Study Report

Prominent Precedents on the Constitutional Adjudication Volume 2

The 6th Congress of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC)

17-21 September 2024

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Preface

The study report on "Prominent Precedents on the Constitutional Adjudication" Volume 2 is prepared with an aim to study decisions of the Constitutional Court, the Constitutional Council, and judgments of the Supreme Court and the Supreme Administrative Court which have established precedents for utilization and interpretation of the constitution. The report also studies and conducts a comparative analysis of judicial decisions for constitutional cases both in Thailand and overseas.

The study was conducted by the Constitutional Court's Committee for Academic Mission Support. Led by Professor Emeritus Borwornsak Uwanno, Ph.D., the study team on "Prominent Precedents on the Constitutional Adjudication" consists of Justices of the Constitutional Court, those who support the work of the Justices of the Constitutional Court including their advisors, experts, and officials of the Office of the Constitutional Court, as well as external advisors. In its role as President of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) for a two-year term (2023-2025) and as host of the 6th Congress of the AACC titled "The Constitutional Courts and Equivalent Institutions in Strengthening Constitutional Justice for Sustainable Society" (to be held from 17-21 September 2024), the Office of the Constitutional Court has chosen to publish Volume 2 of the precedents from the study "Prominent Precedents on Constitutional Adjudication." This follows Volume 1, which was published and used as material for the symposium held on 11 April 2023, to mark the 25th Anniversary of the Constitutional Court of the Kingdom of Thailand.

This publication is intended for use at the aforementioned AACC Congress. Its content consists of 11 precedent case studies, including: 1) Constitutional Conventions of Thailand under the Democratic Regime of Government with the King as Head of State by Professor Emeritus Borwornsak Uwanno, Ph.D., Advisor to the Justices of the Constitutional Court; 2) Transitory Provisions of the Constitution by Boonserm Nagasara,

Judge of the Supreme Administrative Court; 3) Act of Government by Ruthai Hongsiri, Ph.D., President of a Chamber of the Supreme Administrative Court; 4) Legislative Process by Asst. Prof. Ponson Liengboonlertchai, Ph.D., Faculty of Law, Chulalongkorn University; 5) The Meaning of Treaty under the Constitution of Thailand by Prof. Prasit Piwawattanapanich, Ph.D., Senior expert to the Justices of the Constitutional Court; 6) "No Crime without Law" by Surasit Sangwiroatjanapat, Ph.D., Justice of the Court of Appeal; 7) The Privilege against Self-Incrimination by Surasit Sangwiroatjanapat, Ph.D., Justice of the Court of Appeal; 8) Precedents on the Exercise of State Power for the Expropriation of Immovable Properties under the Constitution in the case of the Supreme Administrative Court's judgment No. For.16/B.E. 2545 (2002) by Papot Buppawan, Ph.D., Office of the Council of State; 9) Rights and Liberties to Engage in an Occupation by Prachya Chiasakul, Office of the Council of State; 10) Rights and Liberties of Officials of the State by Dr. iur. Nanchaya Channarong (Ass. iur), Office of the Council of State; and 11) The Principle of Equality in Bearing Public Burdens by Ruthai Hongsiri, Ph.D., President of a Chamber of the Supreme Administrative Court.

Office of the Constitutional Court hope that the study report titled, "Prominent Precedents on the Constitutional Adjudication Volume 2" will be beneficial for academic research and further enhance the understanding of prominent precedents in Thai and foreign constitutional adjudications.

Office of the Constitutional Court
June 2024

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Executive Summary

The study report on **"Prominent Precedents on the Constitutional Adjudication Volume 2,"** by Professor Emeritus Borwornsak Uwanno, Ph.D., as head of the study project, examines the rulings of the Constitutional Court, the Constitutional Council, and judgments of the Supreme Court and the Supreme Administrative Court, which have established precedents for the utilization and interpretation of the constitution. The report also conducts a comparative analysis of judicial decisions for constitutional cases both in Thailand and overseas. The 11 precedents under study consist of the following:

1. Constitutional Conventions of Thailand under the Democratic Regime of Government with the King as Head of State by Professor Emeritus Borwornsak Uwanno, Ph.D., Advisor to the Justices of the Constitutional Court

Constitutional conventions of Thailand under the democratic regime of government with the King as Head of State are stipulated in section 5 paragraph two of Constitution as follow: *"Whenever no provision under this Constitution is applicable to any case, an act shall be performed or a decision shall be made in accordance with conventions of Thailand under the democratic regime of government with the King as Head of State."* The first constitution to recognize "Constitutional Conventions of Thailand under the Democratic Regime of Government" is the Charter for the Administration of the Kingdom B.E. 2502 (1959). This provision was stipulated as a "stopgap provision" in the interim constitution, which was brief and contained only a few sections. It allowed for the application of the conventions in cases where specific written provisions were not available. This principle has been recognized to the present day.

In examining conventions for governance in overseas context, countries with a common law system typically adhere to constitutional conventions, while those in Europe with a civil law system follow

constitutional customs. Constitutional conventions and customs share two key characteristics: 1) they are long-standing practices followed by authorities without legal provisions; 2) there is a common belief among these authorities that adherence to these practices is essential, to the extent that they feel obligated to act or refrain from acting based on these conventions or customs.

In Thailand, constitutional conventions are reflected in precedents set by the Supreme Court and the Constitutional Court. These conventions under the democratic regime with the King as Head of State can be identified using the following two approaches:

1) Examine whether or not they are conventions or customs with practices that have been consistently observed over time, supported by a belief in their necessity *(opinio necessitatis)* and factual evidence (such as the Constitutional Court Rulings No.6/2543 (2000), 7/2559 (2016), and 3/2562 (2019)). In these rulings, the Constitutional Court referred to "consistently followed practice" and "shared intent... consensus," reflecting the two main characteristics of constitutional customs.

2) Compare across constitutions and consider general principles of constitutional law. Thailand has had a total of 20 constitutions, including the current one. Both the Supreme Court and the Constitutional Court have reviewed past constitutions to identify constitutional conventions from the outset, with the Constitutional Court itself following a similar approach in its Ruling No.3/2559 (2016).

If a provision of the constitution clearly designates entities to act or make decisions regarding constitutional conventions, the authority shall belong to those entities. For example, section 20 of the Charter for the Administration of the Kingdom B.E. 2502 (1959) stated, "Whenever no provision under this Constitution is applicable to any case, a decision shall be made in accordance with constitutional conventions of Thailand under the democratic regime of government. If an issue arises concerning the adjudication of any case under the provisions of the preceding

paragraph within the purview of the Assembly, or arises because the Council of Ministers seeks a decision from the Assembly, the Assembly shall render a final decision." In the absence of a constitutional provision designating specific entities to act or make decisions based on constitutional conventions, the authorized entities may proceed according to these conventions when an "act" is required without requesting for a decision to be made, provided there is no "issue requiring a formal decision." In instances where a formal "decision" is needed, such as a court ruling, the Court of Justice or the Administrative Court would, by applying constitutional conventions, make the decision within their respective areas of jurisdiction. Additionally, the Constitutional Court may apply constitutional conventions in the cases presented to it for rulings.

The Constitution of the Kingdom of Thailand B.E. 2540 (1997), B.E. 2550 (2007), and B.E. 2560 (2017) each recognized of constitutional conventions, especially the present Constitution of the Kingdom of Thailand B.E. 2560 (2017), which includes provisions recognizing constitutional conventions in paragraph two of section 5, concerning the Constitution as the supreme law. Therefore, constitutional conventions are considered equivalent to the written provisions of the Constitution. Laws enacted by the Parliament, regulations issued by the executive branch, or any other actions of legislative bodies or judicial bodies that contravene administrative conventions cannot be enforced pursuant to Section

2. Transitory Provisions of the Constitution by Boonserm Nagasara, Judge of the Supreme Administrative Court

Transitory provisions of the constitution have three main purposes including:

Firstly, to recognize the continued status of constitutional organizations and officeholders: the preservation of constitutional organizations and the officeholders in accordance with the previous constitution, i.e., after the promulgation of a new constitution, the existing

constitution will be annulled, resulting in the constitutional organizations and officeholders under the previous constitution being annulled. However, the new constitution does not intend to change all constitutional organizations and officeholders under the previous constitution.

Secondly, to support the establishment of organizations and the enactment of laws according to the constitution: the constitution mandated the establishment of numerous new organizations and the enactment of laws to recognize their operations and the setup of various mechanisms. For example, Section 90 of the Constitution of the Kingdom of Thailand B.E. 2489 (1946) stipulated that members of the House of Representatives under the old Constitution shall be the election body of the Senate within 15 days from the enforcement of the new constitution. Similarly, Section 334 (3) of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) stipulated that the Administrative Court must be established within two years from the promulgation date of the new Constitution. Additionally, Section 323 stipulated that, within 240 days from the promulgation date of the Constitution there shall be organic law bills on the Election of Members of the House of Representatives and Senators, the Election Commission, and Political Parties.

Thirdly, to support other operations, for example, section 65 of the Constitution of the Kingdom of Siam B.E. 2475 (1932) provided that in case over half of the total number of the people having the right to vote in the election of members of the House of Representatives have not yet graduated from basic primary education and the latest not more than ten years from the day of coming into force of the Temporary Charter for Administration of Siam Act B.E. 2475 (1932), then the House of Representatives was composed of two types of members in equal numbers; type 1 are those elected by the people and type 2 are those appointed by the King. Another example is the exemption of constitutional provisions in some matters, such as The Constitution of the Kingdom

of Thailand B.E. 2540 (1997) stipulated that a preparation period was needed for various systems or the establishment of new constitutional organizations to come in force, existing systems or organizations shall be used. As a result, there was an exemption of some provisions of the Constitution, e.g., transitory provisions, section 315 stipulated that members of the House of Representatives and the senators under the Constitution of the Kingdom of Thailand B.E. 2534 (1991) shall act as members of the House of Representatives and the senators under the Constitution of the Kingdom of Thailand B.E. 2540 (1997). The reason is certain provisions in the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) are inconsistent with the holding of such offices. Therefore, the transitory provisions, section 315 paragraph four, stipulated the exemption of some matters from being applied to members of the House of Representatives and the senators, etc.

3. Act of Government by Ruthai Hongsiri, Ph.D., President of a Chamber of the Supreme Administrative Court

The principles of "government action" *(acte de gouvernement)* is a legal theory widely used in many countries. In France, the Council of State (Conseil d'Etat) refers to the said principles to limit the judicial power to control or inspect certain types of executive actions. At present, the actions considered government actions are narrowed down into two main groups of executive actions: 1) *Actions of the executive branch in relation to the parliament*, such as passing laws, promulgating decrees on opening or closing of the Assembly sitting. 2) *Actions of the executive branch in international relations,* such as actions related to negotiation and preparation of international treaties, actions related to the enforcement of international treaties, and foreign policy actions not related to the implementation of treaties,.

The Republic of Italy, a civil law country, also recognizes the *actes de gouvernement* principle. Legal texts have named such actions L'atto politico and separate the actions of the government into two parts:

1) actions in international relations. For example, Italy's decision not to sign the Convention on Confession of Sin, which was different from the Confession of Sin in Roman Catholicism, or its decision to join an international agreement with the United States in the purchase of fighter planes; and 2) actions in domestic relations, such as the appointment of members of the regional council, the appointment of lifelong senators (five positions), the selection of justices of the Constitutional Court, presidential orders proposing voting, referendums on matters specified by the Constitution *(Referendum costituzionale).*

In addition to common law countries, the act of government principle is applied in countries using the Anglo-Saxon legal system, such as the United States and the United Kingdom, albeit under different names; when the term used in America is "political questions", while in England the term used is "act of state".

In summary, it can be said that in many countries, whether they use a single court system or a dual court system, the court with jurisdiction over administrative cases will not accept cases for adjudication or limit their authority in controlling the actions or exercise of certain administrative powers called by the French lawyers "actions of government." The legal principles or legal techniques used may be different, but they have similar legal effects. That is, to allow the executive branch to have reasonable independence in certain matters that are "policy" or truly political matters deemed by the Court to not control or should be controlled by other means. For example, it is more appropriate to use political control by parliament or the people in order to be in accordance with the principles of separation of powers, which is an important principle of governance in a democratic regime.

In Thailand, there is a prominent precedent set by Supreme Administrative Court Order No.178/2550; this is the matter of the five plaintiffs, who are both foundations and private sector. They disagreed with the fact that the government has negotiated and signed the

Thailand-Japan Economic Partnership Agreement and viewed that it was an action that caused damage to Thailand. Therefore, the case was filed with the Administrative Court to revoke the Council of Ministers resolution approving the Prime Minister and negotiation representatives to sign the mentioned agreement and to decide that the signing was void and to be suspended. The Supreme Administrative Court ruled that the Council of Ministers, in its capacity as a constitutional organization, used the state administrative power under the constitution to act in international relations. Therefore, this case was not within the jurisdiction of the Administrative Court and a dispute related to such action cannot be filed with the Administrative Court.

The Supreme Administrative Court Order No.178/2550 (2007), therefore, set the two types of precedents for the nature of cases concerning the exercise of executive power that is or is not under the control or inspection of the Administrative Court. One type is a dispute case that is under the jurisdiction of the Administrative Court, i.e., the exercise of state administrative power by the 4th defendant according to the Acts or mother laws that are effective as Acts to issue rules, orders, or to act. Another type is a dispute case that is not under the jurisdiction of the Administrative Court, i.e., the exercise of the state administrative power according to the constitution. The latter may result from the exercise of state administrative power in two ways. The first is the exercise of state administrative power to act in parliamentary relations, and the second is the exercise of state administrative power in international relations. The reasons why such action is not within the power of the Administrative Court are that the person who took such action was not "State officials" who exercise administrative power or carry out administrative functions according to section 3 of the Act on Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 (1999).

In summary, it can be seen that the principles or theory regarding the actions of the government (or government actions) have a universal characteristic and are used in both Thai and foreign courts. The mentioned principles do not mean that the exercise of certain executive powers cannot be examined. It should be examined through other methods or means other than the courts, such as the legislature or by the people. At present, the Administrative Court has already decided and laid down the principles for determining which actions will be considered government actions, even though some cases are still difficult to determine. Therefore, we have to wait for the evolution of this matter.

4. Legislative Process by Asst. Prof. Ponson Liengboonlertchai, Ph.D., Faculty of Law, Chulalongkorn University

The legislative process is the heart of the exercise of legislative power in a liberal democratic state. Attaching great importance to the value of representative democracy, the process focuses on the respect for people's rights through deliberations to ensure participation in country government. In this article, the author presents precedents concerning elements of the legislative process as follows:

(1) Quorum: The Constitutional Court Ruling No.2/2551 illustrates a case where the National Legislative Assembly (NLA) resolved to approve principles for the Bill of the Organic Act on Ombudsmen B.E. ... and the Office of the Ombudsman Bill B.E. ... without presence of quorum. Only 86 NLA members participated, which was insufficient to meet the quorum requirement of half of the total members (121 out of 242). The Constitutional Court ruled that the NLA's resolution did not comply with section 126, paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) because the Constitution clearly specifies the NLA's quorum, and conflicting provisions in other laws or assembly regulations regarding quorum shall not be used against the Constitution. This ruling examined the constitutionality of a bill before its promulgation under the provisions of the Constitution of the Kingdom

of Thailand, B.E. 2550 (2007). Furthermore, the Constitutional Court clarified that the quorum must be present throughout the deliberation and voting on legislation.

(2) Debates: Constitutional Court Ruling No.15-18/2556 exemplifies a case where the minority in Parliament was silenced. This case involved a group of members of the National Assembly who jointly proposed a motion to amend Draft Constitution of the Kingdom of Thailand (Amendment No. ...) B.E. ... to change the selection process for senators. The proposed amendment aimed to have all senators elected, thereby eliminating appointed senators. During the first reading, debaters requesting leave to speak and those who proposed the motion were barred from doing so. Additionally, opponents and abstainers used their majority vote to prematurely end the debate. The Constitutional Court ruled that the exercise of discretion and majority voting must not infringe upon members of the National Assembly's rights to perform their duties or disregard minority opinions. The Court concluded that hastily closing the debate and rushing the voting session, coupled with allowing only one day for submitting amendments, constituted an improper exercise of power that unfairly favored the majority. These actions violated the Rules of Procedures of the Parliament and lacked impartiality. The primary reasons cited by the Court were the disregard for the voices of minority members of the National Assembly on one hand, and the violation of their right to perform their duties on the other.

(3) Voting: Constitutional Court Ruling No.15-18/2556 sets a precedent regarding the case of impersonation and illegitimate voting on behalf of others. In this instance, certain National Assembly members used electronic identification cards to impersonate and vote on behalf of others using the voting machines during the consideration of additional amendments to the Constitution. This action was deemed non-compliant with section 126, paragraph three, which specified that each member was entitled to only one vote in such proceedings. Therefore, the resolution

regarding the deliberation of these amendments to the Constitution resulting from these votes could not be considered legitimate.

(4) Legislative Process: Constitutional Court Ruling No.3-4/2545 provides a precedent for cases where a draft Act was deemed passed without consideration by both Houses. It involved a situation where the bill was approved by the House of Representatives, but the Senate proposed additional amendments. The House of Representatives disagreed with the amendments, leading to the establishment of a joint committee to develop a conference bill and report to both Houses. However, in a session, the House of Representatives, with a majority vote, decided to proceed with the original draft they had developed, without waiting for the Senate's deliberations on the conference bill. The Constitutional Court ruled that for a bill to be legitimately enacted, it must receive approval from both Houses of the Assembly. According to constitutional provisions, the original draft could not be reintroduced and approved solely by the House of Representatives without first obtaining the resolution of both Houses. Therefore, the Constitutional Court adjudicated that the House of Representatives' exercise of ultimate power in overriding the joint committee's deliberations without involving the Senate in the process constituted "skipping" a significant step of the legislative process. The Court determined that exclusion of the Senate from the deliberation of the draft law constituted an incomplete legislative process and amounted to "serious negligence."

(5) Committees: Constitutional Court Ruling No.17/2563 involves a case where the investigative powers of the committees of the National Assembly are inconsistent with the principles of the constitution. By virtue of section 231 (1) of the Constitution, the petitioner filed an application with the Constitutional Court for a ruling on whether sections 5, 8, and 13 of the Subpoena Order of the Parliamentary Committees of the House of Representatives and Senate Act B.E. 2554 (2011) had an issue of unconstitutionality in relation to section 129 of the Constitution.

