti, or Prajuab, Sangkao would only have to notify Mr. Thongchai Colsichai who would approve of the payment without any documentary evidence. Upon completion of the boards, Mr. Thongchai Colsichai, or TC, would direct Mr. Kanapiti, or Prajuab, Sangkao to deliver the boards to various constituencies. In this connection, Mr. Kanapiti, or Prajuab, Sangkao would procure the transport vehicle at the spots notified by each candidate since before production began. Mr. Kanapiti, or Prajuab, Sangkao would cover all expenses incurred by the undertakings by withdrawing funds from the account of Mesiah Business and Creation Company Limited and notice of the same given to Mr. Thongchai Colsichai.

The respondent adduced evidence that the respondent, by an election strategy working group chaired by Mr. Chanchai Issarasenarak, the then deputy secretary-general of the respondent party responsible for publicity tasks, had procured and inspected the election campaign billboards before forwarding documents to the election finance and accounting department for review and payment. Two different types of publicity future boards were produced, as follows:

The first type of future board was the party policy board. Towards the end of the year B.E. 2547 (2004), Miss. Wasinee Tongjeua contacted the respondent party's election strategy working group in order to propose the hire for production of future boards. The working group found that the price tendered was lower than those of other tenderers and therefore hired Miss. Wasinee Tongjeua to produce 50,000 future boards to advertise the party's policies. The hire was limited to labour costs at the rate of 50 baht per board paid as a lump sum. Miss Wasinee Tongjeua would be responsible for delivering the boards to various locations as stated. As for the materials used in the production of boards, Miss Wasinee Tongjeua would contact the suppliers. Payment for material costs would be made directly by the respondent to the suppliers. After completion and delivery of the boards by Miss Wasinee Tongjeua, the respondent issued a cheque dated 10th January B.E. 2548 (2005) as payment for the board production hire charges to Kerdmek Advertising and Group Company Limited in the amount of 2,093,713.04 baht. The cheque payment for board production hire charges issued to Kerdmek Advertising and Group Company Limited was made pursuant to a request from Miss Wasinee Tongjeua that the cheque payment be made directly to Kerdmek Advertising and Group Company Limited, which was a subcontractor. Also, a portion of the boards delivered by Miss Wasinee Tongjeua showed a text stating "Produced by Pey Poster", which was a trademark owned by Kerdmek Advertising and Group Company Limited. As for the material costs, the respondent order cheque payments to three suppliers, comprising of (1) a cheque dated 10th January B.E. 2548 (2005) payable to Eco-Plas Industries (Thailand) Company Limited in the amount of 4,697,128.80 baht as payment for future boards, pursuant to which the Company issued a receipt and tax invoice on 23rd December B.E. 2547 (2004) specifying the same amount, and specifying the size of boards as 1.30 metres by 2.45 metres; (2) a cheque dated 10th January B.E. 2548 (2005) payable to Popular Interplas Company Limited in the amount of 1,284,160.50 baht as payment for future boards, pursuant to which the Company issued a tax invoice and delivery note on 28th December B.E. 2547 (2004) specifying the same amount and specifying the size as 3 millimetres by 130 centimetres by 245 centimetres; and (3) a cheque dated 10th January B.E. 2548 (2005) payable to Winson Screen Company Limited in the amount of 1,013,102.23 baht as payment for screening ink and oil mixture, pursuant to which the company issued a receipt on 11th January B.E. 2548 (2005) specifying the same amount.

The second type of board consisted of boards for introducing candidates in the election of Members of the House of Representatives from the respondent party. During early October B.E. 2547 (2004), Mesiah Business and Creation Company Limited, by Mr. Kanapiti, or Prajuab, Sangkao, who had previously produced billboards for election candidates from the respondent party, contacted the respondent's election strategy working group with a hire proposal for the production of future boards for the respondent. The working group considered the proposal and agreed to hire Mesiah Business and Creation Company Limited to produce future boards to introduce the respondent party's election candidates. The contract incorporated hire of labour and

materials under which Mesiah Business and Creation Company Limited had to complete the works in time for the date of candidacy applications. Thereafter, on the date of election candidacy application on 7th January B.E. 2548 (2005), after the respondent drew the party number, which was also the candidate number, Mesiah Business and Creation Company Limited carried out the screening of such number on the prepared boards and delivered the boards to various locations as stated. A sum was collected as hire charges for the production of 91,500 boards in the amount of 22,417,500 baht, value added tax in the amount of 1,569,225 baht, altogether a total sum of 23,986,725 baht. As the hire charge included labour and materials, the respondent was required to make a 3 percent tax deduction in the amount of 672,525 baht. The remaining amount paid was thus 23,314,200 baht. The respondent issued a cheque dated 10th January B.E. 2548 (2005) in the amount of 23,314,200 baht as payment for board production to Mesiah Business and Creation Company Limited, and Mesiah Business and Creation Company Limited issued a receipt dated 10th January B.E. 2548 (2005) specifying the same amount and specifying the size of the board as 1.20 metres by 2.40 metres.

Altogether, the total amount spent on production of future boards was 32,402,304.57 baht. The expenditure of sponsorship funds as approved by the Committee of the Fund for Development of Political Parties in the amount of 27,000,000 baht was complete and lawful. The amount in excess of such sponsorship was borne by the respondent.

The facts conceded by both parties without objection were as follows:

The Political Party Registrar, Ministry of Interior, registered the Democrat Party, the respondent, as a political party under the Political Parties Act B.E. 2524 (1981) on 11th June B.E. 2525 (1982) (Exhibit Ror 1), and the respondent continued to be a political party under the Organic Act on Political Parties B.E. 2541 (1998) and a political party under the Organic Act on Political Parties B.E. 2550 (2007).

The Political Party Registrar issued a total of 3 Notifications acknowledging changes in the respondent's executive committee on 21st November B.E. 2550 (2007), 19th February B.E. 2551 (2008) and 27th August B.E. 2551 (2008) (Exhibit Ror 1 and Ror 2).

In August B.E. 2547 (2004), the respondent prepared projects and schemes in order to apply for funding from the Fund for Development of Political Parties. Four projects involved election expenses. The allegations in this case involved Project (1), the production of 10 roadside advertising billboards in the amount of 14,000,000 baht, for which funding from the Fund for Development of Political Parties was requested in the amount of 7,000,000 baht and the remainder of 7,000,000 baht would be covered by the party, and Project (2), the production of 100,000 advertising future boards with the dimensions of 1.30 metres by 2.40 metres, costing 300 baht each, in the amount of 30,000,000 baht. In the latter project, funding was requested from the Fund for Development of Political Parties in the amount of 15,000,000 baht and the remainder of 15,000,000 baht would be covered by the party (Exhibit Thor Ror 79).

On 19th November B.E. 2547 (2004), the Committee of the Fund for Development of Political Parties passed a resolution approving the budget of the Fund for Development of Political Parties, which granted sponsorship to the respondent in 21 projects requested in the respondent's projects and schemes in the amount of 68,798,400 baht (Exhibit Ror 3). This amount included election expenditure projects and schemes in 4 projects, details of which were provided in the attachments, as follows:

(1) Project for the production of 10 roadside advertising billboards for which funding was requested in the amount of 10,000,000 baht and party contribution in the amount of 4,000,000 baht.

(2) Project for the production of 100,000 advertising future boards for which funding was requested in the amount of 19,000,000 baht and party contribution in the amount of 11,000,000 baht.

(3) Project for newspaper advertising, for which funding was requested in the amount of 10,000,000 baht and party contribution in the amount of 10,000,000 baht.

(4) Project for production of printed media to publicize the party's policies and achievements for which funding was requested in the amount of 4,798,400 baht and party contribution in the amount of 1,201,600 baht.

On 4th January B.E. 2548 (2005), the Office of the Election Commission transferred funds from the Fund for Development of Political Parties to the respondent. The funds were deposited in an account at Krung Thai Bank Public Limited, Ministry of Finance Sub-Branch, account number 068-1-03199-9, under the name of the Democrat Party (Fund for Development of Political Parties), in the amount of 55,738,400 baht. This sum included the funds for Project (1) and Project (2) (Exhibit Ror 4).

On 6th January B.E. 2548 (2005), the Royal Decree on General Election of Members of the House of Representatives B.E. 2548 (2005) was enacted. The Royal Decree came into force as of 6th January B.E. 2548 (2005) and a general election of Members of the House of Representatives was to be held on 6th February B.E. 2548 (2005) (Exhibit Thor Ror 81).

The respondent sent letter no. Por Chor Por 4800020/2548, dated 10th January B.E. 2548 (2005), Re: Adjustments to the Political Party's Projects and Plans Proposed in the Application for Funding from the Fund for Development of Political Parties for the Year B.E. 2548 (2005), to the Chairman of the Fund for Development of Political Parties, requesting for an adjustment of projects and plans by reducing the budget for expenditure expenses in the project for production of roadside billboards, from 10,000,000 baht to 2,000,000 baht, and applying the 8,000,000 baht obtained to supplement the project for production of future boards from the previous budget of 19,000,000 baht to 27,000,000 baht (Exhibit Ror 5, Ror 112 and Thor Ror 48).

