

Reform of the Parliamentary Electoral System under the New Constitution

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Prior to the 1997 Constitution, direct elections applied only to elections of members of the House of Representatives. The 'relative majority' rule was generally employed. The concepts of 'single number,' 'combined numbers,' 'divided constituencies' and 'combined constituencies' were empirically practised but failed to produce adequate satisfaction in preventing dishonest conduct in elections. The 1997 Constitution, albeit retaining basic electoral principles, introduces several novel features. In particular, the entire National Assembly is now created through direct election and the 'proportional representation' formulation is adopted. The Election Commission oversees national elections and ensures fairness. Changes are also made in respect of voters and candidates. However, on top of substantive provisions of law, real enforcement is a crucial key to the success of the electoral reform.

1. Introduction

The underlying theme in the present Constitution is based on the subject of political reform prompted by past failures in the development of Thai politics. As we have witnessed, the preceding Constitution of 1991 was unable to prevent the exercise of dishonest devices for the attainment of political power, and, indeed, a common occurrence in the political setting during an election, at both national and local levels, has been the sale and purchase of votes¹ which tremendously undermined democratic principles

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¹ Tantisunthorn, T. Introduction to the institute of educational policies. Cited in: Traimas, C. (1999) *A new electoral system: why Thais should vote*, 2nd edition. Bangkok, Institute of Educational Policies, p. i. and Nanakorn, P. (1997) History and evolution of the Constitutions in Thailand: from the abrogation of the absolute monarchy to the political reform. *Administrative Law Journal*, vol. 16 (Special Issue), p. 212 at 242.

in the election of representatives. Such problems gave rise to political reform by a revision of the system of representation. Various electoral systems for members of the House of Representatives were proposed and widely debated upon on their pros and cons and their suitability for implementation to Thai political and domestic cultures. In the end, the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) provides for an electoral system on a *proportional representation* basis, rather than on a *relative majority* basis, even though in the initial period all had spoken in one voice of the difficulties and inappropriateness of proportional representation in Thailand.² There are, in fact, difficulties in the implementation of all novel and unaccustomed electoral systems, but if a thorough study is undertaken, any electoral system would not be rendered beyond the capability of the Thai people.³

2. Prologue to the Electoral System of Members of the House of Representatives and Senators

The first election law in Thailand was enacted on 16th December 1932 in an Act called the Election Act, B.E. 2475 (1932).⁴ The Act provided for an election procedure whereby the people in each *Tambon* voted for one representative who would in turn vote for one representative for each *Changwat*. That, in reality, constituted a system of 'indirect election.' The electoral system under the Act was also founded upon the *absolute majority* principle, or in other words, a person would only be elected if the number of votes received exceeded half the total number of voters. This

² Tantisunthorn, T. Introduction to the institute of educational policies. Cited in: Traimas, C. (1999) *A new electoral system: why Thais should vote*, 2nd edition. Bangkok, Institute of Educational Policies, p. iii.

³ Mewongukote, B. (1992) *Texts on comparative constitutional law: the German Constitution*. Bangkok, Textbooks and Supplementary Teaching Materials Project, Faculty of Law, Thammasat University, p. 110.

⁴ Cheuthai, S. (1992) *Texts on general constitutional principles*. 2nd edition. Bangkok, Textbooks and Supplementary Teaching Materials Project, Faculty of Law, Thammasat University, pp. 122-126.

law was, however, never applied to any election due to the National Assembly being in recess, during which the Act underwent certain amendments. The amended law was subsequently applied to its first general election on 15th November 1933. After the amendment, the election was still in the indirect fashion but there was introduced the so-called 'combined constituency' formulation, by which a *Changwat* was prescribed as one constituency. Also, the count of votes originally based upon the *absolute majority* notion was replaced by that of *relative majority*, whereby a candidate was considered elected when receiving the respectively greatest number of votes of all candidates without having to obtain the votes of more than half the total number of voters.