The Subpoena Order of the Parliamentary Committees of the House of Representatives and Senate Act B.E. 2554 (2011) included criminal procedures and penalties for violations of the order. Meanwhile, section 129 of the Constitution B.E. 2560 (2017) granted parliamentary committees the power to demand documents from any person or summon any person to provide statements of fact or opinions on the act or matter under their inquiry or study, which represented a differing provision. The Constitutional Court held that section 129 of the Constitution B.E. 2560 (2017) modified the provisions in section 135 of the Constitution B.E. 2550 (2007) by amending the powers and duties of parliamentary committees. In particular, the amendments changed the committee's authority from "issuing subpoena orders" to "summoning" individuals to provide statements or facts, and from "investigation" to "inquiry," respectively, in order to more accurately reflect the committee's duties. Section 129 paragraph five of the Constitution was an obligatory measure that held the Minister responsible for the matters under the committee's inquiry or study accountable for instructing state officials under his or her supervision to provide facts, submit documents, or give opinions. Therefore, imposing a criminal penalty for violation of the committee's subpoena order was inconsistent with the purposes of criminal penalties and thus contrary to section 129 of the Constitution. The court elaborated on the nature and characteristics of the power to seek facts by closely referencing the constitutional provisions, which led to the aforementioned ruling.

5. The Meaning of Treaty under the Constitution of Thailand by Prof. Prasit Piwawattanapanich, Ph.D., Senior expert to the Justices of the Constitutional Court

In previous versions of the Thai Constitution, the term "Treaty" was used in sections addressing agreements spanning from the past to the present. However, none of them provided a definition of the term "Treaty" or examples of their possible forms. An issue arose when the

executive branch created an international instrument without seeking approval from the Assembly, raising the question of whether that instrument was subject to Assembly oversight. This consequently led to the Constitutional Court Ruling No.11/2542, which established a precedent for interpreting the term "Treaty" in section 224 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The Thai government issued the Letter of Intent seeking academic and financial support from the IMF, which led to the National Anti-Corruption Commission bringing the matter to the President of the National Assembly, requesting a petition be filed with the Constitutional Court to determine whether the Letter of Intent proposed to the IMF required approval from the National Assembly under section 224 paragraph two. The Constitutional Court ruled, "The Letter of Intent seeking academic and financial support from the government to the IMF is not a treaty under section 224 of the Constitution and therefore does not require approval from the National Assembly." Based on the juristic method, this case involved two main issues. Firstly, it questioned whether the Letter of Intent from the Thai government to the IMF, seeking academic and financial support, held legal status as an agreement under section 224 of the Constitution B.E. 2540. Secondly, if deemed a treaty, it asked whether or not the Letter of Intent was subject to approval by the National Assembly. In this case, the Constitutional Court deliberated based on the components of the Vienna Convention on the Law of Treaties, 1969, which was established through the codification of customary international law. It is worth considering why the Constitutional Court invoked customary international law in its deliberation of this case. This is because none of Thailand's constitutions, past or present, have recognized customary international law within the Thai legal system, while many foreign constitutions explicitly acknowledge its status. Nevertheless, the court referenced the four components of the Convention: 1) being a treaty between states or between a state and

an international organization; 2) being made in writing; 3) creating legal obligations; and 4) being an agreement under international law. However, the ruling did not explicitly clarify the status of the Letter of Intent. On this matter, the author is of the opinion that the creation of this document constitutes a unilateral act by the state. This ruling is highly significant as it establishes a precedent for interpreting the term "treaty" with the same meaning as "treaties," based on the components of the Vienna Convention on the Law of Treaties, 1969. Subsequent to this ruling, there were three additional rulings addressing whether an agreement made by the executive branch should be subject to approval by the National Assembly, wherein the court applied the rationale established in this ruling.

6. "No Crime without Law" by Surasit Sangwiroatjanapat, Ph.D., Justice of the Court of Appeal

The Constitutional Court Ruling No.3-5/2550 involves a case in which the Attorney General filed an application with the Constitutional Court seeking an order to dissolve the Pattana Chartthai Party, the Thai Ground Party, and the Thai Rak Thai Party for committing a prohibited act under the Organic Act on Political Parties, B.E. 2541 (1998). Subsequently, the Council for Democratic Reform under Constitutional Monarchy (CDRM) issued the Notification No.27 on 30 September B.E. 2549 (2006), imposing a five-year revocation of election rights on the executive committee members of parties dissolved by the court order. Following this announcement, the petitioner amended the application to request the dissolution of the three parties and the revocation of their executive committees' election rights for a period of five years from the date of the party dissolution order. However, the three respondents argued that the CDRM's Notification No.27 issued on September 30, 2006 (B.E. 2549) did not have retroactive effect. This was because it imposed an additional penalty by revoking the election rights of executive committee members for five years, a penalty not originally stipulated

in section 69 of the Organic Act on Political Parties B.E. 2541 (1998). While not a criminal penalty, the revocation of election rights deprived individuals of their freedom to exercise political rights. Consequently, it was considered a more severe political penalty than certain criminal penalties. The Justices of the Constitutional Court, by majority, responded to the respondents' legal arguments, stating that while the revocation of election rights was not a criminal penalty, it was a legal measure resulting from the authority granted by the Organic Act on Political Parties, B.E. 2541 (1998), empowering the Court to dissolve a political party that had committed prohibited acts to prevent its executive committee from jeopardizing the country and democratic governance.

In addition to this ruling, there was an issue in the Court of Justice regarding whether the forfeiture of political rights should be considered a criminal penalty. The Supreme Court's Criminal Case Division for Persons Holding Political Positions opined that while forfeiture of political rights was not a criminal penalty, it should not have retroactive effects that would declare anyone guilty, as it went against the rule of law. The Supreme Court also stated that the forfeiture of political rights was an accessory penalty to a criminal penalty. Based on this interpretation, the Court of Justice held the view that forfeiture of political rights was a penalty that should not have retroactive effects, which contrasted with the Constitutional Court's decision.

The question posed by this article is whether the revocation of election rights can have a retroactive effect. To answer this question, the author notes the necessity of understanding the principle behind the prohibition of *ex post facto* laws, the distinctions between criminal penalties and other types of penalties, and the legal nature of election rights revocation.

From this article, it can be concluded that forfeiture of political rights qualifies as a criminal penalty and is therefore subject to the principle of 'No Crime without Law,' which prohibits retroactive

punishment. For this reason, the author disagrees with the Constitutional Court's ruling in the aforementioned case. To ensure clarity and consistency with the aforementioned legal principles, it is the responsibility of the legislative branch to clearly determine the legal nature of the forfeiture of political rights, whether it should be categorized as a criminal penalty or otherwise.

7. The Privilege against Self-incrimination by Surasit Saengwirojanapat, Ph.D., Justice of the Court of Appeal

The Constitutional Court Ruling No.2/2562 stemmed from a case involving Notification No.25 of the Council for Democratic Reform under Constitutional Monarchy (CDRM) dated September 29, 2006, regarding criminal procedure. This notification mandated, "A criminal suspect shall provide a fingerprint, handprint, or footprint as ordered by the public prosecutor or inquiry official. Failure to comply constitutes an offense against the criminal justice system and is subject to up to six months imprisonment, a fine of up to 1,000 Baht, or both." The Court was asked to determine if the provision on violation and punishment was consistent with sections 3, section 26, section 28 paragraph one, and section 29 paragraph four of the Constitution.

The Constitutional Court ruled that Notification No.25 of the CDRM violated section 3 paragraph two, section 26 paragraph one, and section 28 paragraph one of the Constitution for two main reasons. Firstly, the notification contradicted the harm principle because violations of its provisions did not constitute serious offenses or disrupt public peace and order to the extent that they should be proclaimed criminal offenses. Secondly, the notification violated the principle of proportionality, as the state already had alternative measures similar to those in the notification that were deemed effective in addressing the issue. To understand the issue, the author believes that the opinions of Thai legal experts regarding section 132 of the Criminal Procedure Code should be studied first, as this section provides details relevant to the inquiry

official's authority to collect evidence related to an offense, including the fingerprint of the alleged offender.

In the event that the alleged offender refused to provide their fingerprint, section 132 of the Criminal Procedure Code neither explicitly stated that the inquiry official may compel them to do so nor mentioned the inquiry official's power to force the alleged offender to provide their fingerprint in order to continue proceedings as provided by the law. According to the author, without a provision granting the inquiry official the authority to compel the alleged offender to provide a fingerprint, the legal experts might have an opinion that the inquiry official would not have the power to do so, and this led to the provisions stated in CDRM's Notification No.25.

The author notes that the concept of 'duty to tolerate' the actions of government officials (Duldungspflicht) had been applied, it would give a better interpretation of the law pertaining to this issue, thereby eliminating the need for specific provisions such as those in Notification No.25 of the CDRM.

8. Precedents on Exercise of State Power for Expropriation of Immovable Properties under the Constitution in the case of the Supreme Administrative Court's judgment by Papot Buppawan, Ph.D., Office of the Council of State

The Thai Administrative Court has recognized and implemented the principle of proportionality to regulate the administrative body's discretion in expropriating immovable property, ensuring that such actions are justified by necessity and serve the public interest. In determining whether a state's expropriation of land is conducted out of necessity or for the public good, the Administrative Court does not simply assess whether the expropriation is for matters of public interest as defined by the Constitution or specific laws. Instead, it also examines the factual circumstances of the project to determine whether the areas designated for expropriation in a royal decree by the authorities comply

with principles of proportionality. Therefore, the Court will deliberate based on the "proportionality principle in a narrow sense," which entails weighing the public benefits derived from land expropriation under the royal decree against potential damages or impacts on the private landowners affected. Upon consideration, if there is evidence supporting or indicating that the expropriation of the disputed land will provide substantial benefits to the public or society at large without causing the private landowners undue damages, the designation of the land for expropriation under the royal decree shall be deemed lawful.

From a comparative law perspective, the Thai Administrative Court precedent safeguarding rights to property exhibits a universal character. Its principle and idea align with the French Council of State's decision in the *Ville Nouvelle Est* case, where the proportionality principle was invoked to control the administrative body's exercise of authority to expropriate immovable property for public projects, ensuring that expropriation is justified by reason, necessity, and the public interest (utilité publique). The principle used for deliberating on the expropriation dispute is also known as the "Cost-benefit Analysis Theory" (bilancoût-avantages), which calls for stringent scrutiny by the court regarding the legality of a Déclaration d' Utilité Publique (Declaration of Public Utility: DUP) proclaimed by an administrative body. This necessitates the consideration of contextual or factual information regarding a given project across various dimensions to weigh advantages and disadvantages, potential damages, and project implementation costs against the benefits that the public or society will receive, thereby ensuring that the expropriation genuinely serves the public interest. If the court determines that the potential impacts or damages of expropriation, including damage to private property, implementation costs, or other social harms, outweigh the benefits that the public would receive, the expropriation shall not be considered an act for the public interest.

However, despite the Thai Administrative Court establishing a clear precedent that the exercise of expropriation power must adhere to the proportionality principle, successfully applying this principle in real-world situations in a manner that is both accepted and considered equitable for all stakeholders remains challenging. Take the case in France as an example. Despite the Council of State's decision on the *Ville Nouvelle Est* case in 1971 being a precedent for applying the cost-benefit analysis theory in considering public interest—a practice spanning over 50 years—it remains a controversial issue among legal scholars. While some argue that the Council of State's decision has yet to effectively serve as an instrument to protect citizens' rights and propose that the court increase the "degree" of scrutiny over the administrative body's discretion in exercising power, others express concern that heightened scrutiny through the use of this theory could lead to perceptions of judicial overreach into the government's executive authority.

In the current economic and social environment, the government sector plays a crucial role in driving the country's economy and improving citizens' livelihoods by providing comprehensive and efficient public services. While the expropriation of immovable property for infrastructure development is a legal measure essential to the country's economic and social development, the exercise of expropriation power by the state inevitably restricts individuals' property rights and can potentially impact citizens and society. Therefore, the Constitution stipulates that state expropriation can only be carried out on a "necessity" basis for matters of public interest as specified and must be proportionate to the individuals' constitutionally protected freedoms affected by the expropriation. Therefore, the Thai Administrative Court, as the entity with authority to scrutinize the state's use of expropriation power, having the challenging task of exploring and developing approaches to implementing the "proportionality principle" while taking into account

the country's economic and social contexts. This is to ensure that the intent to achieve a reasonable balance between the potential benefits and impacts on the general public and all stakeholder groups is fulfilled, guaranteeing that the state will not exercise its expropriation power over private property in a manner that infringes upon or restricts the constitutionally protected rights and freedoms of individuals without justifiable reasons.

9. Rights and Liberties to Engage in an Occupation by Prachya Chiasakul, Office of the Council of State

In his article, the author discusses three main rulings on rights and liberties to engage in occupation as follows:

Constitutional Court Ruling No.61/2545 (the precedent for deliberating on the issue of liberty to engage in an occupation): This ruling has established a framework concerning the freedom to engage in an occupation that consists of two parts. Firstly, it involves determining whether the law in question restricts the freedom to engage in an occupation as per section 50 paragraph one of the Constitution of the Kingdom of Thailand (B.E. 2540). Secondly, it involves assessing the law's consistency with the provisions outlined in section 50 paragraph two, and section 29. This ruling serves as a precedent for the Constitutional Court in cases relating to the freedom to engage in an occupation. In addition to establishing a broad framework for future rulings, the Court also considered the impact of section 30 of the Emergency Decree on Financial Sector Restructuring, highlighting that it was limited to companies under suspension that failed to rehabilitate or restore their businesses, demonstrating that the Court incorporated the degree of a state measure's impact into its decision. Thus, it can be inferred that the Constitutional Court has provided a guideline allowing the degree of impact of a state's measure on individuals to be considered when deliberating on the issue of materiality of rights, as evidenced in this specific ruling, or when applying the proportionality principle in a narrow sense.

Constitutional Court Ruling No.7/2549 (precedent concerning the meaning of liberties to engage in an occupation and restriction of such liberties): The Constitutional Court has established a guideline determining the scope of protection of rights and freedom to pursue an occupation. It affirms that "individuals have the freedom to operate a business or engage in an occupation without coercion or obstruction from operating or competing freely." This suggested that provisions safeguarding the freedom to pursue a profession served not only economic principles but also protected an individual's "desire" to choose an occupation. Furthermore, this principle provided a strong basis for the Constitutional Court to definitively determine that legislation mandating occupational permission, by its nature, infringed upon the fundamental freedom to engage in a profession. Additionally, in determining whether a restriction on freedom was constitutional, the Constitutional Court mentioned other measures under the law in question to broadly demonstrate how provisions mandating a permission system contribute to fulfilling the law's purpose. However, it is regrettable that the Constitutional Court did not provide many details in its decision regarding the necessity of implementing this permission system, as it should have done. Meanwhile, the German Constitutional Court (BVerfG) focuses heavily on the necessity of such legal measures in cases concerning the freedom to engage in a profession. Specifically, the state must prove that no less stringent measures are available to achieve the same results; otherwise, the Constitution may rule that these measures are unnecessary or unconstitutional.

Constitutional Court Ruling No.12/2549 (precedent for applying the proportionality principle): The Court ruled that the Revolutionary Council's announcement prohibiting the sale of food and beverages between 1:00 AM and 5:00 AM was unconstitutional in the case at hand. Given that this announcement not only explicitly restricted individual rights but also represented an "order" that denied the sovereign rights

of the people, who were subjects of rights and freedoms protected by the Constitution, this ruling undeniably aimed to uphold the Constitution's intent by safeguarding individuals' rights under a liberal democratic system. The circumstances of a coup d'état in a country were temporary, not permanent, and court rulings should not only address specific circumstances but also provide a basis for decisions in normal situations. By providing guidelines for determining whether a law infringed upon people's rights and freedoms under the Constitution, this ruling not only positively impacted those affected by the aforementioned announcement but also provided a basis for the legislative branch to exercise its powers. During the legislative process, legislators must anticipate future changes in circumstances and design measures in bills to ensure proportionality and consistency with evolving situations. However, since the future cannot be precisely predicted, these frameworks can significantly constrain legislative discretion. Therefore, it is crucial to monitor whether the Constitutional Court will broaden or restrict the precedent it has established in the future and to what extent.

10. Rights and Liberties of Officials of the State by Nanchaya Channarong, Ph.D., Office of the Council of State

In her article, the author elaborates on three important Constitutional Court's decisions about the rights and liberties of government officials, as follows:

Constitutional Court Ruling No.24/2546: Pursuant to section 198 of the Constitution, the Ombudsman filed an application with the Constitutional Court to rule on the constitutionality of section 19 of the Act on the Organization of Military Courts B.E. 2498 (1955). The ruling showed that the Constitutional Court not only protected the rights of civilians in proceedings before civilian courts to receive judgments from the judges sitting in court (as per section 236 of the Thai Constitution B.E. 2540) but also the rights of military personnel in proceedings before military courts. The restriction of the rights and

liberties of military personnel, justified by their role as officials required to sacrifice more for the nation, did not necessarily require them to forfeit constitutional rights for their case to be adjudicated solely by the judges presiding over the hearing.

Constitutional Court Ruling No.26/2546: Pursuant to section 264 of the Constitution, the Supreme Court presented the defense of the first defendant in the case at hand (Sergeant Major First Class Sarawut Tharatorn) to the Constitutional Court for ruling. The matter under consideration was whether section 10 of the Act on Measures for the Suppression of Offenders in Offenses Relating to Narcotics, B.E. 2534 (1991), violated section 64 of the Constitution. The Constitutional Court ruled that imposing harsher penalties on certain government personnel, such as military, police, civil officials, or other state employees, did not contradict the provision stating that state officials enjoyed the same rights and liberties under the Constitution as other individuals (section 64 of the B.E. 2540 Constitution or section 27 paragraph five of the current Constitution). The Court provided brief reasoning that "the provision in question pertained solely to the severity of punishment and not to differences in rights and liberties under the Constitution" Therefore, section 64 of the Constitution (B.E. 2540) and section 10 of the Act on Measures for the Suppression of Offenders in Offenses Relating to Narcotics (B.E. 2534) were deemed unrelated and thus not conflicting." "This illustrates that the Constitutional Court's decision was based on the principle of *nullapoena sine lege*, or "no crime without law." In this instance, section 10 of the Act stipulated that state officials who committed an offense were subject to more severe punishment compared to ordinary civilians. This indicates that as long as the law exists, corresponding penalties may be applied accordingly.