The secretarial team of the Committee of the Fund for Development of Political Parties sent a most urgent circular letter no. EC0402/Cir.119, dated 17th January B.E. 2548 (2005), to members of the Committee of the Fund for Development of Political Parties requesting consideration for approval of the adjustment of the respondent's budget details for projects in the year B.E. 2548 (2005) in both projects.

The secretarial team of the Committee of the fund for Development of Political Parties sent a very urgent letter no. EC0402/905, dated 21st January B.E. 2548 (2005), to the respondent for notice (Exhibit Ror 5, Ror 111, Ror 112, Thor Ror 47 and Thor Ror 49).

On 28th March B.E. 2549 (2006), the respondent, by Mr. Abhisit Vejjajiva, reported the expenditure of Democrat Party's sponsored funds for the annual period of B.E. 2548 (2005) to the Election Commission (Exhibit Ror 7 and Thor Ror 52). Details of the project for production of roadside billboards and project for production of advertising future boards were included therein.

Police Sergeant Tochapon Promchan, filed a complaint dated 26th May B.E. 2551 (2008) requesting the Department of Special Investigations to investigate wrongdoings in the receipt and expenditure of funds by the respondent in respect to the receipt of funds from TPI Polene Public Company Limited through Mesiah Business and Creation Company Limited by Mr. Kanapiti, or Prajuab, Sangkao, the managing director. It was alleged that the transfer was made under the guise of a hire contract for promotional activities and payments were made thereunder. Thereafter, Mr. Kanapiti, or Prajuab, Sangkao transferred the funds to a close associate who would withdraw cash to hand over to the respondent (Exhibit Ror 18).

The Department of Special Investigations sent a confidential letter no. Yor Thor 0800.3/6, dated 17th March B.E. 2552 (2009), to the respondent, Re: Proceedings in the Case of a Political Party Violating the Provisions of the Organic Act on Political Parties. Portions of the letter referred to the respondent, as follows (Exhibit Ror 8):

(1) The case of donations received from TPI Polene Public Company Limited through Mesiah Business and Creation Company Limited by means of a hire contract for production of promotional media in various projects constituted a concealed act to evade reporting of donation receipts as required by law.

(2) The case of sponsored funds expenditures not being in accordance with legal provisions and the preparation of a false report on expenditure of the political party's sponsored funds submitted to the Election Commission.

Mr. Kiatudom Menasawas, Member of the House of Representatives for Udon Thani Province, Pheu Thai Party, submitted a letter dated 26th March B.E. 2553 (2010) to the respondent, Re: Request for Investigation and Proceedings Against the Respondent and the Respondent Party's Executive Committee on Account of Wrongdoings under the Organic Law on Political Parties (Exhibit Ror 9).

The meeting of the Election Commission no. 48/2552, on 30th April B.E. 2552 (2009) found that there were facts appearing before the Election Commission showing reasonable grounds to believe an act was committed in violation or in non-compliance with laws relating to the Election Commission. Thus, in order to obtain data and facts for consideration in a prudent and fair manner for all parties, a resolution was passed to appoint the 10th Sub-Committee on Determination of Protests and Questions or Objections (chaired by Mr. Isara Limsiriwong) as the investigation committee tasked with the investigation of such matter pursuant to the Rules of the Election Commission on Investigations and Rulings B.E. 2550 (2007). The investigation committee would

have to submit an opinion to the Election Commission for determination and ruling within 30 days as from the date of notice of the order (Exhibit Ror 10 and Thor Ror 20).

In the meeting of the Election Commission no. 92/2552 on 25th August B.E. 2552 (2009), a representative of the investigation committee reported the investigation outcome and resolution by majority of the investigation committee on the first allegation that there were no grounds of any wrongdoing and thus the matter should be dismissed, and a unanimous resolution on the second allegation that there were no grounds on the alleged wrongdoings and that the matter should also be dismissed. The Election Commission was of the opinion that the investigation of related persons as well as related documents was still incomplete. The Election Commission therefore directed the investigation committee to invite such related persons and call for the submission of such related documents for investigation and to carry out a complete review of information on all aspects, such proceedings to be completed within 30 days (Exhibit Ror 102 and Thor Ror 21).

In the meeting of the Election Commission no. 128/2552 on 10th November B.E. 2552 (2009), the investigation committee reported the investigation outcome (supplementary) and resolution by a majority of the investigation committee to dismiss the first allegation and unanimous resolution to dismiss the second allegation. The Election Commission, after deliberations, passed a resolution directing the investigation committee to invite persons to give statements and to obtain additional evidence, such proceedings to be completed within 30 days as from the date of resolution by the Election Committee (Exhibit Ror 180 and Thor Ror 21).

In the meeting of the Election Commission no. 144/2552 on 17th December B.E. 2552 (2009), the investigation committee had already completed its additional investigation and passed a resolution by a majority to dismiss the first allegation and a unanimous resolution to dismiss the second allegation. The meeting of the Election Commission, after deliberations, passed a majority resolution to refer both allegations to the Political Party Registrar for consideration under section 95 of the Organic Act on Political Parties B.E. 2550 (2007) (Exhibit Ror 227 and Thor Ror 21).

The majority of the Election Commission, consisting of Mr. Prapan Naigowit, Mrs. Sodsri Sattayatham and Mr. Somchai Juengprasert, found it appropriate to refer both allegations to the Political Party Registrar for consideration under section 95 of the Organic Act on Political Parties B.E. 2550 (2007). The minority, consisting of Mr. Apichart Sukhagganond, the Chaiman of the Election Commission, held that the protests filed in regard to both allegations should be dismissed in accordance with the opinion of the investigation committee, and Mr. Wisut Pothithan held on the first allegation that the matter should be referred to the Constitutional Court for ruling, and on the second allegation that the protest should be dismissed in accordance with the opinion of the investigation committee (Exhibit Ror 227).

The Political Party Registrar issued Order No. 9/2552 Re: Appointment of a Review Committee Pursuant to the Organic Act on Political Parties B.E. 2550 (2007),

dated 29th December B.E. 2552 (2009), and Order No. 3/2553, dated 10th February B.E. 2553 (2010) (Exhibit Ror 12 and Ror 228).

The Review Committee Pursuant to the Organic Act on Political Parties B.E. 2550 (2007) prepared a summary of facts along with an opinion submitted to the Chairman of the Election Commission (Political Party Registrar) on 12th April B.E. 2553 (2010). Mr. Apichart Sukhagganond, in his capacity as the Political Party Registrar, found that in the light of facts obtained by the Registrar's working group in addition to those already complied in the preliminary by the investigation committee appointed by the Election Commission, there was a possibility that an act under section 94 of the Organic Act on Political Parties had been committed. The importance of this matter required a submission to the Election Commission for consideration and resolution. The Political Party Registrar therefore gave instructions for the urgent submission of the matter to the Election Commission through the Chairman of the Election Commission (Exhibit Ror 13).

In the meeting of the Election Commission no. 41/2553 on 12th April B.E. 2553 (2010), the Political Party Registrar submitted an opinion to the Election Commission that, upon consideration of the additional facts obtained by the Political Party Registrar's working group, there could have been a commission of an act under section 94 of the Organic Act on Political Parties B.E. 2550 (2007), and that the Democrat Party might or might not have committed an act under section 94 of the Organic Act on Political Parties B.E. 2550 (2010). The Political Party Registrar considered such matter to be of significance and therefore made a submission to the Election Commission for consideration and ruling. The meeting of the Election Commission, after deliberations, passed a unanimous resolution to dissolve the Democrat Party, and passed a majority resolution to instruct the Political Party Registrar to notify the Attorney-General together with evidence so that the Attorney-General could submit an application to the Constitutional Court for an order to dissolve the Democrat Party pursuant to section 95 of the Organic Act on Political Parties B.E. 2550 (2007) (Exhibit Ror 14 and Ror 229).

The Election Commissioners in the majority on the second allegation consisted of Mr. Prapan Naigowit, Mrs. Sodsri Sattayatham and Mr. Somchai Juengprasert. Those Election Commissioners held that the Political Party Registrar should notify the Attorney-General along with evidence so that the Attorney-General could submit an application to the Constitutional Court for an order to dissolve the respondent party pursuant to section 95 of the Organic Act on Political Parties B.E. 2550 (2007). Mr. Apichart Sukhagganond, the Chaiman of the Election Commission, on the other hand, held that the Political Party Registrar, with the approval of the Election Commission, should submit an application to the Constitutional Court within fifteen days pursuant to section 93 paragraph two of the Organic Act on Political Parties B.E. 2550 (2007). Mr. Wisut Pothithan held that the matter should be referred to the Constitutional Court as there were additional facts on the false reporting of expenditures (Exhibit Ror 229).