A direct election of representatives came forth for the first time in the election on 7th November 1937 - the second general election - that was held under the umbrella of the Election Act, B.E. 2475 (1932) as amended by the Election Act (No. 3), B.E. 2479 (1936) according to which the 'single-member constituencies' concept was practised but the relative majority was retained. No further changes were made at two following general elections (on 12th November 1938 and 6th January 1946 respectively).⁵

The fifth to the ninth general elections (from 29th January 1948 to 10th February 1969) reverted to the combined constituency model.⁶ Subsequently, however, the Constitution of the Kingdom of Thailand, B.E. 2517 (1974) adopted the rule of divided constituencies where each *Changwat* was divided into many constituencies. Further changes were made by the Constitution of the Kingdom of Thailand, B.E. 2521 (1978) where combined constituencies were once again adopted with the exception of Bangkok, which was divided into 3 constituencies. The Constitution retained the system of relative majority, but the rule of election

⁵ Thongthamachati, K., et al. (1988) *The election of political parties and governmental stability*, Bangkok, Research Section, Faculty of Political Science, Chulalongkorn University, pp. 35-36.

⁶ *Ibid.* p. 37.

on an individual or a numerical basis was amended to an election of a team or political party, hence a so-called 'combined number' archetype.

In 1985, the Constitution of the Kingdom of Thailand, B.E. 2521 (1978) was further amended to allow elections on the basis of both the 'combined constituency' model and the 'divided constituencies' pattern, depending on the number of members of the House of Representatives that could be elected in each *Changwat*. In this instance, the rule of 'combined constituency' applied to any *Changwat* where no more than 3 members could be elected (and, for this purpose, the entire boundaries of such *Changwat* were considered as a constituency) whilst in a *Changwat* where more than 3 members of the House of Representatives could be elected, the *Changwat* boundaries would be divided into several constituencies. Meanwhile, the electoral system remained by relative majority but in order of the number of votes cast for each number.

When the Constitution of the Kingdom of Thailand, B.E. 2534 (1991) was promulgated, the blended paragon of 'combined and divided constituencies' was still employed, along with the relative majority electoral system.

As we have seen from above, Thailand held direct elections of representatives only for members of the House of Representatives. The elections were by relative majority and alternated between the use of single numbers and combined numbers, as well as between the use of combined and divided constituencies. In the end, however, a mixture of both combined and divided constituencies was concurrently employed. On the other hand, it never appeared that people could directly vote for senators.

3. The Reform under the Current Constitution

The reformation of the Thai political system in 1996 included the electoral system as one of its agendas. It was hoped that a new electoral

system would provide for elections which would be fair and honest, reduce opportunities for the sale and purchase of votes, eliminate corruption by influential political groups and open up opportunities for more virtuous and able candidates.⁷ Thus, the present Constitution introduces a number of essential qualities for the electoral system, including the following⁸: imposing a duty to vote on the Thai people; providing for senators to be directly elected by the people; allowing for eligible voters overseas or residing outside their constituency to exercise the right to vote; establishing an Election Commission as an independent unit in charge of holding and supervising elections free from any governmental intervention and placing it at the heart of the process of political reformation under the new Constitution⁹; prescribing election procedures on a single-member constituency basis, derogating certain political rights from those who fail to exercise their right to vote without reasonable grounds; and finally, providing for proportional representation in lieu of relative majority. In this connection, the present Constitution calls for our further exploration in the following matters.

3.1 The Basic Principles of an Election

Certain fundamental principles are necessary for an election. In effect, these principles are considered by the majority of public law experts as the entitlements of both eligible voters and candidates. To them, such legal entitlements are equal in status to constitutional rights or basic political rights and are universally applicable to all stages of elections at all levels and, indeed, in all electoral systems.¹⁰ The principles can be brought out below.

⁷ Traimas, C. (1999) *A new electoral system: why Thais should vote*, *op. cit.*, note 1 *supra*, pp. ix-x.

⁸ *Ibid.* p. ix.

⁹ Nitikraipot, S. (1997) The legal implications of the transitory provisions upon the promulgation of the new Constitution. *Jurisprudence Review*, 27(3), p. 778 at 783 and 787.

¹⁰ *Op. cit.*, note 3 *supra*, pp. 91-92.

Firstly, an election must be on a *universal suffrage* basis.¹¹ A person should be given the right to be a candidate and the right to vote without being excluded by reasons of sex, social and economic status, religion, race, education, occupation, political views or membership of a political party.¹² Anything done in contravention of this general principle will also violate the equality rule recognised by the Constitution. Exceptions are, however, candidly set out - the following persons, for example, are not permitted to vote or stand as a candidate: minors, the mentally disabled or lunatics or prisoners.¹³

Secondly, an election must be held on a *direct suffrage* basis.¹⁴ Representatives must, that is, be elected directly by those entitled to vote. The prohibition of intermediaries applies also to organisations wishing to act as an agent of voters and exercising the votes at their discretion.¹⁵ Any election involving a person or organisation acting as an intermediary is an indirect election.