Constitutional Court Ruling No.9/2563: This ruling addressed the constitutionality of section 9 of the Civil Service Pension Act (Version 5)

B.E. 2502 (1959), questioning its compliance with sections 4 and 26 of the Constitution. The Central Administrative Court subsequently referred the plaintiff's complaint to the Constitutional Court for ruling. The plaintiff sought an amendment to his pension payments from the Comptroller General's Department and the Comptroller-General, asking for the inclusion of both military service and a double official service period in the calculation, as stipulated by the Civil Service Pension Act B.E. 2494 (1951), amounting to a total of 52 years, 6 months, and 27 days. Compared with the calculation method outlined in section 32 of the Civil Service Pension Act B.E. 2494 (1951), the pension amount asked by the plaintiff would exceed his last salary, and effectively, the Comptroller General's Department and the Comptroller-General only paid the pension equal to the plaintiff's last salary. After deliberation, the Constitutional Court determined that "despite section 9 of the Civil Service Pension Act (Version 5) B.E. 2502 (1959) restricting individual rights, this restriction was proportional under the circumstances. It balanced the public interest with the duly deserved rights of the government officials who have served the country. The provision does not affect the standard pension calculated based on the actual service term, which is a fundamental right for all government officials and aligns with the principle of proportionality. It does not violate the rule of law, human dignity, or fairness to individuals. Moreover, it is a general law applied universally rather than targeting specific individuals or cases. "Considering the proportionality of rights restrictions, the Constitutional Court ruled that," The calculation of pension rates has included an individual's "last salary," incorporating monthly skill premiums, promotion pay, danger pay related to the recipient's role, and additional compensation for dangerous situations such as during battle and/or in offender suppression operations. Therefore, it is deemed fair compensation, encompassing special benefits that the state provides to its officials, recognizing their long-term service and sacrifices while allowing them to maintain a suitable standard of living in their post-service years."

Judgment of the Supreme Administrative Court in Red Case No. Aor Bor. 238/2562 concerning a dispute over the issuance of an unlawful order by a government official (appeal):

The Supreme Administrative Court deliberated on the issue of political partisanship raised by the defendant, who used it against the plaintiff during his performance evaluation. The Court ruled, "The fact that the plaintiff holds different political affiliations from Mr. Sakchai Hantrakul, the winner of the Chiangdao District Mayor election, and testified as a witness before the Election Committee to contest the election results, was merely an expression of differing political views. In this instance, the plaintiff had the right to testify before the Election Committee, and such action did not violate the provisions outlined in the Regulations of the Prime Minister's Office (on political etiquette of civil servants dated March 16, 2499). Therefore, it cannot be assumed that the plaintiff failed to uphold municipal officials' disciplinary guidelines on political impartiality, acted unsuitably as a municipal official, or lacked political etiquette as claimed by the defendant. This decision of the Supreme Administrative Court aligned with Germany's legal ideology, specifically the opinion that a municipal official's differing political stance did not constitute political bias, thereby demonstrating the court's respect for individuals' political views. Regarding the plaintiff testifying before the Election Committee, it was viewed as an exercise of their right. It is noteworthy that being a witness in the Election Committee's investigation procedure is not only a right but also a responsibility of an individual as a citizen, to which the municipal official was obligated to cooperate just like any other citizen. Meanwhile, according to German law, testifying as a witness is a general obligation for citizens.

11. The Principle of Equality in Bearing Public Burdens by Ruthai Hongsiri, Ph.D., Justice of the Supreme Administrative Court

This article discusses a case where the Royal Irrigation Department excavated and expanded an irrigation canal near the land of eight

plaintiffs to construct a flood alleviation project in Hat Yai District. The project required the closure of the original canal to install concrete floors and walls, resulting in durian trees in the plaintiffs' orchards, which depended on water from the canal, dying due to a water shortage. The Court determined that while the construction was in the public interest, including all eight plaintiffs, it unfairly burdened them as the only group affected by the loss of durian trees and income. Consequently, the Court ruled that the Royal Irrigation Department bore other liability for these damages and must compensate the eight plaintiffs accordingly.

This illustrates that the liability of the state or a state agency, particularly the Royal Irrigation Department, stemmed from a lawful act rather than a violation or breach of agreement. Despite this, the state agency was held liable for its consequences. This was a case of liability without fault-another form of state liability. It arose from the exercise of lawful authority for the public interest or the benefit of citizens at large, resulting in damages or burdens specifically for the plaintiffs and not others. This situation created inequality or unfairness for the plaintiffs, necessitating compensation by the state or state agency.

In summary, the application of the legal principles of state liability, particularly the principle of other liability of the state or liability without fault, is on the rise. It aims to protect individuals harmed by the exercise of state power or actions taken in the absence of specific legal provisions, ensuring fairness and underscoring the critical role of the Administrative Court in safeguarding people's rights and freedoms within the framework of the law and the rule of law.

Constitutional Conventions of Thailand under the Democratic Regime of Government with the King as Head of State

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The Constitutional Court Ruling No. 7/2559 (2016) stated, *"After the Constitution Drafting Commission had amended the Draft Constitution and revised the preamble to the Draft Constitution in accordance with the Constitutional Court ruling and submitted the Draft Constitution to the Prime Minister to present to the King for royal assent, it appeared on the facts that during the process of presentation for royal assent, His Majesty King Bhumibol Adulyadej passed away, thus resulting in the preamble to the Draft Constitution not being in accordance with the actual facts, and such an event had never occurred before. In addition, there were no provisions in this Constitution being applied specifically to this case.* ***Hence, the matter had to be dealt with in accordance with constitutional conventions of Thailand under the democratic regime of government with the King as Head of State****. In the past, all Constitutions had to be enacted and would become fully effective upon royal assent granted by the King and publication in the Government Gazette. Until such process had been completed, the Draft Constitution would not be effective.* ***This practice had become a part of constitutional conventions of Thailand under the democratic regime of government with the King as Head of State****.*

In order to complete the Draft Constitution and ensure consistency with actual facts, prior to the Prime Minister's presentation to the King for royal assent, according to constitutional conventions of Thailand under the democratic regime of government with the King as Head of

State, the Constitutional Court therefore found that the enactment of a law had to reflect actual facts. A necessity arising from an actual fact was paramount. This ensured that the necessary act was taken lawfully and according to the rule of law. Moreover, a revision of the preamble was not a change to the provisions which constituted the essence of the Draft Constitution. Therefore, the preamble to the Draft Constitution could be amended to reflect the occurring actual facts."

Provisions on conventions of Thailand under the democratic regime of government with the King as Head of State are stipulated in section 5 paragraph two of the Constitution as follows:

"Whenever no provision under this Constitution is applicable to any case, an act shall be performed or a decision shall be made in accordance with conventions of Thailand under the democratic regime of government with the King as Head of State."

Background

The first constitution to recognize "Constitutional Conventions of Thailand under the Democratic Regime of Government" is the Charter for the Administration of the Kingdom, B.E. 2502 (1959), as stipulated in section 20:

"Whenever no provision under this Constitution is applicable to any case, a decision shall be made in accordance with constitutional conventions of Thailand under the democratic regime of government.

If an issue arises concerning the adjudication of any case under the provisions of the preceding paragraph within the purview of the Assembly, or arises because the Council of Ministers seeks a decision from the Assembly, the Assembly shall render a final decision."

Later, similar provisions are found in section 22 of the Charter for the Administration of the Kingdom, B.E. 2515 (1972), section 25 of the Constitution of the Kingdom of Thailand, B.E. 2519 (1976), section 30 of the Charter for the Administration of the Kingdom, B.E. 2520 (1977), and

section 30 of the Charter for the Administration of the Kingdom, B.E. 2534 (1991).

The provision was stipulated as a "stopgap provision" in the interim constitution, namely the Charter for Administration of the Kingdom, which was brief and contained only a few sections. It allowed for the application of the conventions of Thailand under the democratic regime in cases where specific written provisions were not available. The initiator of this idea was Praya AttakariNibhon (Lieutenant General Amporn Jintakanon, in "Commemorative Book at the Royal Cremation Ceremony for Praya AttakariNibhon", B.E. 2521 (1978) page 32, who was the Chairman of the Constitution Drafting Commission.

Later, during the drafting of the Constitution B.E. 2540 (1997), I proposed the inclusion of the following provision in section 7:

"Whenever no provision under this Constitution is applicable to any case, it shall be decided in accordance with the constitutional conventions of Thailand under the democratic regime of government **with the King as Head of the State**." The rationale behind this proposal was that several conventions, which should have been specified in written provisions such as the monarch's authority to decide on petitions submitted by citizens and the monarch's prerogative power during crises were not explicitly included. Similar provisions to the one above can be found in section 7 of the Constitution B.E. 2550 (2007), while section 5 paragraph two of the current Constitution B.E. 2560 (2017) states:

"Whenever no provision under this Constitution is applicable to any case, **an act shall be performed or a decision shall be made** in accordance with the constitutional conventions of Thailand under the democratic regime of government with the King as Head of State." The phrase "an act shall be performed" was added to this provision.

Meanwhile, the Constitution of the Kingdom of Thailand (Interim), B.E. 2549 (2006) stipulated the provision on this issue in section 38,

while in the Constitution of the Kingdom of Thailand (Interim), B.E. 2557 (2014), it was stipulated in section 5.

1. Conventions for Governance in Overseas Context

1.1 Constitutional Conventions in Common Law Countries

The term "constitutional convention" is familiar among constitutional lawyers and political scientists in common law countries like England, the United States, Australia, New Zealand, and Canada. Meanwhile, in the European region, rules governing the behavior of political organs are often termed *"constitutional custom"* or *"coutume constitutionnelle"* by constitutional lawyers and political scientists.

The first person to use this term was Dicey, the renowned English constitutional lawyer. He introduced it to distinguish between the convention of the constitution and the law of the constitution. While the term "constitutional law" broadly encompasses both concepts, Dicey, as a law professor, focused his lectures solely on the law of the constitution and deliberately excluded the convention of the constitution (See A.V. Dicey, 10th ed., 1959, pp. 22-32) because it involves "understandings, habits, and practices." Dicey argued that despite the availability of defined norms for governmental entities, the actions of ministers and civil servants are not considered laws, and therefore the courts do not recognize them (1959, p. 24).

Professor Hood Philips described constitutional conventions as "Rules of political practice that are regarded as binding by those to whom they apply, but which are not laws because they are not enforced by the courts and Parliament" (Hood Philips, 1973, p. 77).

Meanwhile, according to Professor Geoffrey Marshall and Professor Graeme C. Moodie, constitutional conventions are "rules of constitutional behavior that are considered to be binding by and upon those who operate the constitution, but which are not enforced by the law courts" (Marshall & Moodie, 1971, pp. 23–24).

From the definitions above, it can be concluded that constitutional conventions have two key characteristics:

(1) Constitutional conventions are practices or rules consistently followed in politics without legal obligations. For example, it is a convention that the King or Queen Regent shall not veto legislation approved by the National Assembly and presented for royal assent, despite having the legal authority to do so. Another example can be taken from constitutions prior to B.E. 2540 (1997), where the President of the House of Representatives would submit a proposal, accompanied by a letter from coalition party leaders endorsing the chosen Prime Minister candidate. The King would then appoint as Prime Minister the proposed individual who was the leader of a political party or another individual supported by the majority vote of the House of Representatives, despite the constitution at that time not mandating such actions from the President of the House of Representatives or the King.

(2) The practices must either be binding or fall under opinion necessitatis. Political organs and individuals vested with legal authority must have a sense of obligation to follow these conventions, thereby either acting or refraining from acting as required. However, practices that are consistently followed but where the actors do not feel obligated to adhere to them do not qualify as conventions. For instance, the practice of transferring tasks from an outgoing person to their successor, or the scheduling of parliamentary sessions during the harvesting season because it is a period when farmer-citizens are too busy for parliament members' visits, do not constitute constitutional conventions.

Some examples of constitutional conventions in England include the Prime Minister's role being a conventional role, the King's obligation not to veto bills, the King's appointment of the party leader with a majority vote in the House of Commons, and the King's delivery of the Speech from the Throne to declare government policies to Parliament.

It is worth noting that constitutional conventions are not exclusive to a country with a customary constitution like England; rather, they exist in every constitutional system. Even in countries with a hard-to-amend codified constitution like the United States, there are no fewer political norms and traditions compared to those in England (Dicey, p. 28-30). For example, prior to Amendment XXII of the Constitution, it was a rule that a U.S. President should not serve more than two consecutive terms, guided by the precedent set by George Washington. However, after President Roosevelt held office for four terms, thereby breaking this norm, an amendment to the Constitution was made to prohibit a person from serving more than two consecutive terms.

1.2 *Coutume Constitutionnelle* or Constitutional Customs

The term "constitutional custom" is used in the context of public law in European countries governed by codified legal system with a written constitution as the supreme law. A pertinent question arises: do these nations, with clearly defined constitutions, recognize constitutional customs?

On this matter, there exist two ideological camps:

The first camp believes that constitutional customs are inherently valid as laws by nature. The Natural Law school and the Historical Law school, led by Savigny, argue that when courts adopt constitutional customs, they are essentially "acknowledging" and "explicitly endorsing" these practices rather than creating new rules (Savigny, in Archive de Philosophie de droit, p. 27, 1982).

The second camp rejects the notion that constitutional customs are inherently laws, arguing instead that they are factual elements that gain validity only when authorized entities within the legal system adopt and enforce them (Hart, H.L.A., French translation, 1976, pp. 62-65).

In Europe, it is believed that for constitutional customs to be enforceable, they must possess the following two characteristics:

(1) They must be **practices** that have been followed by relevant authorities long enough to affirm the saying, "Once is not a custom" (unefoisn'est pas coutume). This idea contrasts with the practice in England, where a practice can be considered a custom if there is consensus to continue it, even if it has been followed only once. Consider, for instance, the Statute of Westminster 1931, wherein the United Kingdom recognized the freedom and independence of its colonial territories known as dominions. This became an agreed international norm among dominions in the Commonwealth, immediately constituting a custom without requiring an extended period of practice. However, in general, for a practice to be considered a custom in Europe, it necessitates a substantial period of continuous observance. Thus, this characteristic is considered objective.

(2) **Entities in power commonly hold the opinion that it is necessary to follow those practices** *(opinio necessitatis)*, or there is **a mutual belief that they constitute laws** *(opinio juris)*. This subjective characteristic distinguishes customs from etiquettes. Etiquettes are something one **should follow**; failing to do so may result in being considered ill-mannered, but it is not illegal.

In terms of the role of conventions for governance in Europe, jurists believe they play a similar role to customs in general—**assisting in the interpretation of written laws (*coutume* interpretative)** and further clarifying where interpretation is needed. For instance, while the Constitution specifies that the King has the power to grant pardons, generally for criminal offenses, the Thai monarch also granted pardons for disciplinary offenses conducted by civil servants or students in the past. Therefore, interpreting "royal pardons" requires the use of constitutional conventions to determine whether the royal prerogative of mercy extends to pardons for disciplinary offenses in these contexts. **In this case, constitutional conventions are considered to hold equal status with constitutional provisions.**

Furthermore, constitutional conventions are similar to customs in that they can **supplement codified laws *(coutume supplétive)*** in the absence of specific provisions. For example, where the constitution lacks provisions on the King's constituent power, the royal prerogative concerning subjects' petitions, or the resolution of constitutional crises, conventions of governance can serve to complement it. **In such cases**, constitutional conventions can be applied **and are regarded as having equal status to the constitution itself**.

However, conflicts can arise when **constitutional conventions contradict constitutional provisions.** There are differing opinions on whether instances exist where **conventions of governance can lead to the annulment or amendment of a written constitution** (in the cases of *coutume contra legem*). According to Carré de Malberg, a positivist jurist, such conventions for governance violate the constitution and therefore lack legal basis (Carré de Malberg, 1920, pp. 683, 686). In contrast, jurist Jean Carbonnier (see Carbonnier, Jean, 1994, p. 30) and political scientist Georges Burdeau (see Burdeau, George, 1977, p. 65) argued that such conventions cause the written law to fall into disuse *(désuétude)* because these old legal provisions have been supplanted by conventions of governance that are considered a new form of law (*opinio juris*créant une règle nouvelle). In this regard, **Constitutional Court Ruling No. 6/2543 (2000)** stipulated that the King, Queen, heir-apparent, and members of the royal family were not required to vote in elections because *"...historically, the King, Queen, Princes, and Princesses have never participated in elections... mandating their participation would create conflicts and contradict the principle that the monarch should remain above politics and maintain political neutrality."* Therefore, section 68 of the Constitution on the duty to vote, does not apply to the King, Queen, heir-apparent, and members of the royal family. Additionally, the Court referenced a

letter from King Prajadipok requesting the Constitution Drafting Commission to include provisions ensuring that members of the royalty from the rank of Mom Chao (M.C.) and above remain politically neutral. This provision can be found in section 11 of the Constitution B.E. 2475 (1932). Although the Court's decision did not explicitly cite constitutional conventions as the basis for exempting provisions under section 68 of the Constitution B.E. 2540 (1997), which lacks an exception clause, it can be presumed that **the Thai Constitutional Court considered constitutional conventions —despite their contradiction with written provisions *(coutume contra legem)*— as an applicable unwritten exception clause.**

2. Constitutional Conventions of Thailand under the Democratic Regime of Government with the King as Head of State

2.1 Supreme Court and Constitutional Conventions

Since the inclusion of provisions involving constitutional conventions in section 20 of the Charter for the Administration of the Kingdom, B.E. 2502 (1959), the Supreme Court has consistently relied on these conventions in its judgments. For instance, in Supreme Court Judgment No.562/2508 (1965), the Court deliberated on the constitutionality of asset forfeiture related to offenses enforced under provisions of the Customs Act, which state that assets instrumental to an offense are subject to forfeiture irrespective of their possessor or owner. Considering constitutional conventions outlined in section 20, these provisions of the Customs Act were found to be in conflict with constitutional provisions, specifically those in section 29 of the Constitution B.E. 2492 (1949), which stipulated that criminal punishment applied only when an act was considered an offense under the laws in effect at the time it was committed. The Court referenced Supreme Court Judgment No.1011/2505 (1962), which also applied the constitutional conventions in similar manner. According to the judgment, provisions in section 3 of the Act on Control of Export and Import of Certain Goods, (No.3), B.E. 2493 (1950), mandating forfeiture of

instrumentalities regardless of the ownership and the owner's acknowledgement of the offense, contradicted the constitutional conventions and were therefore not enforceable (see also Supreme Court Judgment No.222/2506 (1963), Supreme Court Judgment No.1602-1603/2509 (1966), Supreme Court Judgment No.1240/2514 (1971), Supreme Court Judgment No. 913/2536 (1993), etc.). However, it's important to note that the Supreme Court tends to apply similar provisions across different versions of the constitution in its judgments. For example, in Supreme Court Judgment No.921/2536 (1993), it was stated that *"the authority of the Property Examination Committee (PEC) mentioned is the authority to deliberate a case, which, according to constitutional conventions of Thailand under the democratic regime of government, belongs to the court. Therefore, clause 2 and 6 of the announcement concerning the appointment of individuals who are not part of the court to deliberate legal cases in a manner similar to the court contradict the constitutional conventions of Thailand under the democratic regime of government.* ***Since every version of the constitution includes provisions*** *specifying that the power to deliberate cases falls under the jurisdiction of the court, establishing a new court to deliberate on a specific case, thereby replacing an existing legally recognized court, is impermissible."* This concept can be considered a "constitutional convention" or a "general principle of constitutional law," which will be discussed further.