The meeting of the Election Commission no. 43/2553 on 21st April B.E. 2553 (2010) considered the second allegation and found that as the Chairman of the Election

Commission had given the opinion that "the Political Party Registrar, with the approval of the Election Commission, shall submit an application to the Constitutional Court within fifteen days pursuant to section 93 paragraph two of the Organic Act on Political Parties B.E. 2550 (2007)," there was an additional issue pertaining to second allegation which had to be determined by the Election Commission in regard to section 93 of the Organic Act on Political Parties B.E. 2550 (2007). The meeting passed a unanimous resolution approving the Political Party Registrar's submission of an application to the Constitutional Court to dissolve the Democrat Party pursuant to section 93 of the Organic Act on Political Parties (Exhibit Ror 231).

On 26th April B.E. 2553 (2010), the applicant submitted an application in this case to the Constitutional Court.

As regards the expenditures under the respondent's project for the production of promotional future boards, the following documents and evidence were adduced.

1. the respondent's cheque dated 10th January B.E. 2548 (2005) payable to Mesiah Business and Creation Company Limited in the amount of 23,314,200 baht, in respect of which the company issued an invoice/bill no. 267, original receipt no. 293 and original tax invoice no. 301, all dated 7th January B.E. 2548 (2005) and specified the amount of 23,986,725.00 baht, and the respondent's receipt dated 10th January B.E. 2548 (2005) in the amount of 23,314,200 baht, specifying the price of P.P. BOARD with the dimensions of 1.20 metres by 2.4 metres (FUTURE BOARD) in the amount of 23,986,725 baht less retained tax in the amount of 672,525 baht (Exhibit Ror 84, Ror 93, Ror 111, Ror 114 and Thor Ror 42);

2. the respondent's cheque dated 10th January B.E. 2548 (2005) payable to Kerdmek Advertising and Group Company Limited in the amount of 2,093,713.04 baht, in respect of which the company issued a receipt/tax invoice dated 10th January B.E. 2548 (2005) for the amount of 2,154,108.60 baht specifying the price of P.P. BOARD (FUTURE BOARD), and the respondent's receipt dated 10th January B.E. 2548 (2005) in the amount of 2,093,713.04 baht, specifying the price of P.P. BOARD (FUTURE BOARD) in the amount of 2,154,108.60 baht less retained tax in the amount of 60,395.56 baht (Exhibit Ror 114 and Thor Ror 46);

3. the respondent's cheque dated 10th January B.E. 2548 (2005) payable to Popular Interplas Company Limited in the amount of 1.284,160.50 baht, in respect of which the company issued an original tax invoice/delivery note dated 28th December B.E. 2547 (2004) for the amount of 1,284,160.50 baht specifying 8,890 units of white FUTURE BOARD with the dimensions 3 mm by 130 cm by 245 cm, and an original receipt dated 10th January B.E. 2548 (2005) for the amount of 1,284,160.50 baht (Exhibit Ror 114 and Thor Ror 44);

4. the respondent's cheque dated 10th January B.E. 2548 (2005) payable to Ecoplas Industries (Thailand) Company Limited in the amount of 4,697,128.80 baht in respect of which the company issued a tax invoice, receipt, delivery note and copy of tax invoice dated 23rd December B.E. 2547 (2004), all such four documents for the amount of 4,697,128.80 baht and specifying 33,768 units of white ECOBOARD with

the dimensions of 3 mm by 130 cm by 245 cm, and the respondent's receipt dated 10th January B.E. 2548 (2005) for the amount of 4,697,128.80 baht, specifying the price for white ECOBOARD with the dimensions of 3 mm by 130 cm by 245 cm (FUTURE BOARD) (Exhibit Ror 114 and Thor Ror 43);

5. the respondent's cheque dated 12th January B.E. 2548 (2005) in the amount of 1,013,102.23 baht payable to Winson Screen Company Limited in respect of which the company issued a receipt dated 11th January B.E. 2548 (2005) for the amount of 1,013,102.23 baht, specifying the repayment of monies owed under 14 delivery notes in the amount of 1,013,102.23 baht, and the respondent's receipt dated 12th January B.E. 2548 (2005) specifying the price for screening ink and FUTURE BOARD printing oil in the amount of 1,013,102.23 baht (Exhibit Ror 114 and Thor Ror 45).

The Court determined the issues which required ruling, as follows:

The first issue was whether or not the process for the submission of an application for dissolution of the respondent party had been lawfully carried out.

The second issue was whether or not the respondent's actions as stated in the application were subject to the Organic Act on Political Parties B.E. 2541 (1998) or the Organic Act on Political Parties B.E. 2550 (2007).

The third issue was whether or not the respondent had expended funds sponsored by the Fund for Development of Political Parties in the year B.E. 2548 (2005) in accordance with the approved project.

The fourth issue was whether or not the respondent had prepared a true and accurate report of expenditures of political party sponsorship funds in the year B.E. 2548 (2005).

The fifth issue was whether or not, and if so how, there was a cause for the dissolution of the respondent party as well as the abrogation or revocation of election rights of the party leader and party executives as provided under the Organic Act on Political Parties B.E. 2541 (1998) or the Announcement of the Council for Democratic Reform No. 27 Re: Amendment of the Announcement of the Council for Democratic Reform No. 15 dated 21st September B.E. 2549 (2006), dated 30th September B.E. 2549 (2006), or the Organic Act on Political Parties B.E. 2550 (2007).

So as to ensure that the trial of this case proceeded in a suitable manner, the Court found it appropriate to rule on the second issue first.

The second issue was whether or not the respondent's actions stated in the application was subject to the Organic Act on Political Parties B.E. 2541 (1998) or the Organic Act on Political Parties B.E. 2550 (2007).

The applicant alleged that the respondent had committed a violation of the law thereby constituting a cause for party dissolution in the period between B.E. 2547-2548 (2004-2005). During such period, the Organic Act on Political Parties B.E. 2541 (1998) was effective, but when at the time of application, the Organic Act on Political Parties B.E. 2550 (2007) was enacted to replace the Organic Act on Political Parties B.E. 2541 (1998). Thus, with respect to the provisions pertaining to the causes for dissolution of a political party in this case, the provisions of the Organic Act on Political Parties B.E.

2541 (1998), which was in force at the time of occurrence of such causes, should be the governing principles in this ruling in accordance with the Ruling of the Constitutional Court No. 17/2550.

The application of the Organic Act on Political Parties B.E. 2541 (1998) to a ruling only meant a ruling on the substantive law, i.e. the provisions prescribing the wrongdoings or prohibitions or regulations. The procedural law, however, must conform to the Organic Act on Political Parties B.E. 2550 (2007), which was the law in force at the time of these legal proceedings.

On the first issue of whether or not the process for the submission of an application for dissolution of the respondent party had been lawfully carried out, the Constitutional Court found as follows.

An application for dissolution of a political party under the Organic Act on Political Parties B.E. 2550 (2007) may be submitted in two separate cases:

(1) in the case where a political party committed an act under section 94, the Political Party Registrar, with the approval of the Election Commission, had the power to notify the Attorney-General to submit an application to the Constitutional Court for an order to dissolve such political party as provided under section 95 paragraph one;

(2) in the case where the political party's expenditure political party sponsorship funds was not in accordance with the law, or failed to prepare a truthful expenditure report for submission to the Election Commission as provided under section 82 in conjunction with section 42, the Political Party Registrar, with the approval of the Election Commission, had the power to submit an application to the Constitutional Court for an order to dissolve such political party pursuant to section 93 paragraph two.

In this case, the applicant requested that the Constitutional Court dissolve the Democrat Party, the respondent, pursuant to the second allegation, in accordance with section 93 of the Organic Act on Political Parties B.E. 2550 (2007). It was claimed that the respondent committed an act in violation of section 82, which provided that a political party had to expend political party sponsorship funds in accordance with the law and to prepare a true expenditure report for submission to the Election Commission. This was not an application filed by an Attorney-General under section 95 paragraph one.

For the filing of any application for a court order to dissolve a political party under section 93, the law provided rules in the second paragraph which stated that "when it appeared before the Registrar that a political party showed a cause under paragraph one, the Registrar, with the approval of the Election Commission, shall file an application to the Constitutional Court within fifteen days as from such finding of the Registrar."

From the said provisions, it could be seen that once the Political Party Registrar knew that a political party had committed a violation of section 82 thereby constituting a cause for the dissolution of such political party pursuant to section 93 paragraph one, upon such facts appearing before the Political Party Registrar, regardless of whether the knowledge was obtained on the Political Party Registrar's own accord or by notification

from any person, the Political Party Registrar was the authorized person to make a preliminary determination on whether or not such known acts constituted a cause for dissolution of the political party.