Furthermore, *independence of votes* must be maintained.¹⁶ Votes should be cast freely, without any undue influence, psychological pressure, economic duress or other influences. This principle is an essential condition for any election and is, in effect, at the heart of the reform of the electoral system. Now, the principle is, as well, found in sections 44 - 48 of the Organic Act on Elections of Members of the House of Representatives and Senators, B.E. 2541 (1998). In this regard, the 1998 Act protects the electorate from both foreigners¹⁷ and State officials¹⁸

¹¹ *Ibid.*, p. 92 and *op. cit.*, note 4 *supra*, p. 111.

¹² See Constitution of the Kingdom of Thailand, B.E. 2540 (1997), section 105 (1).

¹³ See Constitution of the Kingdom of Thailand, B.E. 2540 (1997), section 105, section 106 and section 109.

¹⁴ *Op. cit.*, note 3 *supra*, p. 93 and *op. cit.*, note 4 *supra*, p. 114.

¹⁵ See Constitution of the Kingdom of Thailand, B.E. 2540 (1997), section 104 paragraph 3.

¹⁶ *Op. cit.*, note 3 *supra*, p. 93 and *op. cit.*, note 4 *supra*, p. 111.

¹⁷ The Organic Act on the Election of Members of the House of Representatives and Senators, B.E. 2541 (1998), section 46 and section 106.

¹⁸ The Organic Act on the Election of Members of the House of Representatives and Senators, B.E. 2541 (1998), section 47 and section 101.

and it penalises an eligible voter who sells his vote as well.¹⁹ Any election that is not conducted in accordance with this principle will in effect render other basic electoral principles meaningless. On the contrary, a fair and honest election will result in having representatives which truly reflect the intentions of the people, hence, the people's power and the meaningful sovereignty.²⁰

Next, an election must be conducted on a basis of *equal suffrage*.²¹ The votes of all eligible voters shall carry equal weight.²² In addition, it must be by *secret ballot*²³; nobody may discover how other voters cast their votes. Even if a voter does not intend his vote to be left confidential, compliance with the secret ballot principle is still mandatory,²⁴ for it serves as a safeguard for liberal election. This principle is applied in practice by sealing a ballot paper in an envelope or depositing it in a ballot box.

The reform of the electoral system under the new 1997 Constitution retains all these basic electoral principles that were generally provided for in the Constitution of the Kingdom of Thailand, B.E. 2534 (1991). Notwithstanding, many novelties have been planted. We will now discuss these breakthroughs.

3.2 Novel Features in the Electoral System for Members of the House of Representatives and Senators

The electoral system of members of the House of Representatives and Senators under the 1997 Constitution is different from that under the

¹⁹ The Organic Act on the Election of Members of the House of Representatives and Senators, B.E. 2541 (1998), section 63 and section 111.

²⁰ *Op. cit.*, note. 7 *supra*, p. v.

²¹ *Op. cit.*, note. 3 *supra*, p. 95.

²² See Constitution of the Kingdom of Thailand, B.E. 2540 (1997), section 102 paragraph 1 and section 104 paragraph 1.

²³ *Op. cit.*, note. 3 *supra*, p. 97 and *op. cit.*, note. 4 *supra*, p. 112.

²⁴ See Constitution of the Kingdom of Thailand, B.E. 2540 (1997), section 104 paragraph 3.

1991 Constitution in a number of ways. First, while under the 1991 Constitution direct elections were held only for members of the House of Representatives based upon the relative majority principle and the electoral process involved the use of both combined and divided constituencies, the 1997 popular Constitution²⁵ provides for an electoral system whereby both members of the House of Representatives and Senators acquire office from general elections only. Next, an election of members of the House of Representatives is both on the basis of constituencies and on a basis of party lists, with 400 members being elected on a constituency basis and 100 from political parties' party-lists. At the same time, 200 senators are elected.