2.2 Constitutional Court and Constitutional Conventions

Even the Constitutional Court itself argued that provisions in section 30 paragraph one of the Constitution B.E. 2492 (1949); section 28 paragraph one of the Constitution B.E. 2511 (1968); section 32 paragraph one of the Constitution B.E. 2517 (1974); section 27 paragraph one of the Constitution B.E. 2521 (1978); section 29 paragraph one of the Constitution B.E. 2534 (1991); section 33 paragraph one of the Constitution B.E. 2540 (1997); and section 39 paragraph two of the Constitution B.E.

2550 (2007) established a legal presumption that accused persons or defendants in criminal cases are presumed innocent. Therefore, this practice is categorized as *"constitutional conventions of Thailand under the democratic regime of government with the King as Head of State"* (Ruling No. 3/2559 (2016)), although the court later referenced the rule of law. This illustrates that in this instance, the Constitutional Court followed a similar approach to the Supreme Court in "identifying" constitutional convention, which differs from Constitutional Court Rulings No. 6/2543 (2000) and No.7/2559 (2016). In those cases, the Court applied practices consistently followed since the establishment of the Constitution B.E. 2475 (1932) to identify the constitutional conventions.

However, in Ruling No. 3/2562 (2019), the Constitutional Court continued to apply the principle that practices deemed necessary to follow by different entities due to their binding nature were considered conventions. The Election Commission itself particularly referenced the constitutional conventions in its petition for the dissolution of the Thai Raksa Chart Party, arguing that the action of involving a high-ranking member of the royal family in politics was *"inconsistent with ancient royal tradition, customs, and national culture...since all members of the Royal Family were above politics and observed political impartiality and could not hold any political office."* During the proceedings, the Constitutional Court examined practices based on opinio necessitatis followed by the King, the Queen, the heir-apparent, and other royal family members from 1932 to the present, as well as the practices of agencies avoiding involving royal family in political matters. The Election Commission, believing that the King and royal family members have no duty to vote in elections and considering the nomination of the King or a royal family member as a prime ministerial candidate to be infeasible due to its contradiction with the constitutional conventions, filed a petition for the dissolution of the political party for breaching these conventions.

The Constitutional Court subsequently ruled that, *"The essence of a fundamental principle in the democratic form of government with the King as Head of State was stated in Royal Writing Number 1/60, dated 14th November B.E. 2475 (1932), that members of the Royal Family holding the rank of Mom Chao or higher should be above all politics. Such fundamental principle was deemed as part of the* ***founding spirit*** *of the Thai governing system in the Constitution and had been* ***continuously accepted and recognised*** *by consensus of the House of Representatives. The King and high-ranking members of the Royal Family should be above politics, in particular, in terms of not participating in political contests which could draw attacks, criticisms and prejudice to public order and harmony between the Royal Institution and the people,* ***being the constitutional convention under the democratic regime of government with the King as Head of State.*** *Although the Draft Constitution of the Kingdom of Thailand, B.E. 2489 (1946) was silent on the restriction of roles of the Royal Family in politics, this did not mean that the fundamental constitutional principle on the revered status of members of the Royal Family who were above criticism, and non-involvement in politics which could prejudice the impartiality of the Royal Institution, was annulled. This was evident in Constitutional Court Ruling No.6/2543 (2000) and consistent with the principle that the King "reigns, but not rule". This constitutional principle of parliamentary democracy could be found in civilised nations with monarchs as heads of states. The respondent's actions affected the fundamental principle of the Thai democratic form of government with the King as Head of State which upheld the King's reign but not rule principle, and by implication caused detriment and deterioration of the said principle."*

The Constitutional Court's assertion that the monarchy's political impartiality is part of the Thai governing system's "**founding spirit.**..and a **consistently held consensus**" signifies both objective and subjective elements of a constitutional convention. Objectively, this convention is grounded in a **practice** dating back to 1932, while its subjective

elements of being the **founding spirit** and a **consensus** make it qualify as a necessity *(opinio necessitatis)*.

2.3 Identifying Constitutional Conventions of Thailand under the Democratic Regime of Government with the King as Head of State

Considering the Supreme Court's rationale in conjunction with the Constitutional Court's, a conclusion can be made that constitutional conventions stipulated in the Thai Constitution are both:

2.3.1 Conventions or customs established through consistent practice over time and the perceived necessity *(opinio necessitatis)* based on the actual facts. As the Constitutional Court has outlined in rulings No. 6/2543 (2000), No. 7/2559 (2016), and No. 3/2562 (2019), these conventions comprise "consistently followed practice" rooted in "founding spirit...and consensus," thereby reflecting the two components of customs.

There are several constitutional conventions of this type that do not necessarily be stipulated as provisions under the constitution, such as:

The constitutional convention designating that the constituent power belongs to the King (see Ruling No.7/2559 (2016) and Borwornsak Uwanno, 4th Edition, 2005, pp. 241-253). Later, when the people were given the right to vote in a constitutional referendum, the constituent power fell into the hands of both the monarch and the people, specifically according to the Constitution B.E. 2550 (2007) and the Constitution B.E. 2560 (2017) (see Ruling No. 18-22/2555 (2012) and Ruling No. 4/2564 (2021), and Borwornsak, 2020, pp. 145-154).

The constitutional convention under the democratic regime whereby the King delivers an inaugural address, akin to taking a royal oath during the coronation ceremony, before a grand audience including ambassadors, the Prime Minister, the President of the National Assembly, and the President of the Supreme Court, affirming his commitment to uphold the oath.

The constitutional convention recognizing the monarch's prerogative power during crises, as demonstrated in the incidents of October 14th, 1973, and May 17-20, 1992 (Borwornsak, 2005, pp. 184-185).

The constitutional convention acknowledging the monarch's authority to consider petitions submitted by the people and issue royal decisions on them (Borwornsak, 2005, pp. 185-186).

The constitutional convention recognizing the monarch's royal prerogative of mercy, which includes granting pardons to individuals convicted of criminal offenses, civil servants, or students involved in disciplinary offenses. For example, there was a royal pardon for severe disciplinary offenses granted to the former President of the Supreme Court and his group by King Bhumibol Adulyadej, countersigned by Mr. Anand Panyarachun; a royal pardon for the former Permanent Secretary of the Ministry of Finance and the former Permanent Secretary of the Ministry of Culture, countersigned by Mr. Abhisit Vejjajiva; and a royal pardon in 1963 for nine Chulalongkorn University students who had been expelled for misconduct but had their status reinstated upon expressing remorse and apology (Wattanawan, 1997).

Identifying practices and the belief in their adherence involves gathering information directly from responsible authorities and relevant parties. For example, the practices described above have been consistently upheld by the monarch, the Bureau of the Royal Household, the Secretariat of the Cabinet, and other relevant agencies over an extended period based on a shared belief in their necessity.

Practices that are consistently observed but lack a perceived necessity may not qualify as conventions under the democratic regime. For example, following resolutions from the Joint Coordinating Committee of the House of Representatives (Whip), appointing the Minister of Finance as Chairperson of the House of Representatives' Ad-hoc Committee on Annual Budget Appropriations, consulting with government agencies on Cabinet proposals, and adhering to protocol

seating for royal audiences are practices that have been followed over long periods without binding force, and thus may not be classified as conventions of Thailand under the democratic regime of government.

2.3.2 Comparison of different versions of the constitution: general principles of constitutional law

Thailand has had multiple versions of its constitution, totaling 20, including both current and obsolete versions. The Supreme Court has identified "constitutional conventions" by reviewing these various versions of the constitution, as outlined in section 2.1 of this article. The Constitutional Court has similarly employed this approach to identify the constitutional conventions in its Ruling No. 3/2559 (2016).

Meanwhile, in other countries, specifically France, both the Council of State (Conseil d'Etat) and the Constitutional Council (Conseil Constituionnel) use this approach to identify "general principles of public law" (principes généraux de droit public) (see Borwornsak, 1995, pp. 266-273).

Consequently, from the perspective of the theory of sources of law (théorie des sources de droit), what the Supreme Court and the Constitutional Court in Thailand regard as constitutional conventions are considered "general principles of constitutional law" in other jurisdictions. As both the Supreme Court and the Constitutional Court consider practices endorsed by provisions in all or several versions of the constitution to be constitutional conventions, we must conclude that practices endorsed by existing positive laws should also be regarded as constitutional conventions, as this principle is followed by both courts in their adjudications. Therefore, to determine whether a practice qualifies as a convention within Thailand's democratic regime, two criteria must be met: firstly, it must be binding and proven to be consistently followed based on factual evidence; secondly, it must be derived from general principles of constitutional law endorsed by multiple versions of the constitution. These criteria reflect the roots of distinct categories of law in other countries.

Regarding the approaches to identifying general principles of law, Professor Wissanu Krea-ngam, Ph.D., and I discussed them in our book titled, "Explanation of the Charter for the Administration of the Kingdom, B.E. 2520 (1977)" (Wissanu Krea-ngam & Borwornsak Uwanno, 1977, pp. 167-168).

"A. Compare previous versions of the constitution to identify common principles. For example, the Legislative Committee of the Office of the Council of State has followed a specific practice and considered that the state could expropriate private land for certain interests.

B. The common principles shall not contradict the intent and provisions of this Charter for the Administration, either explicitly or implicitly. For example, although rights to elections were given to the Thai people according to previous constitutions, if such rights contradict the intent and provisions of this Charter for the Administration, they do not constitute conventions under the democratic regime as stated in section 30.

C. When identifying the constitutional conventions, it is crucial to adhere to constitutional conventions that share a common background. If none is found, it is inappropriate to search for ones in constitutions of different backgrounds—such as comparing a constitution drafted by the Constitution Drafting Assembly with one drafted by the Revolutionary Council—and to conclude that such conclusions are final.

D. An act or provision that occurs only once should not be regarded as a constitutional convention. For instance, the Constitution B.E. 2517 (1974) established the position of State Auditor of the National Assembly, a new role that was appointed only once and later abolished. Such provisions cannot be considered as part of the conventions of Thailand under the democratic regime of government.

E. A practice that is established only once through new provisions for the purpose of overriding or amending practices endorsed by previous provisions can be considered a constitutional convention.

For example, the Constitution B.E. 2511 (1968) and earlier versions of the constitution stipulated that the Privy Council should consist of no more than nine Privy Councillors. Even the Charter for the Administration of the Kingdom, B.E. 2511 (1968) specified that the Privy Council consisted of up to nine Privy Councillors. However, with the promulgation of the Constitution B.E. 2517 (1974), provisions were introduced stating that the Privy Council could consist of up to 15 Privy Councillors. Therefore, the most recently determined maximum number of Privy Councillors can be considered a convention of Thailand under the democratic regime of government (Yut Sanguthai, 1973, p. 158).

The Council of State has previously deliberated on the constitutional conventions of Thailand under the democratic regime. By comparing previous versions of the constitution and in the presence of a full quorum, the Council rendered the decision that land expropriation could be conducted for the following four purposes: (1) providing public utility, (2) matters necessary for national defense, (3) acquisition of natural resources, and (4) other state interests (this decision was made prior to the promulgation of the Constitution B.E. 2511 (1968))".

2.4 Authorized Bodies for Acting on and Deliberating on Constitutional Conventions

2.4.1 In Cases Where Explicit Provisions Exist in the Constitution

Section 20 of the Charter for the Administration of the Kingdom, B.E. 2502 (1959) stipulated:

"Whenever no provision under this Constitution is applicable to any case, a decision shall be made in accordance with the constitutional conventions of Thailand under the democratic regime of government.

If an issue arises concerning the adjudication of any case under the provisions of the preceding paragraph within the purview of

the Assembly, or arises because the Council of Ministers seeks a decision from the Assembly, the Assembly shall render a final decision."

Similar provisions are found in section 22 of the Charter for the Administration of the Kingdom, B.E. 2515 (1972), section 25 of the Constitution of the Kingdom of Thailand, B.E. 2519 (1976), section 30 of the Charter for the Administration of the Kingdom, B.E. 2520 (1977), and section 30 of the Charter for the Administration of the Kingdom, B.E. 2534 (1991).

All six interim constitutions specified that the Constitution Drafting Assembly (in the case of the Charter for the Administration of the Kingdom B.E. 2502 [1959]) and the National Legislative Assembly or National Administrative Reform Council (in the case of the Constitution B.E. 2519 [1976]), were empowered to make decisions **when there were issues** related to conventions of Thailand under the democratic regime, including what were the conventions and whether certain practices constituted part of these conventions. **This meant that if there were no issues or disputes, it was unnecessary to apply the relevant sections of these constitutions.** Therefore, authorized bodies were permitted to act or refrain from acting as guided by these conventions without requesting for the decisions to be made, provided no issues arose. For instance, the Office of the Privy Council and the Secretariat of the Cabinet could address public grievances in accordance with royal decisions until someone raised an issue, claiming the practice was impractical or inconsistent with the conventions. In such cases, a decision from the Council would be required.

Meanwhile, it is important to note that the phrase "constitutional conventions of **Thailand** under the democratic regime of government" necessitates interpretation to determine whether or not the application of these conventions is confined exclusively to those within the context of Thailand's democratic regime and does not extend to conventions from other countries or internationally recognized

conventions, except where they align with those practiced in Thailand. Furthermore, the phrase "with the King as Head of State" was introduced for the first time in the Interim Constitution B.E. 2549 (2006) and has been consistently used since. This indicates that conventions related to the monarch's status, roles, and customary powers must also be applied.

Nevertheless, the Interim Constitution B.E. 2557 (2014) had changed the authorized bodies entrusted with power to make decisions. It was stated in section 5 as follows:

"Whenever no provision under this Constitution is applicable to any case, it shall be carried out or decided in accordance with constitutional conventions of Thailand under the democratic regime of government with the King as Head of State, provided that such conventions shall not be contrary to or inconsistent with this Constitution.

If an issue arises concerning the adjudication of any case under paragraph one within the purview of the National Legislative Assembly, such issue shall be decided by the National Legislative Assembly. In the case where an issue arises outside the purview of the National Legislative Assembly, the National Council for Peace and Order, the Council of Ministers, the Supreme Court of Justice or the Supreme Administrative Court may request the Constitutional Court to make a decision thereon; but in the case of the Supreme Court of Justice and the Supreme Administrative Court, such request may be made only upon the resolution of the plenary session of the Supreme Court or the Supreme Administrative Court and only in the case concerning the adjudication of the Court."

In essence, the Interim Constitution B.E. 2557 (2014) granted authority to the Constitutional Court. Following the promulgation of the Constitution B.E. 2560 (2017), the Constitutional Court has since applied the constitutional conventions in its rulings, as exemplified by Ruling No.3/2562 (2019) mentioned earlier. It can be concluded that a new constitutional convention has been established, which asserts

that when an issue arises necessitating deliberation on the conventions of Thailand under the democratic regime, the Constitutional Court has the authority to render decisions in accordance with the constitutional conventions upheld since Rulings No.6/2543 (2000), 3/2559 (2016), 7/2559 (2016), and 3/2562 (2019).

2.4.2 In Cases Where the Constitution Does Not Specify Authorized Entities to Act on or Deliberate Issues Relevant to Constitutional Conventions

None of the permanent constitutions from B.E. 2540 (1997), B.E. 2550 (2007), or the current version specify authorized entities to address or deliberate issues related to Thailand's conventions under the democratic regime. This matter should be examined from two perspectives:

(1) The Aspect of "Action"

The Constitution B.E. 2560 (2017) stipulated that "an act" must be performed in a manner similar to that outlined in the Interim Constitution B.E. 2557 (2014), which was the first constitution to establish such a provision. Consequently, it can be interpreted that, in the absence of a specific constitutional provision, the authorized bodies may act according to constitutional conventions without requiring a decision to be made, as there is no "issue requiring decision" at that point. This suggests that both the Interim Constitution B.E. 2557 (2014) and the Constitution B.E. 2560 (2017) have granted the authority to the entities responsible for acting or refraining from acting based on conventions to promptly consider and exercise their powers. If no objections are raised, then there is no issue that necessitates the involvement of decision-making authorities. If an issue is raised, it becomes an "issue requiring decision" regarding whether the act has been performed according to constitutional conventions or the extent to which the conventions apply or its significance. In such cases, the issue must be submitted to the entity authorized to render a final decision.

(2) The Aspect of "Decision"

A "decision" is required only when there is a dispute involving an entity entrusted with the power to act in accordance with the constitutional conventions or when there is a specific reason to apply the conventions, such as the use in judicial adjudications. This suggests that the Court of Justice or the Constitutional Court will render "decisions" based on these conventions within their respective jurisdictions. In other words, the Constitutional Court may apply constitutional conventions to cases brought before it, provided no objections are raised against the Court. This aligns with provisions stating, "...**it shall be decided in accordance with the constitutional conventions** of Thailand under the democratic regime of government with the King as Head of State," without indicating that the conventions apply only in the presence of conflicting arguments.