The power to make a preliminary determination on whether or not a political party had committed an act in violation of section 82 was the exclusive power of the Political Party Registrar. If the Political Party Registrar found that a political party had violated section 82, such a case would constitute facts appearing before the Political Party Registrar. It was therefore the duty of the Political Party Registrar to seek the approval of the Election Commission in order to submit an application to the Constitutional Court for the dissolution of such political party. The law provided that the prior approval of the Election Commission must be sought in order to ensure that proceedings on this significant matter were carried out prudently.

The law provided that the preliminary determination of whether or not a political party had violated section 82 was the power of the Political Party Registrar due to section 82 being a provision on the supervision of the proper expenditure of political party sponsorship funds, including documentary operations i.e. the due preparation of documents and reports, which were normally routine tasks under the direct supervisory functions of the Political Party Registrar who was under a duty to ensure legal compliance of political parties. Such matters were within the powers and duties of the Political Party Registrar who regularly exercised inspections. Section 93 therefore provided for the Political Party Registrar to submit a direct application to the Constitutional Court, which differed from the more serious acts under section 94. Hence, section 95 provided that the Political Party Registrar had to refer the matter to the Attorney-General who would then submit an application to the Constitutional Court, so as to enable the Attorney-General, a legal specialist, to take proceedings.

When making a determination, the law did not require the Political Party Registrar to make a determination on his own accord. The Political Party Registrar therefore had the power to appoint or request an opinion from any person, including a request for an opinion from the Election Commission. Nonetheless, the decision at this stage vested in the powers and duties of the Political Party Registrar who had to make a preliminary determination and opinion on whether there was a cause for political party dissolution. The Election Commission, despite its being a larger organ than the Political Party Registrar, did not have the power to make a preliminary determination on whether or not there was a cause for political party dissolution as provided under section 82. The Election Commission only had the power to approve a submission made by the Political Party Registrar.

According to the application, reply statement and motion for preliminary ruling on a legal issue submitted by the respondent, together with the objection to the motion for preliminary ruling on a legal issue submitted by Mr. Apichart Sukhagganond, the Political Party Registrar, the following finding of facts was made. In March B.E. 2552 (2009), the Department of Special Investigations and Mr. Kiatudom Menasawas notified the Political Party Registrar petitioning for an investigation of the respondent's violation

of the Organic Act on Political Parties B.E. 2550 (2007) in two instances, namely that (1) the payment made by TPI Polene Public Company Limited to Mesiah Business and Creation Company Limited as hire for the production of promotional materials was a concealed donation made by TPI Polene Public Company Limited to the respondent, and (2) the expenditure of political party sponsorship funds by the respondent was not in accordance with the law and the expenditure report was not factually accurate.

After receiving the notice, Mr. Apichart Sukhagganond submitted the matter to the meeting of the Election Commission on 30th April B.E. 2552 (2009). The Election Commission then passed a resolution to appoint a committee chaired by Mr. Isara Limsiriwong to investigate the matter and report to the Election Commission.

The investigation committee, after an investigation and revision of the relevant evidence, found that the respondent had not committed a wrongdoing in both instances. A unanimous opinion was given on the second instance, which was the cause of action in this case, and an investigation report was submitted to the Election Commission for acknowledgement.

Thereafter, on 17th December B.E. 2552 (2009), the Election Commission deliberated on the report filed by the investigation committee and passed a majority resolution which instructed the Political Party Registrar to proceed under section 95 of the Organic Act on Political Parties B.E. 2550 (2007) in both instances.

In that resolution, Mr. Apichart Sukhagganond, in his capacity as Chairman of the Election Commission, voted in the minority and gave his opinion on both instances as follows:

(1) it could not found on the facts that TPI Polene Public Company Limited donated funds to the respondent; and

(2) on the expenditure of political party sponsorship funds not in accordance with the law and the factually inaccurate expenditure report, which were the instances stated in the application in this case, Mr. Apichart Sukhagganond held that "from the review of documents pertaining to the expenditures of the Democrat Party pursuant to the information revealed by the auditor of Anant Audit Office Company Limited, no irregularity was found in the documenting system; the documents that have been systematically reviewed were therefore credible proof that the Democrat Party had expended sponsored funds in accordance with the objects; also when considered together with the evidence obtained from investigating Mr. Abhisit Vejjajiva, the Democrat Party Leader, who gave a written statement, the testimony of Mr. Pokkrong Suntornsut given on behalf of Police General Wassana Permlarb, former Chairman of the Election Commission, along with other documentary evidence, it was found that the Democrat Party applied such amount of political party sponsored funds in accordance with the objects of the project with requested and approved modifications; the matter therefore represented a misunderstanding of the alleger; the protest should therefore be dismissed in accordance with the opinion of the investigation committee."

Subsequent to the resolution by the Election Commission, Mr. Apichart Sukhagganond, in his capacity as the Political Party Registrar, issued an order on 29th

December B.E. 2552 (2009) to appoint a Review Committee for Proceedings under the Organic Act on Political Parties B.E. 2550 (2007) pursuant to the majority resolution of the Election Commission. The said committee was chaired by ML Prateep Charoonroj. Such appointment of a fact-finding committee as part of the exercise of legal functions was within the powers of the Political Party Registrar as provided under section 6 paragraph one of the Organic Act on Political Parties B.E. 2550 (2007).

Thereafter, on 12th April B.E. 2553 (2010), the chairman of the fact-finding committee submitted a summary of facts and an opinion to the Political Party Registrar. On the same day, Mr. Apichart Sukhagganond, in his capacity as Political Party Registrar, entered his opinion at the bottom of the fact-finding committee's letter reporting the outcome of deliberations that "after consideration, I find from the facts compiled by the Political Party Registrar's working group in addition to those preliminarily compiled by the investigation committee appointed by the Election Commission, that there might have been a commission of an act under section 94 of the Organic Act on Political Parties; as this is an important matter, it should be deliberated and determined by the Election Commission; thus the matter should be urgently submitted to the Election Commission through the Chairman of the Election Commission." It also appeared from Exhibit Ror 14 that the Political Party Registrar only held the opinion that there might or might not have been a commission of an act under section 94 of the Organic Act on Political Parties B.E. 2550 (2007), that the matter was important and should therefore be submitted to the Election Commission for determination.

Mr. Apichart Sukhagganond, in his capacity as Chairman of the Election Commission, summoned a meeting of the Election Commission on 12th April B.E. 2553 (2010) and presented the review results of such committee to the Election Commission for deliberation. The meeting of the Election Commission passed a unanimous resolution on the instance stated in the application of this case that the respondent party should be dissolved, and a majority resolution that the Political Party Registrar should notify the Attorney-General along with evidence so that the Attorney-General could file an application to the Constitutional Court for a dissolution order against the respondent party pursuant to section 95. Mr. Apichart Sukhagganond, in his capacity as Chairman of the Election Commission, gave his opinion in voting the resolution that "the Political Party Registrar with the approval of the Election Commission shall submit an application to the Constitutional Court within fifteen days pursuant to section 93 paragraph two of the Organic Act on Political Parties B.E. 2550 (2007)."

Thereafter, on 21st April B.E. 2553 (2010), the Election Commission held another meeting. The Political Party Registrar, as the Chairman of the Election Commission, however, was not present at the meeting. The meeting passed a unanimous resolution to approve the Political Party Registrar's submission of an application to the Constitutional Court for dissolution of the respondent party under section 93 of the Organic Act on Political Parties B.E. 2550 (2007). The opinion given by Mr. Apichart Sukhagganond upon voting in the meeting of the Election Commission

on 12th April B.E. 2553 (2010) was deemed as the opinion of the Political Party Registrar.

A question which had to be ruled upon was therefore whether or not the individual opinion of the Chairman of the Election Commission given upon voting in the meeting of the Election Commission on 12th April B.E. 2553 (2010) constituted an opinion of the Political Party Registrar.

The Constitutional Court found as follows. Even though section 6 paragraph one of the Organic Act on Political Parties B.E. 2550 (2007) provided for the Chairman of the Election Commission to act as the Political Party Registrar, such Act still provided for mutually exclusive functions to be performed by the Election Commission and the Political Party Registrar. In certain instances, the Act provided for the Election Commission and the Political Party Registrar to exercise functions in either a collaborative or balancing manner. In some instances powers were vested exclusively in the Election Commission, such as section 74 on the Election Commission's functions in regard to the appropriation of political party sponsorship funds, control of the expenditure of the revolving fund, and development of political parties, and section 81 on the Election Commission's ability to determine that various forms of assistance be granted to a political party. Other provisions vested powers and duties exclusively in the Political Party Registrar, such as section 12 and section 13, which provided the Political Party Registrar with the powers and duties to consider a notice of a change in political party policy and rules of a political party. In other instances powers were vested in the Election Commission and the Political Party Registrar in a collaborative or balancing manner, such as section 92 which provided for the Political Party Registrar to investigate facts in the case where a political party showed grounds for dissolution, in which case, if the Political Party Registrar found that such grounds actually existed in the political party, the Political Party Registrar with the approval of the Election Commission shall order the termination of such political party, or section 93 paragraph two which provided for the submission of an application to the Constitutional Court for an order to dissolve a political party due to the political party's failure to comply with section 42 paragraph two or section 82.