With respect to members of the House of Representatives to be elected on a party-list basis, each political party prepares one party-list and voters may only cast a vote for one list (with the entire country constituting a constituency for this purpose). Thereafter, the proportion of members of the House of Representatives allocated to each party will be calculated subject to the rule that any party-list receiving less than 5 per cent of the total number of votes cast in the country will be outright disregarded and a party-list that receives at least 5 percent of the total number of votes throughout the country will be allocated members of the House of Representatives in proportion to the number of votes received (with the listed candidates being regarded as elected according to the order in which their names appear).²⁶

As for an election to be conducted on a constituency basis, a *Changwat* which can have only one member of the House of Representatives is considered as a constituency whilst a *Changwat* with more than one member will, however, be further divided into several single-

²⁵ See Constitution of the Kingdom of Thailand, B.E. 2540 (1997), sections 98 - 104 and sections 121 - 123.

²⁶ Organic Act on the Election of Members of the House of Representatives and Senators, B.E. 2541 (1998), section 76.

member constituencies, each with a similar number of inhabitants.

By way of comparison, in a case of an election of senators, the boundaries of a *Changwat* is taken as a constituency. The calculation of the number of senators for each *Changwat* is made from the proportion of people per member (as in the case of a constituency-based election of members of the House of Representatives). Each voter shall cast a vote for only one candidate.

To sum up, we have seen the following major changes in the electoral system under the new Constitution:

(1) "Proportional representation" is employed for the first time. Voters may now cast votes for candidates on both constituency and party-list basis. An election on a party-list basis gives rise to representation at a national level, while the election on a constituency basis enables local representation.

(2) The amalgamation of the country into one constituency for the purpose of a party-list election of members of the House of Representatives and the division into single-member constituencies for the purpose of constituency-based elections are the first of their kind and have never been found in previous constitutions.

(3) The successful candidate is elected either from the order in which his name appears in the party-list or from the single-member constituency.

(4) The entire National Assembly is created purely by direct election; that is to say, members of the House of Representatives and Senators must now be directly elected by the people alike.

3.3 The Election Commission

The Election Commission as set up under the present Constitution is placed at the heart of the political reform process. An election is conducted under the charge and control of this Commission, whose status is that of an independent agency free from any governmental

intervention.²⁷

As far as its composition is concerned, the Election Commission consists of a Chairman and other four Commissioners elected by the Senate from persons of apparent political impartiality and integrity. In this connection, Election Commissioners may not be elected from those assuming several vulnerable positions, or engaging businesses, as constitutionally enumerated.²⁸ When the Senate elects any person as an Election Commissioner, the elected person can only commence the performance of duties only after resigning from the prohibited position or ceasing the proscribed engagement. These restrictions are in effect imposed in an endeavour to ensure that all Election Commissioners are genuinely politically impartial.

The procedure by which Election Commissioners are elected is even solidly prescribed by the Constitution. The nomination, for submission to the Senate, will first be made by a specially set up Selection Committee consisting of the President of the Constitutional Court as Chairman, President of the Supreme Administrative Court, elected Rectors of State higher education institutions and representatives of political parties. Another set of nominations must also be made by the general assembly of the Supreme Court of Justice. Upon both nominations, the Senate will be convoked for passing, by secret ballot, a resolution

²⁷ See Constitution of the Kingdom of Thailand, B.E. 2540 (1997), sections 136 - 148.

²⁸ The positions listed are: a member of the House of Representatives, a senator, a political official, a member of a local assembly, a local administrator, a member or a holder of any other position in a political party (throughout the period of five years preceding the holding of office), an Ombudsman, a member of the National Human Rights Commission, a Judge of the Constitutional Court, a Judge of the Administrative Court, a member of the National Counter Corruption Commission, a member of the State Audit Commission, a Government official holding a permanent position or receiving salary, an official or an employee of a State agency, a State enterprise or a local government organisation, a holder of any position in a partnership, a company or an organisation carrying out businesses for sharing profits or incomes, or an employee of any person. In addition, an Election Commissioner is prohibited from engaging in any other independent profession.

electing the nominated persons. The first five persons who receive the highest votes which are more than one half of the total number of the existing senators are elected as Election Commissioners.

Under the popular Constitution, the Election Commissioners may serve for only one term of seven years. Obviously, this limitation strives to vindicate an effective guarantee of the Election Commissioners' independence from political influences. At the same time, the Election Commissioners are subject to constitutional scrutiny. The Constitution allows members of the House of Representatives or Senators, in a prescribed number, to lodge with the President of the National Assembly a complaint that any Election Commissioner is disqualified or has acted in contravention of the Constitution. Such a complaint, if made, will be referred to the Constitutional Court for a determination towards removing that Election Commissioner from office.