However, when an issue arises concerning a convention—such as a situation where an annual budget expenditure bill fails to receive approval from the House of Representatives and the Council of Ministers does not resign, despite members of the House of Representatives believing that resignation is necessary—it is within the jurisdiction of the Constitutional Court to render a decision in accordance with Thailand's conventions under the democratic regime. This practice has been established since the issuance of Ruling No.6/2543 (2000) in the year 2000 and was further reinforced by the provisions of section 5 of the Interim Constitution B.E. 2557 (2014).

2.5 Status of Constitutional Conventions in Legal Hierarchy

The Constitution B.E. 2540 (1997), the Constitution B.E. 2550 (2007), and the Constitution B.E. 2560 (2017) all recognize the constitutional conventions of Thailand under the democratic regime. The Constitution B.E. 2560 (2017), in particular, includes provisions in paragraph two of section 5 that acknowledges these constitutional conventions in the context of the Constitution's status as the supreme

law of the State. Consequently, the constitutional conventions hold an equivalent status to the written Constitution. Therefore, any laws enacted by the National Assembly, rules issued by the executive branch, or any actions by legislative, administrative, or judicial bodies that are contrary to or inconsistent with the constitutional conventions shall be deemed unenforceable, as specified in section 5. This may also lead to the enforcement of section 148, which could result in the bill or draft organic act being referred to the Constitutional Court for a decision. If the law in question has already been enacted, the matter can be submitted to the Constitutional Court for adjudication pursuant to sections 212 or 231 (1).

French jurists refer to all supreme regulations, whether they are written constitutions or general principles of public laws that serve to control legislative power, as the *"bloc constitutionnel"* (see Bowornsak, 1995, p. 272).

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Bibliography

Thai Language

Borwornsak Uwanno, **Public Law, Volume 2: Classification of Public Law—Private Sector and Development of Public Law in Thailand,** Bangkok: Chulalongkorn University Press, 4th ed, 2005

Borwornsak Uwanno, **Public Law, Volume 3: Background and Juristic Method,** Bangkok: Nititham Printing

Borwornsak Uwanno, **Course Description for Constitutional Law,** Bangkok: The Institute of Legal Education, Thai Bar Association, rev. ed, 2020

Lieutenant General Amporn Jintakanon, "Than Chaokhun AttakariNibhon", in **Commemorative Book at the Royal Cremation Ceremony for Praya AttakariNibhon (Sitthi Junnanon),** The Secretariat of the Cabinet Printing Office, 1978

Wattanawan Prapattong, **The Royal Prerogative Relative to Subjects Petitioned in Thailand,** Thesis, Bangkok: Graduate School Chulalongkorn University, 1997

Wissanu Krea-ngam, Bowornsak Uwanno, **Charter for the Administration of the Kingdom B.E. 2520,** Bangkok: Namaksorn Printing, 1977

Professor Yut Sanguthai, **Explanation of the Charter for the Administration of the Thai Kingdom,** Thonburi: Sawaeng Sutthi Printing, 1973

Foreign Languages

Burdeau, Georges, **droit constitutionnel et institutions politiques,** 18 ed, Paris, LGDJ., 1977

Carr. de Malberg, Raymond, **Contribution à la théorie Générale de l Etat**,Tome I, Paris, CNRS, 1920

Carbonnier, Jean, **Sociologie juridiques,** Paris, PUF, 1994

Dicey A.V., **An Introduction of the study of the Law of the Constitution**, 10th ed, 1959, Mc millan, New York

G. Marshall & G.C. Moodie, **Some problems of the Constitutional,** London: Hutchinson, 5th ed, 1971

Hant, H.L.A., **Le Concept de droit,** traduction fran.aise, Bruxella Faut. Univ. Saint - Louis, 1976

Hood Phillips, **Constitutional and administrative law,** London: Stevens & Son, 5th ed, 1973

Savigny, F.K Von, **"la théorie des sources du droit dans l'Etathistoriques",** in Archives de philosophie du droit, p.27, 1982

Transitory provisions of the Constitution

Boonserm Nagasara
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1. Introduction

The purposes of the transitory provisions can be summarized into five points. Firstly, to delay the enforcement of some principles or to allow state actions or organizations previously guaranteed by law to continue performance without disruption until the mechanisms of the newly established laws or subordinate legislation or secondary laws are ready or can be implemented. Secondly, to prepare for expected impacts or eliminate controversy in various matters from law enforcement, be it a new law, a repeal or improvement of law (repeal the old version and enact a new one), or an amendment of the law. Thirdly, to support any operations of the private sector existed before the enacted law comes into force to be under law enforcement or to operate continuously at the commencement of the law enforcement. Fourthly, to specify temporary legal mechanisms or measures in the first term or phase of law enforcement, and fifthly, to recognize the continued benefits a person received as a result of the previous law.[2] From the past to the present, Thailand has a total of 20 constitutions, 12 of which contain transitory provisions, i.e., Constitution of Siam, Constitution of the Kingdom of Thailand, B.E. 2489 (1946), Constitution of the Kingdom of Thailand, (Interim), B.E. 2490 (1947), Constitution of the Kingdom of Thailand, B.E. 2492 (1949), Constitution of the Kingdom of Thailand, B.E. 2475 (1932) (Revised 1952), Constitution of the Kingdom of Thailand, B.E. 2511 (1968), Constitution of the Kingdom of Thailand, B.E. 2517

[2] Jaruwan Hengtrakul et al. Legislative Drafting Manual. (Bangkok: Office of the Council of State, 2008), page 245.

(1974), Constitution of the Kingdom of Thailand, B.E. 2521 (1978), Constitution of the Kingdom of Thailand, B.E. 2534 (1991), Constitution of the Kingdom of Thailand, B.E. 2540 (1997), Constitution of the Kingdom of Thailand, B.E. 2550 (2007), and Constitution of the Kingdom of Thailand, B.E. 2560 (2017).

The purposes of the transitory provisions of above mention constitutions can be summarized into three essences. Firstly, the preservation of constitutional organizations and the officeholders in accordance with the previous constitution, i.e., after the promulgation of a new constitution, the existing constitution will be annulled, resulting in the constitutional organizations and officeholders under the previous constitution being annulled. However, the new constitution does not intend to change all constitutional organizations and officeholders under the previous constitution. Therefore, the transitory provisions are provided to recognize the continued status of constitutional organizations and officeholders. Secondly, the establishment of organizations and the enactment of laws according to the constitution; i.e., the constitution mandated the establishment of numerous new organizations and the enactment of laws to recognize their operations and the setup of various mechanisms. For example, the transitory provisions, section 90 of the Constitution of the Kingdom of Thailand, B.E. 2489 (1946) stipulated that members of the House of Representatives under the old Constitution shall be the election body of the Senate within 15 days from the enforcement of the new constitution. The transitory provisions, section 334 (3) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) stipulated that the Administrative Court must be established within two years from the promulgation date of the new Constitution, or section 323 stipulated that within 240 days from the promulgation date of the Constitution there shall be organic law bills on the Election of Members of the House of Representatives and senators, the Election Commission, and Political Parties and thirdly, other operations. For example,

the transitory provisions, section 65 of the Constitution of the Kingdom of Siam, B.E. 2475 (1932) provided that in case over half of the total number of the people having the right to vote in the election of members of the House of Representatives have not yet graduated from basic primary education and at the latest not more than ten years from the day of coming into force of the Temporary Charter for Administration of Siam Act, B.E. 2475 (1932), then the House of Representatives was composed of two types of members in equal numbers; type 1 are those elected by the people and type 2 are those appointed by the King. Another example is the exemption of constitutional provisions in some matters, such as The Constitution of the Kingdom of Thailand, B.E. 2540 (1997) stipulated that a preparation period was needed for various systems or the establishment of new constitutional organizations to come in force, existing systems or organizations shall be used. As a result, there was an exemption of some provisions of the Constitution, e.g., transitory provisions, section 315 stipulated that members of the House of Representatives and the senators under the Constitution of the Kingdom of Thailand, B.E. 2534 (1991) shall act as members of the House of Representatives and the senators under the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The reason is certain provisions in the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) are inconsistent with the holding of such offices. Therefore, the transitory provisions, section 315 paragraph four, stipulated the exemption of some matters from being applied to members of the House of Representatives and the senators, etc.[3]

[3] Piyathida Wongsiriwat. Effects of the transitory provisions on the Principle of Supremacy of the Constitution: A study of specific cases of the transitory provisions of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), B.E. 2550 (2007), and B.E. 2560 (2017). Master of Laws thesis. Faculty of Law, Chulalongkorn University, academic year B.E. 2559 (2016).

2. Prominent Precedents in Constitutional Cases: transitory provisions of the Constitution

There are two constitutional cases in which the Court had laid down the precedents concerning transitory provisions of the constitution: (1) transitory provisions that recognized the constitutionality of the acts of the coup d'état who exercised sovereign power; and (2) transitory provisions that recognized the status of officeholders according to the previous constitution to continue performance of duties on the day the new constitution came into force.

2.1 Transitory provisions that recognized the constitutionality of the acts of the coup d'état who exercised sovereign power.

Every constitution has provisions to recognize the legal status and continued effectiveness of the announcements or orders of the coup d'état or the coup d'etat leader that came into force before the promulgation date of the interim constitution. The constitutional provisions that recognized legality or the constitutionality of announcements, orders, or acts of the coup d'état or coup d'état leader, however, have developed sequentially as summarized in the following four models:

1. Model 1: Interim constitutions that contain provisions to recognize the legality of the announcements or orders of the coup d'état including the acts in compliance with such announcements or orders. This means interim constitutions contained provisions in the same manner to stipulate that announcement, order, or act in compliance with announcement or order of the coup d'état or the coup d'état leader prior to the promulgation date of the Constitution shall be considered lawful announcement, order, or act. These are section 21 of the Constitution of the Kingdom of Thailand (Interim), B.E. 2515 (1972)[4], section 29 of the Constitution of the Kingdom of Thailand, B.E. 2519 (1973),

[4] Section 21 of the Constitution of the Kingdom of Thailand (Interim), B.E. 2515 (1972) stipulated that "As for all the announcements of the Revolutionary Council or orders of the Head of the Revolutionary Council which were made or given during (the time from) the revolution on November 17th, B.E. 2514 (1971) until the announcement of

section 32 of the Constitution of the Kingdom of Thailand (Interim), B.E. 2520 (1977), and section 32 of the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991).[5] It can be said that the beginning of such provisions was the Constitution of the Kingdom of Thailand (Interim), B.E. 2515 (1972), section 21 drafted by the coup d'état to guarantee legal consequences or legality of the announcements or orders including the acts in compliance with announcements or orders of the coup d'état. It became the prototype for the drafting of the interim constitutions that followed.

2. Model 2: The Permanent Constitutions that contain provisions to recognize the "constitutionality" of the acts of the coup d'état. The Constitution of the Kingdom of Thailand, B.E. 2534 (1991)[6] is the first constitution that contain transitory provisions,

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this Administrative Charter, regardless of any form they might take and whether they were made or given for producing legislative, executive, or judicial effect, those announcements or orders, as well as the observance of those announcements or orders, shall be deemed lawful."

5 For example, section 32 of the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991), stipulated that "As for all the acts, announcements, or orders of the Head of the National Peace Keeping Council or of the National Peace Keeping Council, which were done, made, or given before the day of coming into force of this Administrative Charter and which relate to the seizure and taking control of the administrative power of the State on February 23rd, B.E. 2534 (1991), regardless of how they were done or whatever form they took and whether they were done, made, or given for producing legislative, executive, or judicial effect, those acts, announcements, or orders, as well as the acts of the persons who observe those announcements or orders and the acts of anyone which have been done in connection with the said seizure or taking control of the administrative power of the State, shall be deemed lawful."

6 Section 222 of the Constitution of the Kingdom of Thailand, B.E. 2534, (1991) stipulated that "All announcements or orders of National Council for Peace and Order or Head of the National Council for Peace and Order or laws that have the effect of being correction or addition or orders of the National Council for Peace and Order or the head of the National Council for Peace and Order that came into force prior to the date of promulgation of this Constitution or orders of the Prime Minister or the Head of the National Council for Peace and Order issued by virtue of section 27 of the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991), regardless of their legislative, executive or judicial

section 222 to recognize the "constitutionality" of the acts of the coup d'etat. It also recognizes the coup d'etat's seizure and taking control of the administrative power of the state on February 23rd, B.E. 2534 (1991) after the "legality" of the acts was previously recognized in section 32 of the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991).

In the case of the transitory provisions, section 222 of the Constitution of the Kingdom of Thailand, B.E. 2534 (1991), the constitution drafters initially specified the exercise of three powers, all of which were the use of absolute power. Firstly, announcements or orders of the National Peace Keeping Council or the Head of the National Peace Keeping Council. Secondly, laws that have the effect of correction or amendment to announcements or orders of the National Peace Keeping Council or the Head of the National Peace Keeping Council that came into force prior to the promulgation date of this Constitution. Thirdly, orders of the Prime Minister or the President of the National Peace Keeping Council issued by virtue of section 27 of the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991). All these powers were not only "legal," as provided in previous constitutions, but also extended to be "constitutional," which had very far-reaching effects by law. This is because when these three powers were constitutional, there was no way to apply control over the constitutionality of the law to them. The previous Acts enacted before this Constitution and signed by the King with the advice and consent of the elected National Assembly may be considered inconsistent with this Constitution through the precedential

force until the promulgation date of this Constitution is to be enforceable and shall continue to be in force. If the mentioned announcements or orders are in legislative or judicial force, the repeal or modification of the announcements or orders shall be made by an Act. An Act enacted in accordance with this section shall have no effect to the acts performed by any person or group of persons in compliance with the announcement or order and no person shall expose such person or group of persons to any sort of execution or action."

process of constitutionality control. Another consequence was that the exercise of all three absolute powers was considered to have a higher hierarchy than the Act enacted by the King and Parliament in terms of constitutionality control, but they had the same hierarchy as the Acts enacted by the King and Parliament with respect to amendment or repeal since section 222 of the Constitution recognizes amendments or repeals made by an Act. There is no legal theory that could explain the duality of the use of absolute powers that have two hierarchies, i.e., being "constitutional" in the case of exemption from constitutionality control but being an "Act" in the case of amendment or repeal, but only to conclude that this is "Thai style theory." Another observation is the reiteration that even if the repeal or amendment was made by an Act; "An Act enacted in accordance with this section shall have no effect on the acts performed by any person or group of persons in compliance with the announcement or order, and no person shall expose such person or group of persons to any sort of execution or action." This exhibits that the drafter was unsure of the "righteousness" and "legality" of the announcements or orders because if the announcements or orders were legal, the persons who acted accordingly would not have any liability, whether civil or criminal. Such provisions, therefore, implied the opposite. Moreover, providing absolute protection from lawsuits in any way is an issue of the deprivation of the constitutional right to file lawsuits according to the Constitution, especially section 46, which completely denies the principle of the "legal state."[7]

Section 32 of the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991), and section 222 of the Constitution of the Kingdom of Thailand, B.E. 2534 (1991), recognized the legality and constitutionality of the coup d'état acts, as well as the subsequent acts

[7] Professor Dr. Borwonsak Uwanno. Public Law Volume 2. The Separation of Public and Private Law and the Development of Public Law in Thailand. 3rd printing. (Bangkok: Winyuchon, 2004), pp. 252–253.

related to the seizure and taking control of the administrative power of the state on February 23rd, 1991. That means the constitutionality control could not be applied, which may be considered contrary to the Constitution. However, the Supreme Court has actually examined the constitutionality of the coup d'état acts and subsequent acts on February 23rd, 1991, as stated in the Supreme Court's Judgment No.913/2536 (1993). In the mentioned case, the petitioner, Mr. Sanoh Thienthong, filed a motion for a preliminary decision on the legal issue. On February 25th, 1991, the National Peace Keeping Council (NPKC) issued NPKC Announcement No.26 Re: Seizure and Prohibition of Sale or Transfer of Assets and Appointment of an Assets Examination Committee (AEC) to have the authority to consider the names of politicians who have behaviors that implied being unusually wealthy. Later, the AEC, having considered all of the petitioner's assets, ruled that the petitioner was unusually wealthy according to clause 2 of NPKC Announcement No.26. The petitioner then petitioned the Supreme Court to prove that NPKC Announcement No.26 did not apply to the petitioner. The Supreme Court, by its plenary session, ruled that the Supreme Court had the authority to consider and decide on the legal issues of the petition without having to send it to the Constitutional Tribunal on the ground that when NPKC Announcement No.26 was issued, there was no constitution or interim constitution in force. Later, while NPKC Announcement No.26 was in effect, the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991), was promulgated. Therefore, NPKC Announcement No.26, which had the same hierarchy as an Act, must be governed by the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991) and must not be contrary to or inconsistent with the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991). The Supreme Court was of the opinion that, according to general law principles, the Courts have the authority to try and adjudicate cases. The Courts, therefore, had the authority to consider which provisions of the law should be enforced and to what

extent. The Courts then have the authority to decide whether such provisions of the law were contrary to or inconsistent with the Constitution, unless there was a specific law provided that the authority fell to other organizations. And even though during the time the Supreme Court considered the problem, the Constitution of the Kingdom of Thailand, B.E. 2534 (1991) was promulgated, with constitutional provisions stipulating that the Constitutional Tribunal had the authority to decide whether the text of any provision of the law was contrary to or inconsistent with the Constitution; however, the Constitutional Tribunal had the authority to consider and decide only on the problem of whether or not any provision of law contain texts that is contrary to or inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2534 (1991). Therefore, by the general law principles, the authority to decide whether any provision of law was contrary to or inconsistent with the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991) rests with the Court. For that reason, the Supreme Court had the authority to consider and decide on the petition without having to send it to the Constitutional Tribunal. The Supreme Court considered the contents of the case and found that the AEC's authority to consider and adjudicate cases was the court's legal authority to perform in accordance with Constitution of Thailand under the democratic regime. As a result, NPKC Announcement No.26, clause 2, and clause 6 were an appointment of a group of persons that was not a court to have the authority to consider and adjudicate cases in the same way as the courts. That was contrary to the Constitutional Conventions of Thailand under the democratic regime because every constitution contains provisions stipulating that adjudication of cases is the authority of the courts. The establishment of a new court to try a particular case instead of the existing courts could not be done. In addition, the assets of the petitioner, which were seized according to AEC's decision, were acquired or additionally acquired before NPKC Announcement No.26 clause 6 came into effect. As a result,

the law was considered to be issued with a retroactive criminal penalty to punish the petitioner, which is prohibited by provisions contained in every constitution to protect the rights and liberties of the people, which was considered the Constitutional Conventions of Thailand under the democratic regime as well. When the NPKC Announcement No.26, clause 2 and clause 6 were considered to be contrary to section 30[8] of the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991), the Announcement could not be enforced. This resulted in the AEC's decision by virtue of the NPKC Announcement No.26, clause 2 and clause 6, amended by the Act on Amendment of the NPKC Announcement No.26, clause 3, dated February 25th, 1991 being unenforceable. The Supreme Court ruled that section 32[9] of the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991) was only a general recognition that the mentioned NPKC announcement or order was enforceable as laws, but it did not recognize that it was enforceable if the content was contrary to or inconsistent with the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991). The problem of to what extent the NPKC announcement or order was enforceable was different from the problem of whether the mentioned announcement was legal. The objector (Public prosecutor, Office of the Attorney General) claimed that NPKC Announcement No.26 was constitutional under the Constitution of the Kingdom of Thailand, B.E. 2534 (1991), section 222.[10] The Court ruled that when the mentioned NPKC Announcement clause 2 and clause 6 were not enforceable according to the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991), section 30 paragraph one;

[8] Section 30 paragraph one, of the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991), stipulated that "When there is no provision of the Charter applicable to the case, the case shall be decided by the Constitution of Thailand under the democratic regime," and paragraph two stated that "When there is a problem in considering a case in the work area of the National Legislative Assembly or by request of the Cabinet, the National Legislative Assembly shall decide for a final decision."