The Organic Act on Political Parties B.E. 2550 (2007) separated the powers and duties of the Political Party Registrar and the Chairman of the Election Commission, the latter being a constituent of the Election Commission. The different positions also entailed different functions. The factors applicable as rules for determining various questions depended on the functions incidental to the position held at that time. The law provided for the Political Party Registrar to determine whether or not a wrongdoing had been committed under section 82 of the Organic Act on Political Parties B.E. 2550 (2007) since the Political Party Registrar had the duty of supervising the legal compliance of political party operations and had good knowledge of the details of the political party's operations. The Chairman of the Election Commission, on the other hand, did not have the duty of supervising the functioning of political parties, but

merely had the power to review the rationality of the Political Party Registrar's opinion. The issues of determination were therefore different in the essence.

On 12th April B.E. 2553 (2010), Mr. Apichart Sukhagganond gave 2 opinions. One was given in the written instruction for the submission of the matter to the meeting of the Election Commission where it was clearly specified that the opinion was given in the capacity of the Political Party Registrar as evidenced in Exhibit Ror 13 and Ror 14. As for the opinion given in the vote cast in the meeting of the Election Commission, such opinion was given in the capacity of the Chairman of the Election Commission. The opinion of Mr. Apichart Sukhagganond in such vote was part of the resolution of the meeting of the Election Commission. The Political Party Registrar did not have any power to participate in the votes in the meeting of the Election Commission. The vote was therefore different from the written instruction for the submission of the matter to the Election Commission for deliberations as earlier given in the capacity of the Political Party Registrar. An opinion was thus submitted to the Election Commission for endorsement. The opinion of Mr. Apichart Sukhagganond in the vote cast in the capacity of the Chairman of the Election Commission on 12th April B.E. 2553 (2010) could not be deemed as the opinion of the Political Party Registrar. Determining otherwise would lead to a finding on the facts that Mr. Apichart Sukhagganond already casted a vote in the capacity of the Chairman of the Election Commission at an earlier time in the meeting of the Election Commission on 17th December B.E. 2552 (2009) that the respondent had applied the political party's sponsored funds in accordance with the objects of the project with the modifications requested and already approved. Yet, there was no such deeming that the opinion giving in the capacity of the Chairman of the Election Commission on such an occasion constituted the opinion of the Political Party Registrar.

As the law provided for the Political Party Registrar to submit the application in this case to the Constitutional Court, it could be inferred that the Chairman of the Election Commission did not have the authority to submit the application to the Constitutional Court in this case. The expression of Mr. Apichart Sukhagganond's individual opinion in the meeting of the Election Commission in his capacity as Chairman of the Election Commission on 12th April B.E. 2553 (2010) therefore did not constitute an opinion of the Political Party Registrar.

Moreover, the written instruction of Mr. Apichart Sukhagganond given in his capacity as the Political Party Registrar, as evidenced by the memorandum in Exhibit Ror 13, did not constitute a decision or opinion of the Political Party Registrar on whether or not the respondent had committed an act constituting a ground for party dissolution. The instruction was merely a submission to the Election Commission for deliberations on the possibility of the commission of an act under section 94. In any event, an act under section 94 was neither related to the unlawful expenditure of political party sponsored funds nor to the false reporting of expenditures, violations under section 82, which would constitute a ground for dissolution of the respondent party under section 93 of the Organic Act on Political Parties B.E. 2550 (2007). The

opinion given by the Election Commission on 21st April B.E. 2553 (2010) therefore constituted an irregularity in the essence of legal procedures. Hence, there was no legal effect in terms of authorizing the Political Party Registrar to submit an application to the Constitutional Court for the dissolution of the respondent party.

Aside from the above, there was an alternative reason pursuant to which a ruling could have been made. Since the intent of the Organic Act on Political Parties B.E. 2550 (2007) was to ensure that the discharge of functions by the Political Party Register was scrutinized by the Election Commission, constituting an internal audit within the agency, the procedural law thus provided procedures for submitting an application for political party dissolution. The Election Commission was also an organ entrusted with the power to conduct fact-finding investigations and make rulings on questions or objections arising from acts carried out under the Organic Act on Political Parties. These functions were in accordance with section 236 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The Election Commission therefore had the power to control and supervise the performance of functions by the Political Party Registrar. The Political Party Registrar had to comply with the resolution of the Election Commission, and the Political Party Registrar had to submit an application to the Constitutional Court for a political party dissolution order pursuant to the procedures and time limits prescribed in the process contained in the currently applicable procedural law, i.e. section 93 paragraph two and section 95 of the Organic Act on Political Parties B.E. 2550 (2007).

In an alleged case under section 93 paragraph one of the Organic Act on Political Parties B.E. 2550 (2007), section 93 paragraph two did not provide that the Political Party Registrar should submit an opinion that a political party showed a cause under paragraph one to the Election Commission in order to seek the latter's endorsement for the submission of an application to the Constitutional Court for the dissolution of such political party. This was different to an alleged case under section 94 of the Organic Act on Political Parties B.E. 2550 (2007) where section 95 paragraph one provided that upon facts appearing before and verified by the Political Party Registrar, i.e. the Political Party Registrar had to review the case pursuant to the powers and duties of the Political Party Registrar, a submission would then be made to the Election Commission along with an opinion on whether the political party had committed an act under section 94 irrespective of whether the opinion also proposed the dissolution of such political party. This was consistent with the legislative intent that the exercise of discretion by the Political Party Registrar be reviewed and scrutinized by the Election Commission in both cases of submissions for dissolution or non-dissolution of such political party.

Therefore, in the case under this application, the applicant could either submit or not submit an opinion that the respondent showed a cause under section 93 paragraph one of the Organic Act on Political Parties B.E. 2550 (2007) to the Election Commission. After the applicant's receipt of a letter requesting investigations on the respondent from the Department of Special Investigations and Mr. Kiatudom

Menasawas, thereafter, on 30th April B.E. 2552 (2009), the Election Commission passed a resolution in meeting no. 48/2552, stating reasons that facts had appeared before the Election Commission but not yet before the Political Party Registrar that there was a reasonable cause to believe that an act had or had not been committed in violation or non-compliance with the law as alleged in both allegations. A resolution was therefore passed to appoint a committee chaired by Mr. Isara Limsiriwong to conduct an investigation on such matter.

On 17th December B.E. 2552 (2009), in meeting of the Election Commission no. 144/2552, after deliberations on the report of the investigation committee pertaining to both allegations, a majority resolution was passed to refer the matter to the applicant in order to consider taking proceedings under section 95 of the Organic Act on Political Parties B.E. 2550 (2007) on both allegations. The applicant, in his capacity as the Chairman of the Election Commission, voted in the minority to dismiss the application to dissolve the respondent party on both allegations due to the absence of a finding of wrongdoing. The applicant's opinion was not binding on the Election Commission since the applicant was required to comply with the majority decision. However, as the majority resolution of the Election Commission was a determination on both allegations, each determination should be considered separately and carefully. Only the resolution on the allegation under section 95 of the Organic Act on Political Parties B.E. 2550 (2007) was deemed as a majority resolution which ordered the applicant to present an opinion before submitting to the Election Commission for further consideration. On this allegation, the applicant was able to appoint a committee to assist in making a review prior to presenting an opinion. As for the allegation under section 93 paragraph one of the Organic Act on Political Parties B.E. 2550 (2007), the Election Commission's majority resolution which also included an instruction that the applicant should first submit an opinion for consideration by the Election Commission was an ambiguity in the application of the law in such agency. Later, in meeting no. 41/2553 on 12th April B.E. 2553 (2010), the majority opinion reasoned that the facts in both allegations were interconnected. As a result, the resolution passed still notified the applicant to take proceedings under section 95 of the Organic Act on Political Parties B.E. 2550 (2007). In this regard, the applicant and Mr. Wisut Pothithan, an Election Commissioner, gave the opinion that the applicant should submit an application to the Constitutional Court pursuant to section 93 paragraph two of the Organic Act on Political Parties B.E. 2550 (2007). Thereafter, in meeting no. 43/2553 on 21st April B.E. 2553 (2010), the Election Commission passed a clear unanimous resolution which affirmed endorsement for the applicant's submission of an application to the Constitutional Court pursuant to section 93 paragraph two of the Organic Act on Political Parties B.E. 2550 (2007). This showed that the majority decision of the Election Commission had already given approval for the applicant's submission of an application to the Constitutional Court pursuant to section 93 paragraph two of the Organic Act on Political Parties B.E. 2550 (2007) since 17th December B.E. 2552 (2009). The applicant was not required to submit a prior opinion. In this case, it could be deemed that facts had already appeared before

the Political Party Registrar that the respondent showed a cause under section 93 paragraph one of the Organic Act on Political Parties B.E. 2550 (2007) and that the Election Commission had already given approval for the submission of an application to the Constitutional Court. The fifteen day time limit for submission of an application to the Constitutional Court therefore commenced from 17th December B.E. 2552 (2009), which was the date of resolution by the Election Commission.

