



## Reflections and Comments

### Preliminary Draft Constitution of the Kingdom of Thailand

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International IDEA

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#### Introduction

The International Institute for Democratic and Electoral Assistance (International IDEA) congratulates the Constitutional Drafting Committee on completion of this draft, and is pleased to support the wider discussion on how this draft might reflect both Thai traditions and the current political environment. Understanding that the current draft is under review and recognizing that there is no perfect Constitution, the comments in this report seek to suggest helpful ways by which to improve the draft in its internal consistency and coherence, which may avoid foreseeable problems in the future. The review is based on an unofficial English translation, and it is possible that some of the smaller comments reflect linguistic misunderstanding.

Key points to which these comments draw attention include:

- The potential for the restrictions on membership of the National Assembly and other constitutional bodies to deny those bodies expertise, continuity of experience and diverse perspectives from which Thailand could benefit;
- The variety and breadth of restrictions that might be placed upon rights, suggesting that a single, more focused limitations clause could simplify and clarify this part of the Constitution;
- The absence from the draft of the right to a healthy environment that was included in the 2007 Constitution;
- The apparent non-justiciability of access to public information and administrative justice, both of which can effectively be enforced through courts;
- Several provisions of the draft that impose responsibilities on the Constitutional Court that could politicize it unduly and detract from its effectiveness;

- The impact of the transitional provisions on the delivery of education after the new Constitution comes into effect, at the expense of the responsibility of the incoming government;
- And the unduly rigid requirements for constitutional change.

### General Comments

This document fits within the tradition of constitutions produced by Thailand's military regime. It reflects some distrust of party politics, for example, in including a wholly appointed Senate, and also contemplates a careful, well-articulated transition to the new regime. It also places an admirable emphasis on control of corruption.

One general feature of the draft is that many of the government institutions, such as the Senate and Constitutional Court, are to be staffed by appointees who are limited to a single term. It may be that this reflects the broader distrust of political actors, and seeks to prevent people from capturing the offices they hold for a long period or career. Yet there is a downside or trade-off from single terms. Performance in public positions, like everything else, improves with experience. Blanket exclusions on qualified persons mean that valuable experience is lost. Consideration might thus be given to relaxing some of these restrictions and allowing some reappointments, or at least allowing those who have served in other government positions to serve in new ones. In addition, it is unclear as to whether the prohibitions on prior service apply to those who served in offices under earlier constitutions. This point should be clearly addressed in the Transitional Provisions.

A related issue is the manner in which local government is not integrated with the national government. In the section on the House of Representatives, it says that members of local assemblies cannot even run for the national legislature. This is unwise for two reasons. First, local assembly members have legislative experience that is surely relevant to knowing how to serve at a national level. Second, the local assembly members might have valuable information about the performance of government programs that will improve national governance. While we agree that local assembly members should not *sit* as national legislators at the same time, the need for experience and for information suggests that they should not be excluded from running.

A final general comment concerns the transitional provisions. In general, the purpose of transitional provisions is to allow for smooth facilitation to a new order. The provisions in this draft are carefully crafted toward this end: they have clear deadlines and assignment of powers. Yet, in some places, they allow the current institutions to determine the substance of future policy, especially with regard to education. This is not consistent with a return to electoral accountability in a future Thailand. Democratically elected institutions should have the freedom to design and implement policies within the framework of the Constitution.

We now turn to comments on individual sections of the constitution.

## Rights provisions

The rights provisions are subject to many restrictions, which vary between rights and are set out separately in each of the rights articles. One approach found in many other countries is to have a single limitations clause that applies to all or most rights. Doing it in the way presently found in the draft enables restrictions to be targeted to particular rights, but makes the rights provisions very complex and will complicate the development of the constitutional rights jurisprudence over time. A single limitation clause should ensure consistency in the limitations that can be placed on rights. Elsewhere in the world such clauses typically say that rights in the Constitution can be limited only by a law passed by the legislature that is consistent with the norms of a democratic society and that will restrict rights in a manner that is consistent with the principle of proportionality.

In this regard, Section 26 is a kind of limitations clause, but it is excessively vague and broad. It says that even if the Constitution has not provided for the limitation of rights, a law can do so if it is consistent with the rule of law. The rule of law can be understood in many different ways; in some versions it requires only that laws be passed in a procedurally correct manner while in others it incorporates substantive limitations on government policy. We recommend revising Section 26 to be more precise.