The Election Commission is charged with the duties to hold and control elections of members of the House of Representatives and Senators²⁹ in order that they be proceeded in an honest and fair manner. For these purposes, it is empowered to issue necessary Notifications and give orders especially to State officials to perform necessary acts. The paramount duties are, however, those concerned with investigating dishonest conduct enabling a candidate to be elected in an election or violating the organic law on elections of members of the House of Representatives and Senators. Most eminently, the Election Commission orders a new election when satisfied that a particular election was not in an honest and fair manner.

²⁹ In effect, these crucial duties of the Election Commission extend to elections of members of a local assembly, elections of local administrators and the voting in a referendum as well. This is, however, outside the scope of our examination in this paper.

3.4 Voters and Candidates

The new Constitution has implemented a change in its method for compelling voters to cast votes. In this instance, a duty to vote in good faith³⁰ without any penalty for a failure to exercise the right to vote is now shifted to a duty to exercise such right. A person who fails to vote at an election without notifying the authority of an appropriate cause will lose such rights as provided by law.³¹ It is hoped that by stimulating the majority of dormant voters, corrupt or oppressive behaviours at an election will be more effectively suppressed, for difficulties of vote-buying would increase with the overall rise in the number of votes.

Changes are also made to certain aspects of candidate qualifications, such as the requirement of a Bachelor's degree or its equivalent for candidates for membership of the House of Representatives, with an exception for previous members of the House of Representatives or Senators. Senators are, however, not entitled to this exemption.³² Other changes include the repeal of prohibitions on the deaf and mute from candidature in an election of members of the House of Representatives and Senators in order that political rights of participation can be conferred on the disabled; the prohibition on Election Commissioners, Ombudsmen, members of the National Human Rights Commission, judges of the Constitutional Court, judges of an Administrative Court, members of the National Counter Corruption Commission or members of the State Audit Commission or any other persons under a prohibition from holding a political position from exercising the right to be candidates in an election of members of the House of Representatives³³; and a prohibition on members of a local assembly or local administrators, members of the

³⁰Constitution of the Kingdom of Thailand, B.E. 2534 (1991), section 26 and section 51.

³¹Constitution of the Kingdom of Thailand, B.E. 2540 (1997), section 68. Under the relevant law subsequently enacted, the rights to be lost are, in the main, certain political rights.

³²Constitution of the Kingdom of Thailand, B.E. 2540 (1997), section 107 and section 125.

³³Constitution of the Kingdom of Thailand, B.E. 2540 (1997), section 109.

House of Representatives, Election Commissioners, Ombudsmen, members of the National Human Rights Commission, judges of the Constitutional Court, judges of an Administrative Court, members of the National Counter Corruption Commission or members of the State Audit Commission or any other persons under a prohibition from holding a political position from being candidates in an election of senators.³⁴

4. Conclusion

Our journey into the present Constitution reveals several aspects of the reform of the electoral system with a view to forestalling corrupt practices in general elections at the parliamentary level.³⁵ We have seen the implementation of proportional representation dedicated to opening up opportunities for widely approved candidates to be elected as members of the House of Representatives and preventing the use of local influences. Contrary to past practices, these members represent the Thai population as a whole rather than just a particular locality.

We have, moreover, witnessed the establishment of an Election Commission as an independent organisation to supervise elections and ensure honesty and fairness. Further, we are now constitutionally presented with measures intended to stimulate dormant voters in the hope of making corrupt practices more difficult to achieve as long as there is a rise in the overall number of votes. Also, we have senators that are directly elected and, with the added requirement of a Bachelor's degree on the part of members of the House of Representatives and Senators, we may seem to be assured of our being represented by fit parliamentarians. However, the success of all this electoral reformation does not totally hinge on the presence of all the substantive provisions of law so far, or to be, enacted. It is largely dependent on their real enforcement as well. As a matter of fact,

³⁴ Constitution of the Kingdom of Thailand, B.E. 2540 (1997), section 126.

³⁵ Nanakorn, P. *op. cit.*, note 1 *supra*, pp. 246-247.

subsequent to promulgation of the popular Constitution of 1997 and legislation concerned, numerous elections have taken place. We may ask, for example, whether, with the new electoral system and measures, we have been represented by qualified parliamentarians elected purely free from vote buying.

It should be recalled that the popular Constitution of 1997 has up to now been in force for almost 5 years. The success or, perceivably, failure of reformation in the electoral context is worth reconsidering.

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