As regards the respondent's issue of Order No. 9/2552 dated 29th December B.E. 2552 (2009) appointing a review committee to review the investigation report of the investigation committee chaired by Mr. Isara Limsiriwong and the Election Commission's majority resolution in meeting no. 41/2553 on 12th April B.E. 2553 (2010) re-approving the instruction to the applicant to notify the Attorney-General in order to submit an application to the Constitutional Court for dissolution of the respondent party on both allegations pursuant to section 94(3) and (4) and section 95 of the Organic Act on Political Parties B.E. 2550 (2007); despite the Election Commission's unanimous resolution in meeting no. 43/2553 on 21st April B.E. 2553 (2010) giving approval for the Political Party Registrar's submission of an application to the Constitutional Court for a party dissolution order against the respondent pursuant to section 93 of the Organic Act on Political Parties B.E. 2550 (2007), such proceedings were merely internal reviews within the agency and an attempt to clarify the application of legal provisions within the agency, which was still subject to the time limit under section 93 paragraph two of the Organic Act on Political Parties B.E. 2550 (2007), i.e. this was a case where an application had to be submitted to the Constitutional Court within fifteen days as from 17th December B.E. 2552 (2009), being the day when the Election Commission passed a majority resolution after deliberations on the report of the first investigation committee chaired by Mr. Isara Limsiriwong, appointed by the Election Commission. Such date was also deemed as the day when facts appeared before the Political Party Registrar. Thus, when the applicant submitted an application in this case on 26th April B.E. 2553 (2010), the fifteen day limit prescribed by law had already expired. The process of submitting the application for dissolution of the respondent party was therefore unlawful.

The Constitutional Court, by a majority (4 to 2), found that the submission process of the application for dissolution of the respondent party was unlawful conducted. There was no need to make a further ruling on the other issues. One of the 4 in the majority reasoned that in this case facts had appeared before the Political Party Registrar and the Election Commission had approved the Political Party Registrar's submission of an application to the Constitutional Court since 17th December B.E. 2552 (2009). The submission of application in this case therefore exceeded the fifteen day limit imposed by law.

Three of the 4 in the majority reasoned that facts had not yet appeared before the Political Party Registrar on a violation of the law which would constitute a cause for dissolution of the respondent party, and that the Political Party Registrar had not yet submitted an opinion that there was a cause for dissolution of the respondent party

pursuant to section 93 paragraph two. Also, the Political Party Registrar had not yet sought the approval of the Election Commission. As for the opinion of the Chairman of the Election Commission in the meeting of the Election Commission on 12th April B.E. 2553 (2010), such an opinion was not made in the capacity of the Political Party Registrar. The submission process of the application for dissolution of the respondent party was therefore unlawful conducted.

By virtue of the aforesaid reasons, the Constitutional Court held that the application be dismissed.

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|---|---|
| Mr. Chat Chonlavorn | President of the Constitutional Court |
| Mr. Charun Pukditanakul | Justice of the Constitutional Court |
| Mr. Nurak Mapraneet | Justice of the Constitutional Court |
| Mr. Boonsong Kulbupar | Justice of the Constitutional Court |
| Mr. Supoj Kaimook | Justice of the Constitutional Court |
| Mr. Udomsak Nitimontree | Justice of the Constitutional Court |

# The Advocate and Practitioner of the Idea of Guardian of the Constitution („HÜTER DER VERFASSUNG“): Prof. Yueh-Sheng Weng's Contributions to the Development of Democratic Constitutionalism in Taiwan

**Chien-Liang Lee**[*]

## Preface

Since the Second World War, Taiwan has transformed from an authoritarian state to a democratic constitution, from indirect democracy to direct election and referendum. It has gone through constitutional change via a “Quiet Revolution”. The Constitutional Court of the Judicial Yuan of Taiwan played a significant role in this rapid change of constitutional order and political environment.[1] By protecting democratic constitutionalism, clarifying the boundaries of the constitutional institutions, maintaining the separation of powers, and protecting fundamental rights, the Constitutional Court, through its constitution interpretations, acts as a guardian of the constitution. It has contributed to the democratisation of government, the revitalisation of the constitution as a living constitution and has also helped to lay the foundation of democratic constitutionalism in Taiwan. Among all the Grand Justices of the Constitutional Court who helped to instigate the constitutional change through interpretation, Prof. Yueh-Sheng Weng is most well known. As a former public law scholar, Prof. Weng undoubtedly played a leading and important role.

## Advocacy of the ‘Guardian’ of the Constitution Concept

Prof. Weng graduated from National Taiwan University (NTU) in 1960. He became a Heidelberg University student in Germany and followed Prof. Hermann Mosler[2] to

[*] Research Professor, Institutum Iurisprudentiae, Academia Sinica, Taipei, Taiwan. I would like to thank Dr. Wen-Tsong Chiou, an Associate Research Professor of my institution, for his assistance in revising the English version of this article. All errors are the author’s own responsibility.

[1] See Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (2003), p. 357.

[2] Hermann Mosler was one the most well-known Germans Expert in international law the post-war period as well as from 1954 to 1980 director of the Institute for Max-Planck for foreign public right and international

study public law after obtaining a scholarship of the Ministry of Education. He wrote the dissertation *Die Stellung der Justiz im Verfassungsrecht der Republik China*[3] and was conferred a PhD degree in 1966. He began teaching administrative law and comparative judicial systems and continued to publish articles after becoming a NTU professor in the same year. In 1972, Prof. Weng criticised the practice of constitution interpretation by judges in his article *Guardians of the Constitution.*[4] He advocated for 'constitutional guardians' akin to those in Germany *(Hüter der Verfassung)* and wrote of the classification of constitutional litigation, especially of constitutional complaints[5] (Verfassungsbeschwerde). He became the first scholar to emphasise the importance of constitutional initiation, constitutional framing and human rights protection. Also, he was the first one to advocate a shift in Taiwan from a Council of Justices, to a Constitutional Court.

In July 1972, when he was 40 years of age, Prof. Weng was nominated and appointed to be the third Grand Justice of the Judicial Yuan. He was the youngest justice in history, and one of a small number of Taiwanese Justices at the time[6]. In 1988, the 40th anniversary of constitution interpretation by the Judicial Yuan, Prof. Weng further discussed the system and the function of justices in his article *Guardians of the Constitution ─ Review and Prospect*[7]. In it, he referred to: (1) the Judicial Yuan as a guardian of the Constitution; (2) means of evaluation of the function of the Council of Grand Justices; (3) the range and limitation of constitution interpretation; (4) the possibility of the direct petition of constitution interpretation by lower courts; (5) constitutional interpretation, and the protection of human rights, and (6) the naming of a constitution interpretation authority.

Upon his retirement in 2007, Prof. Weng had served as a Grand Justice of the Judicial Yuan for some 35 years. His justiceship spanned from the third to the sixth term, during which he became the President of Judicial Yuan (from February 1999 to September 2007).[8] Given his extensive experience, it comes as little surprise that Prof. Weng should become Taiwan's most influential chief justice.[9] Besides witnessing and partaking in the development of constitution interpretation, he was also actively in

law in Heidelberg after WWII. He was starting from 1959 to European Court of Justice for human rights as well as from 1976 to 1985 as first Germans as Judge to International Court of Justice in The Hague actively.

[3] The dissertation was published in 1970.

[4] See Yueh-Sheng Weng, "Guardians of the Constitution" in *Constitutional Thought* (1972), Vol. 17, pp. 146-8; *NTU Law Review*, Vol. 1, pp. 327-330; see also in *Administrative Law and Rule of Law* (1976), pp. 475-80, all in Chinese.

[5] See Chien-Liang Lee, "A Comparative Study of Judicial Review Procedure Types: The Option of Constitutional Procedures System in Reform of the Constitutional Review of Taiwan", in *National Taiwan University Law Review* (2010), Vol. 5, pp. 73-126.

[6] The distribution of nationality was revoked until 1944.

[7] See Yueh-Sheng Weng, "Guardians of the Constitution ─ Review and Prospect" in *Festschrift of the 40th anniversary of constitutional interpretation* (1998), ed. Judicial Yuan, pp. 133-153, also in *Administrative Law and Rule of Law* (1994), pp. 390-410, both in Chinese.

[8] Prof. Weng was appointed to be the President of Judicial Yuan in February 1999. While being an ex officio chairman to the Council, the President of Judicial Yuan did not hold a post of Justice according to the then Constitution, which was later amended in September 2003. Therefore, Prof. Weng participated in constitutional interpretation without the status of a Grand justice for 4 years.