Section 34 of the draft imposes broad restrictions on freedom of expression, including the notion that the expression shall not lead to disharmony or the deterioration of the minds of the people. Controlling harmful speech is an understandable endeavour in light of Thailand's recent decades of political conflict. But how this new clause will play out is not clear. Moreover, according to the new draft academic freedom, for the first time, must not be pursued contrary to citizens' duty or public morals. More broadly, the draft refers in several places to the good morals of the people. One wonders how these will be decided, and the term arguably gives too much discretion to the government.

One notably absent right is that of individuals and communities to enjoy a healthy environment. One of the most effective mechanisms of the 2007 Constitution, this right provided the ground for local communities to participate in the deliberation of policies that might be harmful to their well-being. Similarly, there is no protection for sexual orientation in the non-discrimination clauses of Section 27.

In addition the sections on rights and duties of the people, there is a section on duties of the state. There is a conceptual overlap between these and the directive principles. We assume that neither is intended to be justiciable, unless particular articles provide to the contrary, but courts might play a useful role in advancing some of the provisions, particularly those in Section 55 (access to public information) and Section 64 (administrative justice).

Section 67 recognizes the country's diversity by referring to ethnic groups' cultural rights. This is in accordance with global trends.

## Religion and Education

The Constitutional treatment of Buddhism, reflected in Section 63 and others, is consistent with the general formula of recent Thai Constitutions, which have obligated the King to be a Buddhist, and

obligated the state to “patronise and protect Buddhism” while preserving freedom of worship in general. It follows the 2007 Constitution in describing Buddhism as “the religion observed by most Thais for a long period of time” to justify state patronage. Section 91 continues the tradition of disenfranchising Buddhist monks, which is undemocratic though squarely rooted in Thai practice.

Section 50 refers to the educational system and its overall goals. The Transitional Provisions, Section 279, provides that the NCPO and Council of Ministers must pursue this project speedily, and it is not clear why. Education, like health care and other social services, is a public good delivered by government. There is no reason to lock in a particular educational program, nor any apparent urgency in this regard. We recommend leaving the program to implement Section 50 to the new government elected under this Constitution.

## Political System

The bicameral legislature has a House of Representatives with 500 members selected by a mixed electoral system (350 elected from constituencies, while 150 come from party list) along with an appointed Senate to act as a check on the elected house. The latter is a theme of Thai constitutional history. This draft leaves all the detail on the selection of Senators to organic law.

Section 93 prohibits various categories of persons from standing as candidates for the legislature. Most of these make some sense. Subsection 13, restricting local assembly members from running, seems problematic, however, as mentioned above in the General Comments. It is often the case that national politicians get their start at a local level. So why prohibit members of local assemblies or administrators from running for office? It is clear from Section 179(1) that such persons cannot *hold* both offices if elected to the House. But should they not be allowed to run? If they win the national office, they would have to resign from the local assembly in any case.

In general, there are significant restrictions on candidatures for office. There is a tension in every country between broad participation and preventing undesirable people from running for office, and this draft leans toward the latter, but there is also the countervailing risk that good candidates do not run. A candidate must gain more votes than votes of abstention to win an election, as per Section 87. Otherwise, that election is void. A re-election shall be held in the latter case, but candidates of the first round will be disqualified. In the case of suspected electoral fraud, the Election Commission can ban that candidate for a year. If a candidate is found guilty, a ban from politics is extended from five to 10 years. Under this draft constitution, candidature for public office seems both unduly restrictive and unduly precarious, to the point where it could become counterproductive.

Section 102 provides the basis for selecting Senators without providing detail. As per Section 259, the Constitutional Drafting Committee will prepare a law for the currently sitting National Assembly to determine the system. However, and again referring to our introductory comments, there are some limitations on who can run, and there is no possibility for serving more than one term in the Senate (Section 104). Since the Senators will all be seated for a five year term at the same time, and there will be no staggering of terms, and this means that the chamber will be made up of completely

inexperienced people. Senators cannot have served in the House of Representatives; they cannot have served as government officials; and they cannot have experience in political parties. We believe this does not fill the intentions of the drafters of providing an effective check on the House of Representatives. The Senate will be institutionally weak because its members will not be experienced in how government actually works. They will lack knowledge and there is a real danger of lack of continuity. One simple modification that could improve the draft would be to have Senators serve six-year terms, with half the cohort leaving every three years.