[9] Please see footnote 5.

[10] Please see footnote 6.

it was not a law in force upon the promulgation of the Constitution of the Kingdom of Thailand, B.E. 2534 (1991). Therefore, section 222 could not been forced in this case.

Supreme Court Judgment No.913/2536 laid down the precedents in constitutional cases in at least three respects, namely:

Firstly, although there was no provision giving the Court the authority to decide whether the provision of any law was contrary to or inconsistent with the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991), the Supreme Court ruled that the Court had such authority according to the general legal principles, which is that when the Courts have the authority to try and adjudicate cases, they then have the authority to consider which provisions of the law shall be enforced in the case and to what extent. The Courts, therefore, had the power to decide whether or not such a provision of law was contrary to or inconsistent with the Constitution.

Secondly, the Constitutional Conventions of Thailand under the Democratic Regime has been adopted by the Supreme Court in deciding that the power to consider and adjudicate cases was the power of the Courts. The NPKC announcement that appointed a group of persons that was not a court to try and adjudicate cases the same way as a court was against the Constitutional Conventions of Thailand under the Democratic Regime. Since every constitution has provisions stipulating that the Courts have the authority to try and adjudicate cases, the establishment of a new court to specifically try a particular case in place of the existing courts could not be done. The NPKC announcement that stipulated the property of a person that was acquired or increased before the effective date of the announcement was, therefore, contrary to the Constitutional Conventions of Thailand under the Democratic Regime because every constitution has provisions prohibiting the enactment of laws that have retroactive criminal penalties to protect the rights and liberties of the people.

Thirdly, even though the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991), section 32 provided that the acts, announcements, or orders, including acts of a person in compliance with the announcement or order as well as acts of any person in connection with the seizure or taking control of the governing power on February 23rd, 1991, were legal, the Supreme Court decided that such a provision only guarantees in general that the NPKC announcement or order were enforceable as law. It did not specify that the said NPKC announcement or order were enforceable if its contents were contrary to or inconsistent with the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991). When the Supreme Court decided that the NPKC announcement was contrary to or inconsistent with, and unenforceable under the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991), section 30 paragraph one, it, therefore, was not a law in effect upon the promulgation date of the Constitution of the Kingdom of Thailand, B.E. 2534 (1991). The transitory provisions, section 222 that recognized the constitutionality of the NPKC announcement or order could not be enforced thereafter.

3. Model 3: Interim Constitutions that contain provisions to recognize the "legality" and "constitutionality" of the coup d'état's acts are sections 36 and section 37 of the Constitution of the Kingdom of Thailand (Interim), B.E. 2549 (2006), and section 47 and section 48 of the Constitution of the Kingdom of Thailand (Interim), B.E. 2557 (2014).[11]

[11] Section 36 of the Constitution of the Kingdom of Thailand (Interim), B.E. 2549 (2006) stated that "All announcements or orders of the Council for Democratic Reform or the orders of the Chairman of the Council for Democratic Reform which announced or ordered during September 19th,2006 (B.E. 2549) until the promulgated date of this Constitution whether done in any form and any announcement or commanded for the enforcement in legislative, executive or judicial force shall continue to be enforced and shall consider that announcements or orders as well as acts done upon such announcements or orders whether the acts of such announcements or orders done by prior or after the promulgated date of this Constitution shall be announcements or orders which being considered lawful and constitutional.", and section 37 stated that

It can be said that the Constitution of the Kingdom of Thailand (Interim), B.E. 2549 (2006), is the first interim constitution that contained provisions to recognize the "constitutionality" of the coup d'état's acts. This may be a result of the fact that the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991), section 32 contained only a provision to recognize the legality but there was no provision to recognize the constitutionality of the coup d'état's acts. The Supreme Court, therefore, had the authority to examine the acts of the coup d'état. Supreme Court Judgment No.913/2536 (1993) decided that section 32 of the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991) was only a general recognition that the said NPKC announcement or order was enforceable as law, but it did not cover its enforcement if the contents were contrary to or inconsistent with the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991). Therefore, the drafters of the Constitution of the Kingdom of Thailand (Interim), B.E. 2549 (2006), used the phrase "legal and constitutional."

4. Model 4: Permanent constitutions that contained provisions to recognize the "legality" and "constitutionality" of the coup d'état's acts. Transitory provisions, section 309 of the Constitution of the Kingdom of Thailand, B.E. 2550 (2007)[12] and section 279 of the

"All acts done by the Chairman of the Council for Democratic Reform which related to the seizure and taking control of the State administrative power on September 19th, 2006 (B.E. 2549) as well as any act done by persons involved in such seizure or of persons being assigned by the Chairman of the Council for Democratic Reform or of persons being commanded by the Chairman of the Council for Democratic Reform which done for such above act. All these acts, whether done for the enforcement in legislative, executive, or judicial force as well as the punishment and other acts on the administration of the State affairs whether done as principals, supporters, instigators, or persons being commanded to do so and whether done on such date or before such date or after such date which if such acts may be unlawful, the actors shall be exempted from any wrongdoing, responsibility, and liabilities."

12 Section 309 of the Constitution of the Kingdom of Thailand, B.E. 2550 (2007) stated that "All matters guaranteed by the Constitution of the Kingdom of Thailand (Interim), B.E. 2549 (2006) to be lawful and constitutional, including all acts related to such

Constitution of the Kingdom of Thailand, B.E. 2560 (2017),[13] recognized the legality and constitutionality of the coup d'état's acts again in the permanent constitutions after being previously recognized in the interim constitutions.

The Constitutional Court has ruled and laid down a precedent in constitutional cases concerning the transitory provisions of the Constitution of the Kingdom of Thailand, B.E. 2550 (2007), which recognized the constitutionality of the coup d'état's acts that exercising the sovereign power in the Constitutional Court Ruling No.5/2551 (2008)[14] as follows:

matters whether before or after the promulgation date of this Constitution, shall be considered constitutional."

13 Section 279 of the Constitution of the Kingdom of Thailand, B.E. 2560 (2017), paragraph one, stated that "All announcements, orders and acts of the National Council for Peace and Order or of the Head of the National Council for Peace and Order which are in force on the day prior to the date of promulgation of this Constitution or which will be issued under section 265 paragraph two, irrespective of their constitutional, legislative, executive or judicial force, as well as the performance of the acts in compliance therewith shall be considered constitutional, lawful and effective under this Constitution. Repeal of or amendment to such announcements or orders shall be made in the form of an Act, except in the case of announcements or orders that, in nature, are the exercise of executive power, a repeal or amendment shall be made in the form of an order of the Prime Minister or a resolution of the Council of Ministers, as the case may be." and paragraph two stated that "All matters recognized as constitutional and lawful by the Constitution of the Kingdom of Thailand (Interim), B.E. 2557 (2014) as amended by the Constitution of the Kingdom of Thailand (Interim), B.E. 2557 Amendment (No.1), B.E. 2558 (2015) and the Constitution of the Kingdom of Thailand (Interim), B.E. 2557 Amendment (No.2), B.E. 2559 (2016), including acts incidental thereto, shall be deemed constitutional and lawful."

14 The Constitutional Court Ruling No.5/2551 (2008) Re: Announcement of the Council for Democratic Reform (CDR) No.30, Re: Review of Actions Detrimental to the State, dated September 30th, B.E. 2549 (2006), and Act on Amendment of the Announcement of the CDR No.30, Re: Review of Actions Detrimental to the State, dated September 30th, 2006 (B.E. 2549), B.E. 2550 (2007) were contrary to or inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2550 (2007) or not.

The Constitution of the Kingdom of Thailand (Interim), B.E. 2549 (2006), section 36, has provided a recognition of the Announcement of the Council for Democratic Reform under Constitutional Monarchy, No.30, Re: Inspection of Acts Being Detrimental to the State, dated September 30th, 2006 (B.E. 2549), to be enforceable and constitutional. The Constitution of the Kingdom of Thailand, B.E. 2550 (2007), also contained transitory provisions, section 309, stating that it is constitutional according to the Constitution of the Kingdom of Thailand, B.E. 2550 (2007). This is to allow corruption and misbehavior examination systems, according to the announcement of the Council for Democratic Reform, to continue without disruption during the change of the public administration. Similarly, the provision of the Constitution of the Kingdom of Thailand, B.E. 2550 (2007), section 293 paragraph one stipulated that "The National Legislative Assembly under the Constitution of the Kingdom of Thailand (Interim), B.E. 2549 (2006) shall act as the National Assembly, the House of Representatives, and the Senate under the provisions of this Constitution until the first meeting of the National Assembly under section 127." The mentioned provisions provided for the continued performance of duties by the National Legislative Assembly, which was a legislative organization as per the Constitution of the Kingdom of Thailand (Interim), B.E. 2549 (2006), until there was a legislative organization as per the Constitution of the Kingdom of Thailand, B.E. 2550 (2007). The Constitutional Court, therefore, ruled that the announcement of the Council for Democratic Reform under the Constitutional Monarchy did not contain any provisions contrary to or inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2550 (2007).

As for the Act on amendment of the Announcement of the Council for Democratic Reform under Constitutional Monarchy, No.30, Re: Inspection of Acts Being Detrimental to the State, dated September 30th, 2006 (B.E. 2549), B.E. 2550 (2007), it was not a law that established any new inspection organization. It was only an extension of the period

for the Assets Examination Committee (AEC) to perform its duties as necessary to complete the outstanding duties according to the objectives of the law and constitution. It stated that the Asset Examination Committee could continue to perform duties only on "inspection or investigation of matters that are in progress (and) not yet completed." New matters could not be accepted for investigation or further investigation. In addition, the extended period was limited to between October 1st, 2007 (B.E. 2550), and June 30th, 2008 (B.E 2551), for a period of only nine months, which was not beyond a reasonable time period. The enactment of this Act made it evident to the people that it had no hidden or ill intentions against any person. It was an exercise of legislative power within the framework of necessity and proportionate to the case, and it did not affect the court's judgment in any way. The Act, therefore, did not have any part that conflicts with or contradicts the rule of law or affects human rights to the extent that is contrary to or inconsistent with any section of the Constitution of the Kingdom of Thailand, B.E. 2550 (2007). Additionally, section 309 of the Constitution of the Kingdom of Thailand, B.E. 2550 (2007), in force at the time the Act was enacted, also recognized in the transitory provisions stating that "all acts recognized in the Constitution of the Kingdom of Thailand (Interim), B.E. 2549 (2006) as legal and constitutional, including acts incidental thereto, whether performed before or subsequent to the date of the promulgation of this Constitution, shall be deemed constitutional under this Constitution." When the announcement of the Council for Democratic Reform under Constitutional Monarchy, No.30, Re: Inspection of Acts Being Detrimental to the State, dated September 30th, 2006 (B.E. 2549), was recognized in the Constitution of the Kingdom of Thailand (Interim), B.E. 2549 (2006), section 36, as legal and constitutional, the enactment of the law in question was, therefore, only an action related to the mentioned case. Even though the Act on Amendment of the mentioned announcement came into force after promulgation date of the Constitution of the Kingdom of Thailand,

B.E. 2550 (2007), it must be recognized by transitory provisions, section 309 of this Constitution to be constitutional. The Constitutional Court, therefore, ruled that the mentioned Act, which extended the period for the performance of duties of the AEC until June 30th, 2008 (B.E. 2551), did not contain any provision that was contrary to or inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2550 (2007).

To summarize, the aforementioned Constitutional Court Ruling No.5/2551 (2008), which was considered the basis on the transitory provisions of The Constitution of the Kingdom of Thailand, B.E. 2550 (2007), can be regarded as a precedent on the constitution adjudications concerning transitory provisions of the constitutions that recognize the constitutionality of the coup d'état's acts that exercised the sovereign power as follows:

The acts of the coup d'état that exercised the sovereign power by issuing the announcement of the Council for Democratic Reform under Constitutional Monarchy, being enforceable law at the same hierarchy as an Act, and the enactment of the Act on Amendment of the mentioned announcement, which was a related act, were considered constitutional as recognized by the transitory provisions of the Constitution of the Kingdom of Thailand, B.E. 2550 (2007).

Later, the Constitutional Court considered the case concerning the transitory provisions of the Constitution of the Kingdom of Thailand, B.E.2560 (2017), which recognized the constitutionality of the acts of the coup d'état that exercised the sovereign power, and passed two rulings as follows:

Constitutional Court Ruling No.4/2561 (2018).[15] During the trial proceeding stage of the Constitutional Court, the Head of the

[15] Constitutional Court Ruling No.4/2561 (2018) Re: The Ombudsman submitted a matter to the Constitutional Court for a ruling under section 231(1) of the Constitution on whether or not section 140 and section 141 and section 141 paragraph one (5) and paragraph two

National Council for Peace and Order submitted an opinion to the Constitutional Court stating that the Order of the Head of the National Council for Peace and Order No. 53/2560 (2017), Re: Amendment of the Organic Act on Political Parties, B.E. 2560 (2017), section 140 and section 141 aimed for a political reform according to the Constitution, section 258 A. (2). The orders were legal, constitutional, and final according to the Constitution of the Kingdom of Thailand (Interim), B.E. 2557 (2014), section 44[16], in conjunction with section 265.[17] Therefore, the amended

of the Organic Law on Political Parties B.E. 2560 (2017), as amended by Order of the National Council for Peace and Order No. 53/2560 Re: Implementation of the Organic Law on Political Parties, were inconsistent with section 25, section 26, section 27 and section 45 of the Constitution.

16 Constitution of the Kingdom of Thailand (Interim), B.E. 2557 (2014), section 44 stipulated that "In the case where the Head of the National Council for Peace and Order deems necessary for the purpose of reforms in various fields, for the enhancement of unity and harmony among people in the country, or for the prevention, restraint, or suppression of any act which undermines public order or national security, the Throne, the national economy, or State affairs, irrespective of whether such act occurred inside or outside the Kingdom, the Head of the National Council for Peace and Order, with the approval of the National Council for Peace and Order, shall have power to order, restrain, or perform any act, whether such act has legislative, executive, or judicial force; the orders and the acts, including the performance in compliance with such orders, shall be deemed lawful and constitutional under this Constitution, and shall be final. When those have been carried out, a report shall be made to the President of the National Assembly and the Prime Minister for acknowledgement without delay."

17 The Constitution of the Kingdom of Thailand, B.E. 2017, section 265 paragraph one, stipulated that "The National Council for Peace and Order holding office on the day prior to the date of promulgation of this Constitution shall remain in office to perform duties until the new Council of Ministers appointed subsequent to the first general election under this Constitution assume its duties." and paragraph two states that "While performing the duties under Paragraph one, the Head of the National Council for Peace and Order and the National Council for Peace and Order shall continue to have the duties and powers as provided in the Constitution of the Kingdom of Thailand (Interim), B.E. 2557 (2014) as amended by the Constitution of the Kingdom of Thailand (Interim), B.E. 2557 Amendment (No. 1), B.E. 2558 (2015) and the Constitution of the Kingdom of Thailand (Interim), B.E. 2557 Amendment (No. 2), B.E. 2559 (2016); the provisions of the Constitution of the Kingdom of Thailand that pertain to the powers of the Head of the National Council for Peace and Order and the National Council for Peace and Order shall be deemed to remain in force."

Organic Act on Political Parties, B.E. 2560 (2017), section 140 and section 141, were constitutional and final. The Ombudsman did not have the duty and authority to accept and consider the complaints of a political party leader and submit matters with opinions to the Constitutional Court for a ruling. The Constitutional Court did not order the disposal of the matter but ruled on the contents of the case that the Organic Act on Political Parties, B.E. 2560 (2017), section 140 and section 141 paragraph one (5) and paragraph two, as amended by the Order of the Head of the National Council for Peace and Order No.53/2560 (2017) Re: Implementation of the Organic Law on Political Parties, were neither contrary to nor inconsistent with the Constitution, section 25, section 26, section 27 and section 45.