[9] The terms of services are as follow: the 3rd term Justice from July 15, 1972 to September 31, 1976, the 4th term from October 1, 1976 to September 31, 1985, the 5th term Justice from October 1, 1985 to September 31, 1994, the 6th term Justice from October 1, 1994 to September 31, 1999, and to be the President of Judicial Yuan and chairman of the Council of Grand Justices from February 1, 1999 to September 31, 2003.

judicial reform, as the chairman of the Judicial Reform Convention in 1999, where a wide gambit of the judicial reform was lain out.

Prof. Weng continued to attend to the issues of constitution interpretation after his retirement. On the 60th anniversary of constitution interpretation by the Judicial Yuan in 2008, he wrote the article "*Guardians of the Constitution─ Reflection and Expectation*"[10] in which he contemplated the nature of his vast experience in constitution interpretation, proffered his suggestions, and outlined his expectations. In this article, he speaks to: (1) the normative effects of the constitution and its guardians; (2) the evolution and evaluation of the functions of the Grand Justices; (3) the scope and limitation of constitution interpretation; (4) the criteria of petition and the procedure of constitution interpretation; (5) the effectiveness and the binding forces of constitution interpretation, and (6) the goal and the reform of constitution interpretation system.

All in all, Prof. Weng made a significant contribution to the development of a more mature constitutional review system and democratic development in Taiwan. He has proven himself both an advocate and exemplar of 'guardians of the constitution.'

## Practicing the Idea of Constitution Guardians

During his 35 years of justiceship, Prof. Weng was involved in the creation of some 500 interpretations (Interpretation no. 134-633). Thus he directly influenced the practice of constitution interpretation, directly or indirectly, for over four decades. What follows are a number of significant examples which represent Prof. Weng's contribution to both the practice of constitution interpretation and the establishment of constitutional government in Taiwan.

### Judicial Review of Administrative Ordinances and the Principle of Legal Priority

One of the most important interpretations during the period of the third and the fourth terms of Grand Justices (1972-1985), in which time Taiwan was under authoritarian rule, was Interpretation No. 137. The interpretation enquired as to whether the lower courts and judges are bound by government agencies in the interpretation of law. The Grand Justice held that:

> although the courts shall not refuse to apply the administrative ordinances interpreting a law if they are handed down by the government agencies in accordance with their respective authorities, it will not prevent a judge from, based on his or her fair and honest belief in the correct interpretation of the law, giving a lawful and legitimate legal opinion in a controversy, which requires a correct judicial interpretation.

Following no. 137, Prof. Weng wrote an article entitled *Review of Orders Illegality* which proffered additional reasoning of the interpretation. "The judges are not legally bound by the law interpretations of government agencies," he wrote. "The law

[10] See Yueh-Sheng Weng, "Guardians of the Constitution ─ Reflection and Expectation" in *Constitutional Interpretation: Theory and Practice* (2009), ed. Fu-Te Liao, Vol. 6, part l, below p. 1, in Chinese.

interpretations of government agencies shall be put aside if judges determine that they are actually in conflict with the law. The Grand Justices do not request the judges who disagree with government agencies to petition for an authoritative interpretation from the Grand Justices. This means that judges are granted with the authority to review and determine whether the law interpretation of government agencies is compatible with the law." His argument was accepted in J.Y interpretation No. 216 on June 19, 1987.[11] Henceforth, it was established that judges may review the legality and constitutionality of administrative ordinances. Also, interpretation of the implementation of law by government agencies may be the target of judicial review, should Grand Justices officially cite it as the basis of a court judgment. In the end, the concept, conceived under the authoritarian rule that administrative ordinances be supreme, was abandoned and instead the priority of legislative law confirmed.

## Empowering the Effectiveness of Grand Justices

In his article *Guardians of the Constitution*, Prof. Weng proposed that should the applicable law or order be declared unconstitutional by Grand Justices, the interpretation shall be the legal basis for the petitioner to seek retrial or extraordinary appeal of his or her case. The proposal was officially adopted in J.Y interpretation No. 177 and 188. The interpretations held that: "An Interpretation given by this Yuan in response to a petition shall also be applicable with respect to the legal action of the petitioner, for which the original petition was made," and that:

> Pursuant to Article 78 of the Constitution, the Judicial Yuan is vested with the power to interpret the Constitution, and to provide uniform interpretations with respect to statutes and ordinances. The interpretations of the Judicial Yuan shall be binding upon every institution and person in the country, and each institution shall abide by the meaning of these interpretations in handling relevant matters. Prior precedents which are contrary to these interpretations shall automatically be nullified. In the case of a final and irrevocable judgment where the statute or ordinance or the interpretation of such statute or ordinance applied in rendering such judgment is deemed contrary to the Constitution pursuant to an interpretation rendered by this Judicial Yuan upon an application by the interested person for such an interpretation, the party against whom such final and irrevocable judgment is entered shall be entitled to file for a retrial or an extraordinary appeal on the basis of said interpretation, and this should not be construed as mere differences in legal interpretations.

[11] The reason of the interpretation is "The provision that judges shall adjudicate independently according to law is specifically prescribed in Article 80 of the Constitution. Administrative rules adopted under the duty of seeking proper construction of laws by various government agencies may be applied by judges in the course of adjudication, who, not being bound thereby, may in a proper manner, express their opinion in light of the law, as stated in Interpretation No. 137 of this Court. Ordinances issued by a judicial administration involving legal issues in the business of adjudication are merely references for judges, who again, are not bound thereby in the course of adjudication. However, the rules, if and when cited by judges during the course of their adjudication, may be subject to a party's application for constitutional interpretation under Article 4, Paragraph 1, Subparagraph 2, of the Grand Justices Council Adjudication Act".

> As such, any part of Precedent P.T. No. 610 (Ad. Ct., 1973) contrary to this Interpretation shall cease to apply.

## Promoting Democratisation and Normalizing Constitutionalism

Taiwanese people became more aware of their rights in the 1980s. Due to the growth of the economy and an increase in average incomes, political and democratic movements flourished after martial law was rescinded on July 14, 1987. Citizens expressed their discontent and protested against first-term national representatives, who had long held these positions without periodic re-election. Some of the newly-elected legislators would later assert that J.Y interpretation no. 31 was against the constitutional principle of sovereignty, which shall belong to the citizens, and that it was required to reinterpretation. To this end, interpretation no. 261, rendered on June 21, 1990, held that:

> 1. Periodical election of representatives is an essential avenue for reflection of the will of the people and implementation of constitutional democracy.
> 2. Neither J.Y. Interpretation No. 31, nor Article 28, Paragraph 2, of the Constitution, nor Paragraph 6, Subparagraphs 2 and 3, of the Temporary Provisions Effective during the Period of National Mobilisation for the Suppression of the Communist Rebellion were intended to allow the first-term national representatives to continue exercising their powers indefinitely.
> 3. The Central Government has been holding regular elections of the national representatives in the Free Area, in order to reinforce our national representative bodies incrementally.
> 4. Those first-term national representatives who have not been re-elected on a periodical basis shall cease the exercise of their powers no later than December 31, 1991.
> 5. The Central Government is further mandated to hold, in due course, a nationwide second-term election of the national representatives, in accordance with the spirit of the Constitution, the essence of this Interpretation and the relevant regulations, so that the constitutional system will function properly.

With this, the issue of the indefinite terms of first-term national representatives were resolved. Tensions between citizens and government eased. Thus the end of the "Period of National Mobilisation in Suppression of Communist Rebellion" could also be attributed to the implementation of interpretation no. 261.

On the first anniversary of his inauguration, President Teng-Huei Lee stated that the "Period of National Mobilisation in Suppression of Communist Rebellion" would ended within a year. However, temporary provisions to the Constitution - provisions that legitimised the national mobilisation – would not have been rescinded, nor would the Constitution be amended, without the pressure brought about by interpretation no. 261. Only after this interpretation would it became possible for the first-term National Assembly to approve the ten articles of the Constitution amendment,

as per the "one-organ and two-stage" policy,[12] and to revoke the temporary provisions on 22 April 1991. President Lee thus ended the Period of "National Mobilisation in Suppression of Communist Rebellion" – a 'suppression' enforced for some 40 years, on 1 May of that year. Thus interpretation no. 261 marked a significant turning point in the history of Taiwanese constitutionalism.