### Legislative Process

The process of introducing Organic laws is unusual in that it involves the courts and independent organizations in the legislative process. Section 126 requires that the Council of Ministers can introduce such bills with the advice of the Supreme Court, Constitutional Court or relevant independent organizations. It is not clear which body gives advice on what kind of bill, but presumably a bill on, for example, establishing the office of the Ombudsman, would not need to receive the advice of the Supreme Court.

Additionally, Section 127 suggests that the bills go to the courts/independent organizations *after* consent in the National Assembly. When read together, Sections 126 and 127 suggest that the courts are involved both in proposing organic law and in approving the drafts. We would suggest removing the mention of Supreme Court, Constitutional Court or relevant independent organizations in Section 126. The advice described in Section 127 is clear and is sufficient, and the language in Section 126 just adds confusion.

On the role of individual members in appropriation bills in Section 139, the scheme is complex and possibly overbroad. We can understand the problem to which Section 139 is directed, but the solution is complicated and creates very considerable uncertainty, possibly having the effect of reducing the authority of legislature in appropriations. This in turn could jeopardize stability of government expenditures.

### Government

Section 155 has a requirement that ministers have a bachelor's degree. This is a rather undemocratic provision that, again, could deny Thailand useful expertise. There is no reason for such a restriction in our view.

We also note that there is no requirement that ministers be sitting in the House of Representatives. Democracies differ in this regard, with some prohibiting ministers from serving in the parliament and others requiring it. Whatever approach is desired, it should be done with intention and made clear in the draft. In particular, in a parliamentary system, there is virtue to having the Prime Minister come from the House, both in terms of political legitimacy and the smooth functioning of executive legislative relations. The daily or weekly connection between the Prime Minister and legislators enhances accountability and legitimacy.

## The Courts

Overall, the Judiciary Chapter is not changed much from prior versions, although we note the absence of provisions on the jurisdiction of the Administrative Court. We believe the 2007 Constitution was exemplary in defining the jurisdictions of the various courts and their interactions, and might be considered a model.

The Constitutional Court is a powerful body. Its members serve only one single term of nine years. In light of this, one wonders about the restriction that persons cannot have had experience serving in the Constitutional Court or another independent organization. It may be that prior experience in such bodies would help one develop expertise that would be relevant to the Constitutional Court. In addition, would someone who served in an earlier incarnation of the Constitutional Court, such as under the Constitution of B.E. 2540 (1997) not be allowed to serve on this Court?

Section 207 provides that when there is no applicable provision in the constitution, the Court can decide issues in accordance with “constitutional convention in a democratic regime with a King as Head of State”. This is an extraordinarily vague provision. It is not clear in the first place why the Constitutional Court would be deciding issues that have no textual basis in the constitutional text. It may allow the Court to intervene in all kinds of questions, politicizing the Court. We recommend a much narrower formulation.

The Court has a role in supervising emergency rule in Section 168. We think that 60 days is a long time to wait for a Constitutional Court decision if there genuinely is an emergency.

The provision allowing courts to issue ‘binding ethical standards’ in Section 215 may be very significant, but do raise genuine separation of powers issues if judges are both articulating standards and imposing punishments. The parameters of ‘national dignity and interests’ are broad and their relationship with ethics is unclear.

## Independent Agencies

Establishing independent agencies at the constitutional level is a global trend, and Thailand has been no exception. We note with approval that this draft has revived the status of the National Human Rights Commission to be an Independent Organization. This was the case in the 1997 Constitution but not the 2007 one. One suggestion to consider is that it might be worth providing that the National Human Rights Commission play a role in the country’s Universal Periodic Review under the Human Rights Council of the United Nations.

## Amendment

The amendment procedure requires 10% of the votes of every political party with over ten members. This should be scrapped, as it will make it virtually impossible in practice to get any amendment through. While constitutional rigidity can be a good thing, too much rigidity will put the entire constitution at risk of replacement when social conditions fundamentally change. We suggest that instead of the universal

party requirement, the threshold move from an absolute majority of MPs to a supermajority of say 3/5. This will prevent easy amendment but also allow some amendments to get through.

### Other matters

Section 23: When the President of the Privy Council is serving as Regent under Section 18, and another person is elected as President of the Privy Council, does the first person get the job back if he is no longer serving as regent?