Constitutional Court Ruling No.30/2563 (2020).[18] Dusit Kwaeng Court referred the objection of a defendant in the criminal case, which disputed that the announcement of the National Council for Peace and Order No.29/2557 (2014), Re: Persons Who Shall Report to Authorities Under Orders of the National Council for Peace and Order, dated May 24th, B.E. 2557 (2014), and Announcement of the National Council for Peace and Order No.41/2557 (2014), Re: Prescription of Offence for Violation or Non-Compliance with a Summons to Report to Authorities, dated May 26, B.E. 2557 (2014), were laws that restricted the rights and liberties of persons and were contrary to the rule of law. The Announcement No.29/2557 (2014) Re: Persons Who Shall Report to Authorities Under Orders of the National Council for Peace and Order, dated May 24th, 2014 (B.E. 2557), was enforced after the Announcement of the National Council for Peace

[18] Constitutional Court Ruling No.30/2563 (2020) Re: Whether or not the Announcement of the National Council for Peace and Order No.29/2557 (2014), Re: Persons Who Shall Report to Authorities Under Orders of the National Council for Peace and Order, dated 24th May B.E. 2557 (2014), and Announcement of the National Council for Peace and Order No.41/2557 (2014), Re: Prescription of Offence for Violation or Non-Compliance with a Summons to Report to Authorities, dated 26th May B.E. 2557 (2014), was contrary to or inconsistent with section 4, section 26, section 27 paragraph one and paragraph three and section 29 paragraph one of the Constitution.

and Order No.5/2557 (2014), Re: Additional Persons Who Shall Report to Authorities, dated May 24th, 2014 (B.E. 2557). It was, therefore, a law that prescribed criminal penalties retroactively concerning the defendant, intended to be enforced in a specific case or for a specific person, not in general. The two announcements mentioned were provisions that prescribed criminal penalties that were disproportionate to the cause and contrary to or inconsistent with the Constitution, section 26. In addition, the Announcement of the National Council for Peace and Order No.29/2557 (2014), specifying persons who had to report to authorities according to the orders of the National Council for Peace and Order and the prescription of criminal penalties to violators, have the characteristics of a threat, violation of human dignity, and unfair discrimination against a person. As a result, it was an unequal protection of persons under the law, contrary to or inconsistent with the Constitution, sections 4 and section 27. Furthermore, both of the mentioned announcements of the National Council for Peace and Order were issued for the benefit of maintaining peace and order in the country while the National Council for Peace and Order seized power or was in power. When the National Council for Peace and Order was not in power, the purpose of the order summoning people to report to the authorities, thus ended. The reason was that a person shall be criminally punished only when the act done by such person is provided to be an offense and the punishment is defined by the law in force at the time of the doing of such act. The existence of the two announcements of the National Council for Peace and Order were, therefore, contrary to or inconsistent with the Constitution, section 29.

At the stage of considering the duties and authorities of the Constitutional Court, the Court found that transitory provisions of the Constitution, section 279, recognized the status of the announcement and order of the National Council for Peace and Order in force prior to the promulgation date of this Constitution to be constitutional and enforceable under this Constitution. Repeal or amendment of such announcement

or order shall be made by the enactment of an Act; except for the case of an announcement or order that has the characteristics of the use of administrative power, repeal or amendment shall be made by order of the Prime Minister or Cabinet resolution, as the case may be. When the Constitution recognized the continued effect of both announcements of the National Council for Peace and Order and they were not repealed by the exercise of legislative or executive power, the two announcements of the National Council for Peace and Order remained effective as law, even though the National Council for Peace and Order had been dissolved. The Constitutional Court, therefore, had the duty and authority to examine the constitutionality of the law, including the two announcements of the National Council for Peace and Order, under section 210 paragraph one (1) of the Constitution.

At the stage of trial proceedings, the Constitutional Court found that both announcements of the Council for Peace and Order had an objective or necessity for a summons to report to authorities under orders of the National Council for Peace and Order in the capacity of an organization exercising sovereign power at that time to preserve peace and solve problems in the country. However, they were laws that restricted the rights and liberties of persons, in which the principle of proportionality to the case must be applied when imposing criminal penalties on offenders. Criminal sentencing was a measure that could achieve the objective of a summons; persons as specified were required to report to the National Council for Peace and Order to preserve peace and order in the country that was of public interest or common interests. However, when compared with the case of bringing in a person who has not yet committed an offense but with only reasonable doubt to be detrimental or to cause unrest and safety, measures to ensure safety were provided under section 46 of the Criminal Code instead of criminal sentencing. In addition, in comparison with the offenses to orders of the authorities under other laws, the failure to report to authorities, which

was an offense or non-compliance to the order of the National Council for Peace and Order subject to criminal penalties, did not result in serious harm or affected social peace and order to the extent that required a criminal penalty in the form of an imprisonment term not exceeding two years, a fine not exceeding 40,000 Baht, or both. There were other legal measures that authorized the authorities in the criminal justice system to enforce the spirit of preserving peace and solving the country's problems in a peaceful and orderly manner, namely the Criminal Code, section 368 paragraph one. Those who violated the authorities' orders without reasonable cause or excuse shall be imprisoned not exceeding ten days, pay a fine not exceeding 5,000 Baht, or both. That is a petty offense appropriate for such a violation according to the preference of the government to apply appropriate measures as penalties to those who committed a violation or non-compliance to the extent necessary and appropriate for the case only. Upon consideration of the protection of rights and liberties of persons as guaranteed by the Constitution and public interest or common interests according to the objectives of both announcements, the Court held that the Announcement of the National Council for Peace and Order No. 29/2557 (2014), Re: Persons Who Shall Report to Authorities Pursuant to Orders of the National Council for Peace and Order, dated May 24th, 2014 (B.E.2557), and the Announcement of the National Council for Peace and Order No.41/2557 (2014), Re: Prescription of Offence for Violation or Non-Compliance with a Summons to Report to Authorities, dated May 26th, 2014 (B.E. 2557), only with respect to criminal penalties, where no reason for summons was given, and the only cause relied upon for the prescription of the criminal penalty was the failure to report to authorities pursuant to an Order of the National Council for Peace and Order. That was considered inappropriate for the nature of the offense and not in accordance with the principle of proportionality. They were laws that restricted the rights and liberties

of a person in excess of reasonability and contradicted the rule of law. Therefore, they were contrary to or inconsistent with section 26 of the Constitution.

The Constitutional Court Rulings concerning the constitutionality of the acts of the coup d'état who exercised sovereign power as per Rulings No.4/2561 (2018) and No.30/2563 (2020) mentioned above, that were ruled based on the provisions of the Constitution of the Kingdom of Thailand, B.E. 2560 (2017), changed the precedent of the previous constitutional cases as ruled in Ruling No.5/2551 (2008), which was ruled based on the provisions of the Constitution of the Kingdom of Thailand, B.E. 2550 (2007), as follows:

Although the transitory provisions of the Constitution of the Kingdom of Thailand, B.E. 2560 (2017), recognized the status of announcements and orders of the National Council for Peace and Order as enforceable laws as the Act was enforced prior to the promulgation date of the Constitution; it was also stated that the announcements and orders of the National Council for Peace and Order will continue to be enforceable under this Constitution. However, the Constitutional Court had the duty and authority to examine whether or not the announcements and orders of the National Council for Peace and Order, which were enforceable laws as Acts, were constitutional. This confirms the principle of the supremacy of the Constitution according to the Constitution of the Kingdom of Thailand, B.E. 2560 (2017), section 5 paragraph one, which provides that the Constitution is the supreme law of the country. The provisions of any law, rule, or regulation, or any act that is contrary to or inconsistent with the Constitution, shall be unenforceable, and the exercising of the state power that results in the restriction of the rights or liberties of a person must not add burden or restrict the rights or liberties of a person beyond reasonability and must be under inspection by the judicial organization under the rule of law.

2.2 Transitory provisions that recognized the status of officeholders according to the previous constitution to continue the performance of duties on the date of promulgation of the new constitution.

Transitory provisions of the Constitution of the Kingdom of Thailand, B.E. 2560 (2017), section 273 paragraph one, provided that "the justices of the Constitutional Court, the officeholders in independent organs, and the Auditor-General who held office on the day prior to the promulgation date of this Constitution shall remain in office to continue performance of duties. When the relevant Organic Acts prepared under section 267 have come into force, the continued holding of office shall be according to such organic acts. In the absence of the Organic Acts prepared under section 267, the vacation of office of the justices of the Constitutional Court, officeholders in independent organs, and the Auditor-General shall be determined by the Constitution of the Kingdom of Thailand, B.E. 2550 (2007), and the relevant Organic Acts or laws."

The Constitutional Court has made three decisions laying down precedents on constitutional adjudications, namely Constitutional Court Ruling No.1/2560 (2017), Constitutional Court Ruling No.1/2561 (2018), and Constitutional Court Ruling No.8/2562 (2019), which can be summarized as follows:

Constitutional Court Ruling No.1/2560 (2017).[19] The Court found that the Draft Organic Act on Ombudsman B.E.., section 56[20]

[19] Constitutional Court Ruling No.1/2560 (2017) Re: The President of the National Legislative Assembly referred the opinions of Members of the National Legislative Assembly to the Constitutional Court for a ruling under section 148 paragraph one (1) in conjunction with section 263 of the Constitution on whether or not section 56 of the Organic Act on Ombudsman B.E. ... contained provisions which were contrary to or inconsistent with the Constitution.

[20] Constitutional Court Ruling No.1/2561 (2018) Re: The President of the National Legislative Assembly referred the opinions of Members of the National Legislative Assembly to the Constitutional Court for a ruling under section 148 paragraph one (1) in conjunction

provided for continued tenure during the transition between the end of the previous law and the commencement of the new law. The extent of tenure of the Chief Ombudsman and Ombudsmen holding office on the day prior to the commencement date of the Organic Act was provided in the transitory provision under section 273 paragraph one of the Constitution. The mentioned draft provision specified the continued tenure in two parts: (1) the continued tenure. This draft provision stated that the Chief Ombudsman and Ombudsmen holding office on the day prior to the commencement date of the Organic Act would remain in office until the expiration of the term as provided by the Organic Act on Ombudsmen B.E. 2552 (2009), and (2) qualifications under the Constitution. This draft provision exempted the application of certain qualifications required under the Constitution. The Chief Ombudsman and Ombudsmen holding office on the day prior to the effective date of this Organic Act would vacate office for a cause under section 18, but the causes under (3) concerning lack of qualification under section 8 did not apply. The draft section 56 was merely a draft provision that recognized the status of the Chief Ombudsman and Ombudsmen holding office on the day prior to the effective date of the Organic Act to remain in office. The objective was for them to continue performing duties during the transitory period between the enforcement of the previous law and the current one to ensure smooth enforcement as well as their constitutional functions without any gaps that could disrupt the functions. The transitory provisions were, therefore, governed by the rule of law, having regard to reasons, necessity, appropriateness, and the spirit of the Constitution. Such a format by the Ombudsman could be different from other forms of independent organs. Another opinion was that the exemption of section 8 on the qualifications of the Ombudsman that

with section 263 of the Constitution on whether or not section 185 of the Organic Act on Prevention and Suppression of Corruption B.E. ... was contrary to or inconsistent with the Constitution.

were in line with section 228 of the Constitution which resulted in the mentioned draft provision containing statements contrary to or inconsistent with the Constitution. The Court viewed that the Constitution, section 273 paragraph one, provided that the National Legislative Assembly would consider the continued tenure of officeholders according to provisions of the Constitution. It can be said that the Constitution has given the authority to the National Legislative Assembly to consider the continued tenure of officeholders but did not specifically provide a period for the continued tenure or vacation of office or specific causes for disqualifications for such persons. Therefore, the exemption of certain qualifications under the Constitution stipulated in the draft section 56 of this Organic Act was neither contrary to nor inconsistent with the Constitution in any way. The Constitutional Court, therefore, ruled that the draft Organic Act on Ombudsman, B.E., section 56, was neither contrary to nor inconsistent with the Constitution.

Constitutional Court Ruling No.1/2561 (2018).[21] The Court viewed that the Draft Organic Act on Prevention and Suppression of Corruption, B.E.., section 185[22] was a transitory provision on the continued tenure between the end of the previous law and the commencement

[21] Constitutional Court Ruling No.1/2561 (2018) Re: The President of the National Legislative Assembly referred the opinions of Members of the National Legislative Assembly to the Constitutional Court for a ruling under section 148 paragraph one (1) in conjunction with section 263 of the Constitution on whether or not section 185 of the Organic Bill on Prevention and Suppression of Corruption B.E. ... was contrary to or inconsistent with the Constitution.

[22] The draft Organic Act on Prevention and Suppression of Corruption, B.E. ... section 185 stated that "The President of the National Anti-Corruption Commission and Commissioners of the National Anti-Corruption Commission who are in office prior to the date this Organic Act comes into force shall continue to be in office until the expiration of term as prescribed by the Organic Act on Counter Corruption B.E. 2542 (1999) and its amendments, or be removed from office under section 19, except in case of section 19 (3). The provisions relating to disqualification under section 9 or prohibitions under section 11 (1) and (18) shall not apply."

of the new law. The draft section 185 provided the exemption of disqualifications under section 11 (1), i.e., not being or having been a Constitutional Court Justice or officeholder in any independent organ; and section 11 (18), not being or having been a member of the House of Representatives, senator, political officeholder, member of a local assembly, or local administrator in the ten years before selection or recruitment, which was an exemption of certain disqualifications under the Constitution, section 273 paragraph one, in conjunction with section 267 of the Constitution, provided that an incumbent holding office prior to the promulgation date of this Constitution should remain in office for continued performance of duties. There was no provision that prohibited such holdings. The National Legislative Assembly, which was the organization exercising legislative power according to section 263 of the Constitution, considered and approved the Draft Organic Act on Prevention and Suppression of Corruption, B.E. ...section 185. The continued tenure of an incumbent holding office during the transitory period was provided for the continued performance of duties according to the transitory provision of the mentioned Constitution. It was, therefore, a case that has been considered following the rule of law and having regard to reasons, necessity, and appropriateness concerning both the composition, duties, and powers of the National Prevention and Suppression Committee and the spirit of the Constitution, which was neither contrary to nor inconsistent with the Constitution. The Constitutional Court, therefore, ruled that the Draft Organic Act on Prevention and Suppression of Corruption B.E.., section 185, on the exemption of disqualifications under sections 11 (1) and (18) was neither contrary to nor inconsistent with the Constitution.

Constitutional Court Ruling No.8/2562 (2019).[23] The Court viewed that the Organic Act on the National Human Rights Commission, B.E. 2560 (2017) section 60[24], was the transitory provision that aimed to specify the process of installing a National Human Rights Commission in line with the principles on the status and duties of national institutions for the protection of human rights, or the Paris Principles. The procedures for appointing such an institution had to be a process with guarantees to ensure that the institution was comprised of diversified representatives in society for the protection and promotion of human rights. In addition, section 246 paragraph four, of this Constitution provides that the recruitment of the National Human Rights Commission shall be made by the Organic Act on the National Human Rights Commission. As such, the provisions on recruitment had to provide for the involvement of representatives of private organizations in human rights. It was, therefore, a change in the recruitment principles of the National Human Rights Commission under the Constitution of the Kingdom of Thailand, B.E. 2550 (2007). This Organic Act had to, therefore, provide that the Chairperson and the National Human Rights Commissioners selected under the criteria and procedures of the Constitution of the Kingdom of Thailand, B.E. 2550

[23] Constitutional Court Ruling No.8/2562 (2019) Re: Whether or not section 60 paragraph one and paragraph two of the Organic Act on National Human Rights Commission, B.E. 2560 (2017) were contrary to or inconsistent with section 3, section 26, and section 27 of the Constitution.

[24] The Organic Act on the National Human Rights Commission, B.E. 2560 (2017), section 60, paragraph one, stated that "The Chairperson of the National Human Rights Commission and the National Human Rights Commission who held office on the day prior to the effective date this Organic Act shall vacate office from the date this Organic Act comes into force but shall continue to perform duties until the newly appointed Chairperson of the National Human Rights Commission and the National Human Rights Commission take over the office", and paragraph two stated that "Those who continue to perform duties under paragraph one are entitled to receive salary, position allowance and other benefits received prior to the effective date this Organic Act and shall be entitle to compensation according to section 32 as the vacation of office shall be considered a resignation by calculating from the date of appointment by royal command until the date of cessation of duty."

(2007), had to vacate office en masse immediately. The recruitment of a new National Human Rights Commission should be done under this Organic Act for the overall benefit of the country and to solve the problem of the status and trust in the National Human Rights Commission and human rights protection process in Thailand. Considering the intention of the law and the provisions of section 60, it was found that the criteria for the recruitment process of the National Human Rights Commission as amended by this Organic Act were in line with the Paris Principles. The recruitment process for a new National Human Rights Commission should commence from the beginning of this Organic Act enforcement. To achieve the objectives of this Organic Act, it was, therefore, necessary to require the existing Chairperson and the previous National Human Rights Commissioners to vacate office as from the date this Organic Act coming into effect. However, they shall continue to perform duties until the newly appointed Chairperson and National Human Rights Commissioners assume duties to ensure continuity in the functioning of the National Human Rights Commission without any gap which would disrupt the Commission's performance of duties. The case was, therefore, consistent with the necessity principle for the public interest or common interests of the nation and was not considered discrimination. The Constitutional Court, therefore, ruled that the Organic Act on the National Human Rights Commission B.E. 2560 (2017), section 60 paragraph one and paragraph two, were neither contrary to nor inconsistent with the Constitution, section 3, section 26, and section 27.

The three aforementioned decisions of the Constitutional Court concerning the provisions of the Constitution of the Kingdom of Thailand, B.E. 2560 (2017), can be summarized as precedents on the constitutional adjudications concerning the transitory provisions that recognize the status of office holders according to the previous constitution to remain in office and continue the performance of duties on the date of promulgation of the new Constitution as follows:

Transitory provisions in the Constitution, which provide exemptions from the contents of the Constitution, were necessary to solve problems during the transitory period between the enforcement of the previous constitution and the current one to be smooth and appropriate to the circumstances of the country in the initial period. Likewise, the organizations established under the Constitution had to continuously perform the duties as provided without a gap that would disrupt the performance of duties until a newly established mechanism or enforcement was ready or be able to perform the duties, as the case may be. This principle was stipulated in the Constitution of the Kingdom of Thailand, B.E. 2560 (2017), section 273 paragraph one, to recognize the status of officeholders for two periods. In the absence of the Organic Acts, the vacation of office of the justices of the Constitutional Court, officeholders in independent organs, and the Auditor-General shall be according to the Constitution of the Kingdom of Thailand, B.E. 2550 (2007), and the relevant Organic Acts or laws. When the organic acts come into force, their continued tenure shall be by such organic acts. It can be considered that the Constitution has given the power to the National Legislative Assembly to determine the continued tenure of the officeholders. However, the Constitution did not provide a specific period for the continued tenure or the vacation from office, as well as the exemption of qualifications. The specification of the continued tenure period may take many forms. For example, the continued tenure of the officeholders shall be until the term expires, according to the Constitution of the Kingdom of Thailand, B.E. 2550 (2007). Another approach is the continued tenure was provided to only qualified officeholders without disqualifications according to the Constitution or the office holders should vacate the office en masse. However, the specification of any form shall have regard to reasons, necessity, and appropriateness concerning the compositions, duties, and powers of each organization and be in line with the spirit of the Constitution.