## Accepting the Petition of Constitution Interpretations from Judges

In his article *Guardians of the Constitution*, Prof. Weng had suggested that lower courts should have a legal status to petition for interpretation by the Grand Justice. Where there are doubts in the constitutionality of law application, as per the Concrete Judicial Review Procedure *(Konkrete Normenkontrolle)* of the German Federal Constitution Court. Prof. Weng's suggestion was realised in J.Y. Interpretation no. 371, which held that:

> The Constitution is the state's highest legal authority. Any statute that contradicts the Constitution shall be null and void. Whether a given statute contradicts the Constitution shall be interpreted by the Grand Justices of the Judicial Yuan. The above statement is obvious from Articles 171, 173 and 78, and Article 79, Paragraph 2, of the Constitution. In addition, Article 80 of the Constitution clearly provides that judges shall only try cases in accordance with law. In trying a case, a judge shall base his decision on statutes that have been promulgated and effective in accordance with the legal procedure. A judge shall have no capacity to hold a statute unconstitutional, and shall not refuse to apply a statute for that reason. Nonetheless, since the Constitution's authority is higher than the statute's, judges have the obligation to obey the Constitution over any other statutes. Therefore, in trying a case where a judge, with reasonable assurance, has suspected that the statute applicable to the case is unconstitutional, he shall surely be allowed to petition for interpretation of its constitutionality. In the abovementioned situation, judges of different levels may suspend the pending procedure on the ground that the constitutionality of the statute is a prerequisite issue. At the same time, they shall provide concrete reasons for objectively believing the unconstitutionality of the statute, and petition to the Grand Justices of the Yuan to interpret its constitutionality.

## Transforming the Council of Grand Justices to the Constitutional Court

Prof. Weng has long advocated for actualisation of the Constitution via judicial means. He once said that he was most impressed during his studies at Heidelberg University,

[12] An organ means the first-term national representatives is a legislative body without intervention of Legislative Yuan. The two-stage means the first amendment is made formally by the first-term national representative's extraordinary session. The second-term national representative's election is formed by approving The Amendment of the Constitution of the Republic of China Article 10 and repealing Temporary Provisions and the second amendment is made practically by the second-term national representatives.

when he visited the German Federal Constitutional Court in Karlsruhe to hear discussion of constitutional litigation. There he heard constitutional law scholars delivering their professional opinions and discussing constitutional issues, and thus it became his 'calling' to actively participate in the establishment of a Taiwanese Constitutional Court. After years of endeavour, the construction of the first courtroom of the Court began on July 20, 1993 and was completed on 28 September of the same year. As President of the Judicial Yuan, Prof. Weng inaugurated the Court on October 22, 1993.[13] The date represents not only a milestone for Taiwan's judicial system, but also the realisation of Prof. Weng's ideas regarding court procedure in constitutional disputes in. Prof. Weng would preside as judge when oral arguments were made in the Court for the first time on 19 October 1995.[14]

## Demarcating the Boundary of Constitutional Amendment and the Constitutional Review of Constitution

Questions as to whether there are distinctions between constitution making and constitution amendment, so too whether there should be limitations to the amendment or revision of a constitution, have been extensively debated. Discrepancies exist between countries owing to their alternate constitutional frameworks. Himself influenced by the provision of Paragraph 3, Article 79 of German Basic Law, Prof. Weng thereby advocated for the limitation theory of constitutional revision. The provision argues that the core values of a constitution, as a foundational normative order of a country, shall not be revised. This view is conducive to the protection of fundamental rights, consistent with the trend of constitutional debate following World War II. Prof. Weng's theory was thus adopted in J.Y interpretation no. 499 in March 2000. In considering whether a newly passed constitutional amendment violated certain constitutional principles, the Grand Justice held that:

> the voting process in the passage of Articles 1, 4, 9, and 10 in its Eighteenth Meeting of the Third National Assembly on September 4, 1999, violates the principles of openness and transparency and the then-valid Article 38, Paragraph 2, of the Regulations of the National Assembly Proceedings. As the flaws of the procedure have achieved the level of major and clear erroneousness, it violates the fundamental principles which must be in full compliance before any such amendment is to take effect; furthermore, the contents of Article 1, Paragraphs 1 to 3, and Article 4, Paragraph 3, contradict the fundamental nature of governing norms and order that form the very basis and existence of the Constitution, and are prohibited by the norms of constitutional democracy. These provisions are held to be invalid as of the day this Interpretation is publicly announced.

[13] See Editorial Board of Judicial Yuan History, *The Chronicle of Judicial Yuan History* (Sep. 2007), Vol. 5, 1st Bundle, pp. 325-326.

[14] See J.Y. interpretation No. 392, which discusses the issue of whether "the prosecutor is empowered to detain a suspect for more than 24 hours."

## Importance of the Judiciary in Constitutionalism

The evolution of modern states often follows the path of transforming autocracy into constitutionalism. While the power of state was divided into three parts: the executive branch, the legislative branch, and the judiciary, the importance of the judiciary was understood relatively late. In addition to the division of political power among three branches, Montesquieu also proposed the concept of checks and balance of power. To Montesquieu, an independent judiciary referred only civil and criminal litigation and sometimes amounted to *en quelque façon nulle*.[15] However, after the long evolution of constitutionalism, and especially after the disastrous experience of World War II, the judiciary began to be seen as more trustworthy than either the executive or legislative branch. Prof. Weng pointed out that the most momentous constitutional change in many countries after World War II was the development of public law litigation. Many European countries, such as Germany, Italy, Spain, Portugal, Belgium, Greece and so on, developed the scheme of constitutional litigation and established their Constitutional Courts. After the communist regimes collapsed in Eastern Europe, Poland, Hungary, Belorussia, Czech Republic, Russia, and Yugoslavia, among others, also established their Constitutional Courts. In Asia, Korea and Mongolia too set up a Constitutional Court system. The purpose of establishing a Constitutional Court is to protect the Constitution from destruction, such as the making of unconstitutional laws by the legislature. The Constitutional Court is endowed with the power to declare and void unconstitutional laws. As a result, judicial power is actively involved in the application of constitutional law, requesting that political branches follow the Constitution. Thus in many countries after World War II, the judiciary was deemed a guardian of the constitution.[16]

## Philosophy regarding the Relationship between the Judiciary and Politics

Although Prof. Weng highly valued the importance of the judiciary, he believed it should play a very cautious role in determining legislation. He explained that, according to the principle of the separation of powers, and the nature of judiciary and judges, justiciability should be confined to cases of legal nature. Cases of political nature are not justiciable. While the legal cases can also be dealt with by political, legislative or the administrative branches, disputes should be resolved only through the court system. The right to seek redress by court therefore should not be deprived. Nevertheless, the court is obliged to resolve that which can be deemed solely a legal issue.

Thus political disputes are inappropriate for the judiciary, given it risks of covering political issues with "legal clothing," and thus further complicating constitutional issues. So too, should the judiciary decides upon issues which contain political questions, may infringe upon the competencies of other authorities in resolving constitutional issues. Only if the judiciary refrains from crossing this 'boundary,' the

[15] See Charles-Louis de Secondat, Baron de La Brède et de Montesquieu (1689-1755), *De L'Ésprit des Lois* (1748), Buch XI, Kapitel VI (De la constitution d'Angleterre); Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland* (1980), Bd. II, S. 889; also see Hans Herbert v. Arnim, *Staatslehre der Bundesrepublik Deutschland* (1984), S. 500.

[16] See Yueh-Sheng Weng, "The tendency of judiciary development" in *Administrative Law and Rule of Law* (1994), pp. 336-340, in Chinese.

proper spheres and the proper functions of other constitutional branches maintained. An exception to this may find that Grand Justices review cases related to the protection of individual rights, even though the issue may be highly politicised.

Moreover, Prof. Weng was conscious of a delicate and dynamic relationship between the constitution judiciary and the development of democracy. The more mature and successful the development of democracy and representative legislation, the less active role the judiciary should play. Likewise, should the judiciary be actively involved in making up the deficiency of democratic representation, should democracy still be in its infancy. When Taiwan was under the authoritarian rule, the lack of democratic legitimacy within the political branch of government provided a legitimate basis from which Grand Justices pursued an active role in deciding issues of a political nature. However, given successful democratisation has been brought about Taiwan, Grand Justices should refrain from entering the troubled waters of political disputes in order to maintain the people's trust in the authority of the judiciary. In general, Grand Justices should maintain a neutral and arm's length relationship with politics. In exercising the power of judicial review, Grand Justices should abide only by the constitution and law.[17]

## Conclusion

Prof. Weng often noted that, whether a constitution has normative effects depends not on the texts of the constitution themselves, but on how much these texts are realised in the real world. Only when the ideas of the constitution are successfully practised in everyday life might the distance between constitutional norms and constitutional reality becomes closer. At this nexus might a constitution be called a "living constitution," emblematic of "constitutional law in action," and may the political entity it represents be deemed a constitutionalist state.[18] Prof. Weng put his constitutionalist ideas into practice, and endeavoured to reduce the gap between the reality and the norms of the constitution. He proved not only a wonderful role model for Taiwan, but so too for other Asian states.

[17] See Yueh-Sheng Weng, "Guardians of the Constitution ─ Reflection and Expectation", p. 52.
[18] See ibid., p. 142.