3. Conclusion

Supreme Court Judgment No.913/2536 (1993) laid down precedents on the constitutional adjudication that the courts had the power to control and examine the constitutionality of announcements or orders of the coup d'état. The Supreme Court, by the general legal principle that the courts have the authority to consider and adjudicate cases, had the authority, therefore, to consider which provisions of law shall be enforced and to what extent, as well as whether the provisions of such a law were contrary to or inconsistent with the Constitution. The Supreme Court has also adopted the Constitutional Conventions of Thailand under the Democratic Regime in considering and deciding the case content that the announcements or orders of the coup d'état were contrary to or inconsistent with the Constitution and were not enforceable. There were provisions contained in the Interim Constitution, the Constitution of the Kingdom of Thailand (Interim), B.E. 2534 (1991), that recognized the constitutionality of the announcements or orders of the coup d'état. The transitory provisions in the Constitution of the Kingdom of Thailand, B.E. 2534 (1991), even provided that the announcements or orders of the coup d'état were enforceable under the Constitution. However, the Supreme Court has ruled that the provisions of the said Interim Constitutions were merely general recognition that announcements or orders of the coup d'etat were enforceable as laws. The provisions did not provide recognition that they were enforceable, even though the contents were contrary to or inconsistent with the said interim constitution. When the Supreme Court judged that announcements or orders of the coup d'état were contrary to, inconsistent with, and unenforceable under the Interim Constitution, the transitory provisions of the Constitution that recognized the constitutionality of the announcements or orders of the coup d'état could not be enforced.

The aforementioned Supreme Court's judgments resulted in the drafting of provisions to contain more concise recognition of the legality and constitutionality provisions in the interim constitution and the subsequent permanent versions. Even though the Constitutional Court's Ruling No.5/2551 (2008) decided that the coup d'état's acts were constitutional, giving reasons that such announcements or orders were recognized in the transitory provisions of the Constitution, the Constitutional Court Ruling No.4/2561 (2018) and the Constitutional Court Ruling No.30/2563 (2020) later changed the precedents on constitutional adjudications. Even though there were transitory provisions of the Constitution that recognized the constitutionality of the announcements and orders of the coup d'état and their continued enforcement, the Constitutional Court had the power to examine the constitutionality of such announcements and orders. This confirms the principle of the supremacy of the Constitution and the protection of rights and liberties of the people according to the rule of law.

Constitutional Court Ruling No.1/2560 (2017), Constitutional Court Ruling No.1/2561 (2018), and Constitutional Court Ruling No.8/2562 (2019) have laid down the precedents on constitutional adjudications concerning transitory provisions that recognized the status of the officeholders according to the previous Constitution. They were provided to continue the performance of duties on the day a new constitution came into force under the transitory provisions as specified in the Organic Acts. It can be said that the Constitution has given the legislature the power of consideration which was in line with the purposes of transitory provisions. It was not different from the transitory provisions, that provided an exemption of some provisions of the Constitution; for example, specifying that the officeholders according to the old Constitution continued the performance of duties for a certain period because the qualifications under the old Constitution were inconsistent with the qualifications of the officeholders according to the new Constitution.

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Bibliography

Jaruwan Hengtrakul et al. **Manual for Legislative Drafting.** Bangkok: Office of the Council of State, 2008.

Borwornsak Uwanno. **Public Law, Volume 2, The Separation of Public and Private Law and the Development of Public Law in Thailand.** 3rd printing. Bangkok: Winyuchon, 2004.

Piyathida Wongsiriwat. **Effects of the Transitory provisions on the Principle of Supremacy of the Constitution: Case Study of Transitory provisions of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), B.E. 2550 (2007), and B.E. 2560 (2017).** Thesis for Master of Laws Faculty of Law, Chulalongkorn University, academic year B.E. 2559 (2016).

Act of Government *(Acte de gouvernement)*

Ruthai Hongsiri, Ph.D.
President of a Chamber of the Supreme Administrative Court

Supreme Administrative Court Order No.178/2550 (2007)

The five plaintiffs alleged that the signing process of Thailand-Japan Economic Partnership Agreement, which was performed by the five defendants; i.e., a public hearing regarding the impact of the said agreement in various areas, the resolution of the 4th defendant (the Council of Ministers) to propose the draft agreement to the National Legislative Assembly for general discussion at a meeting without voting in accordance with section 12 of the Constitution of the Kingdom of Thailand (Interim), B.E. 2549 (2006), and the resolution of the 4th plaintiff on March 27th, 2007, which approved the 5th defendant (the Prime Minister) and the negotiating representatives and group of persons involved in the signing of the said agreement between April 2rd and 4th, 2007, were unlawful. The plaintiffs requested the Administrative Court for a judgment or to order as follows: The five defendants to commence public hearings by strictly following the legal process and the public hearing on December 22nd, 2006 was void. The resolution of the 4th defendant (the Council of Ministers) to propose the draft agreement to the National Legislative Assembly for general discussion at a meeting without voting in accordance with section 12 of the Constitution of the Kingdom of Thailand (Interim), B.E. 2549 (2006) was void. The resolution of the 4th plaintiff on March 27th, 2007, which approved the 5th defendant (the Prime Minister) and the negotiating representatives and group of persons involved in the signing of the said agreement between April 2rd and 4th, 2007 was void and to be suspended. The 4th and 5th defendants had to conduct an investigation on the 2nd defendant (Minister of Foreign Affairs) and the 3rd defendant (Deputy Permanent Secretary of

the Ministry of Foreign Affairs) and other persons involved in illegal acts regarding the said agreement. However, after deliberation, it was seen that all five plaintiffs had a true intention for the Administrative Court to consider or issue an order stating that the resolution of the 4th defendant on March 27th, 2007, agreeing to allow the 5th defendant and the negotiation representatives, including the group of people involved in the signing of the Thailand-Japan Economic Partnership Agreement during April 2rd- 4th, 2007, was void and the signing of the said agreement be suspended to re-start the process regarding the mentioned agreement.

The Supreme Administrative Court considered and found that the Council of Ministers (the 4th defendant) was a group of persons designated by the Constitution of the Kingdom of Thailand (Interim), B.E. 2549 (2006) and the Constitution of Thailand under the Democratic Regime to be the user of state administrative power. The state administrative power used by the defendants to carry out various acts may have its source in Acts or other laws that have the same force as the Act or the Constitution. In the case where the 4th defendant used the state administrative power in accordance with the Act or other laws that were in force as the Act, whether it was the issuance of rules, orders, or any other acts to carry out administrative functions, they were to achieve results as specified in the mentioned laws. It can be considered that the 4th defendant was a "State official" according to section 3 of the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999). The disputes related to the use of the state administrative power in accordance with the Act, or other laws that were in force as the Act, to issue rules, orders, or other actions, or the neglect of the 4th defendant in performing or unreasonable delay in performing the acts accordingly, were indeed within the jurisdiction of the Administrative Court under section 9, paragraph one (1), (2), or (3) of the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999), as the case may be. *However, in the case where the 4th defendant*

used the state administrative power under the constitution to take any action, whether in parliamentary relations or international relations, the 4th defendant did not act in the capacity of a "State official" according to section 3 of the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999), but rather of a "constitutional organization." The dispute related to the 4th defendant's use of the state's administrative power under the Constitution to act in parliamentary relations or international relations, or the dispute related to the neglect of the 4th defendant to use the power to act or unreasonable delay to act, was not within the jurisdiction of the Administrative Court.

Whereas the resolution dated March 27th, 2007 agreed that the 5th defendant and the negotiation representatives as well as the group of persons involved in the signing of the Thailand-Japan Economic Partnership Agreement between April 2nd and 4th, 2007, the case where the 4th defendant used the state administrative power under the constitution to act in international relations was not the use of the state administrative power under the Act or other laws effective as the Acts to issue rules, orders, or any other acts to carry out administrative functions to achieve results as specified by the mentioned law. This case was, therefore, not a dispute within the jurisdiction of the Administrative Court. The Supreme Administrative Court agreed with the order of the Administrative Court of First Instance not to accept this case for consideration and to dispose of it from the case list. Therefore, the order of the Administrative Court of First Instance was upheld.

Note:

This is the matter of the five plaintiffs, who are both foundations and private sector. They disagreed with the fact that the government has negotiated and signed the Thailand-Japan Economic Partnership Agreement and viewed that it was an action that caused damage to Thailand. Therefore, the case was filed with the Administrative Court to revoke the Council of Ministers resolution approving the Prime Minister

and negotiation representatives to sign the mentioned agreement and to decide that the signing was void and to be suspended. The Supreme Administrative Court ruled that the Council of Ministers, in its capacity as a constitutional organization, used the state administrative power under the constitution to act in international relations. Therefore, this case was not within the jurisdiction of the Administrative Court and a dispute related to such action cannot be filed with the Administrative Court.

This case is different from most of cases in the past. The Administrative Court received lawsuits that sued to revoke the Council of Ministers resolution and ruled that the Council of Ministers is a committee which is empowered by law to issue rules, orders, or any resolutions that have an impact on individuals. Therefore, they are State officials according to section 3 of the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999).[1] Some of the Council of Ministers' resolutions are rules or administrative orders that aggrieved or injured or maybe inevitably aggrieved or injured and may be filed to the Administrative Court. Some cases are lawsuits to revoke rules. For example, the Council of Ministers resolution on April 21st, 1998, approved the criteria of the Farmers Welfare Committee for providing assistance to farmers affected by the construction of the dam as central criteria and procedures that can be used with every dam.[2] Some are lawsuits to revoke administrative orders. For example, resolutions to impeach or remove directors of state enterprises from office before the end of their term[3], etc. Such cases may be filed as cases of a dispute

1 Section 3 in this Act...

"State official" means... (2) quasi-judicial council or committee or person empowered by law to issue any by-law, order or resolution affecting persons;...

2 Supreme Administrative Court Judgment No. F. 10/2549 (2006)

3 Supreme Administrative Court Order No.286/2004 Cabinet resolution removing the two plaintiffs from their directorships. Airports Authority of Thailand and Supreme Administrative Court Order No.794/2008, Cabinet resolution for the Chairman and Members of the Government Pharmaceutical Organization to retire from office before the end of their term.

in relation to an unlawful act by a State official according to section 9 paragraph one (1), or as a dispute in relation to a wrongful act or any other liability of an administrative agency or a State official according to section 9 paragraph one (3) of the mentioned Act.

However, the judgment in this case is consistent with the judgment of the Supreme Administrative Court in the case filed with the court to revoke the Royal Decree to dissolve the House of Representatives B.E. 2549 (2006). The court ruled that disputes regarding the legality of the Royal Decree that fall within the jurisdiction of the Administrative Court are disputes concerning the legality of the Royal Decree enacted as a mechanism for the normal administration of state affairs or to determine necessary matters for the operation of administrative affairs as prescribed by various Acts, such as the Royal Decree designating land to be a national park, the Royal Decree specifying the powers, rights, and benefits of EGAT Public Company Limited B.E. 2548 (2005), or the Royal Decree specifying the time conditions for repealing the law on the Electricity Generating Authority of Thailand B.E. 2548 (2005). Nevertheless, the *Royal Decree to dissolve the House of Representatives to allow for the election of new members of the House of Representatives was neither enacted as a mechanism for the normal administration of government affairs nor as a determination necessary for the performance of administrative affairs as prescribed by various Acts. Rather, it is a mechanism for balancing power between the executive branch and the legislative branch in democratic governance according to the parliamentary system.* Disputes regarding the legality of the Royal Decree to dissolve the House of Representatives B.E. 2549 (2006) are, therefore, not within the jurisdiction of the Administrative Court.[5] Even though the plaintiffs filed a lawsuit with a request to withdraw the Royal Decree to dissolve

[4] Supreme Administrative Court Order No. F. 45/2549 (2006)

[5] This is in the same direction as the judgment of the Supreme Administrative Court in the black case No. F. 3/2549 (2006) and the red case No.F. 5/2549 (2006).

the House of Representatives B.E. 2549 (2006), only in the part where the election date was set for April 2nd, 2006, the specification of dissolving of the House of Representatives and the designation of the election date on April 2nd, 2006 were inseparable. Because if the Royal Decree to dissolve the House of Representatives B.E. 2549 (2006), did not contain the designation date for a general election, the royal decree would not be effective, and it would be considered that there was no dissolution of the House of Representatives. Consequently, disputes concerning the legality of the Royal Decree to Dissolve the House of Representatives B.E. 2549 (2006), in whole or in part, were not within the jurisdiction of the Administrative Court.[6]

The Supreme Administrative Court Order No.178/2550 (2007), therefore, set the two types of precedents for the nature of cases concerning the exercise of executive power that is or is not under the control or inspection of the Administrative Court. One type is a dispute case that is under the jurisdiction of the Administrative Court, i.e., the exercise of state administrative power by the 4th defendant according to the Acts or mother laws that are effective as Acts to issue rules, orders, or to act. Another type is a dispute case that is not under the jurisdiction of the Administrative Court, i.e., the exercise of the state administrative power according to the constitution. The latter may result from the exercise of state administrative power in two ways. The first is the exercise of state administrative power to act in parliamentary

[6] Supreme Administrative Court Orders No. F. 28/2549 (2006), No. F. 29/2549 (2006), and No. F. 30/2549 (2006) were ruled in the same manner. And later, when the Royal Decree was issued amending election dates, The Court also ruled in the Supreme Administrative Court Orders No. F. 36/2549 (2006) and No. F. 39/2549 (2006) that even though it was a lawsuit to revoke the Royal Decree amending the Royal Decree to dissolve the House of Representatives B.E. 2549 (2006) in the part that determines the date for the election of new members of the House of Representatives. But in legal terms, it is still considered a part of the Royal Decree to dissolve the House of Representatives B.E. 2549 (2006); therefore, there is a dispute regarding the Royal Decree to dissolve the House of Representatives, which is not in the judicial power of the administrative court.

relations, and the second is the exercise of state administrative power in international relations. The reasons why such action is not within the power of the Administrative Court are that the person who took such action was not "State officials" who exercise administrative power or carry out administrative functions according to section 3 of the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999).

The Constitutional Court also issued the Constitutional Court Ruling No.9/2549 (2006) concerning the enactment of the Royal Decree to dissolve the National Assembly, where the Ombudsman requested the Constitutional Court for consideration under section 198 concerning the unconstitutionality of the conduct of the Election Commission related to the general election of members of the House of Representatives from April 2nd, 2006, until the present. The court found that the Royal Decree to dissolve the House of Representatives B.E. 2549 (2006), was issued and came into force on February 24th, 2006, when the Prime Minister informed the King of the causes for enacting the Royal Decree and the constitutional provisions that provide the power to issue a Royal Decree under section 116 and section 221. According to section 116, it is within the royal prerogative to dissolve the House of Representatives and hold new elections for its members. This action must be carried out by royal decree, which must also specify a new date for the House of Representatives' general election, whereas section 221 provides for the royal power to issue royal decrees. Therefore, the Royal Decree to dissolve the House of Representatives B.E. 2549 (2006) consisted of two important provisions: Section 3, the House of Representatives shall be dissolved in order to enable an election of new Members of the House of Representatives, and section 4, a general election of Members of the House of Representatives shall take place on April 2nd, 2006. The provision to dissolve the House of Representatives was an act of the government. *The Prime Minister, as the head of the executive branch, advised the*

King to dissolve the House of Representatives, which was an exercise of executive power as specified in the parliamentary system to allow a balance of power with the legislative branch. This matter was a relationship between the National Assembly, which is the legislative branch, and the Council of Ministers, which is the executive branch. Therefore, it was truly the discretion of the executive branch that was not under the scrutiny of the Court, which is a judicial organ. In this decision, the Constitutional Court ruled by referring to the principles of foreign law. The Royal Decree to dissolve the House of Representatives B.E. 2549 (2006), concerning the dissolution of the House of Representatives was an act of the government and therefore was not subject to scrutiny by the court, which is a judicial organ[7] whether it is the Court of Justice, the Administrative Court, or the Constitutional Court.

These Supreme Administrative Court Orders and the Constitutional Court Ruling No.9/2549 (2006) therefore acknowledged that in Thai law there is jurisdiction regarding certain types of executive actions that the court does not have the power to investigate, that is, the cases cannot be brought to court. The Constitutional Court Ruling No.9/2549 (2006) is probably the first time that a Thai court has raised the principles of government action in a ruling by referring to foreign legal theories regarding "government actions." It is, therefore, an issue worth considering why the court has never raised these principles in deciding the case before the establishment of the Administrative Courts, the Constitutional

[7] Please see the personal opinion of Mr. Noppadon Hengcharoen, former Justice of the Constitutional Court, who viewed that the enactment of the Royal Decree to dissolve the House of Representatives is an executive action in the capacity of the government that exercises executive power according to section 116 of the Constitution, which is an action related to the relationship between the government or the executive branch and the House of Representatives, which is the legislative branch in theory. Concerning the actions of the government (theory of acts of government), in which the actions of the government are under political control, by political organizations and processes. Therefore, it is beyond the scrutiny of the judicial organization.

Court, and especially the Supreme Court. It may be because there were no lawsuits filed against this type of action in court.

One of the main reasons is that the Supreme Court does not need to refer to the aforementioned theory in deciding cases because cases in Thailand are filed at the Courts of Justice, whether it is a general civil case or a case that has characteristics of an administrative case.[8] A case brought to court must be a case in which there is a dispute arises in relation to the right or duty under the civil law or to exercise his or her right through a court. As a result, the private sector cannot bring disputes regarding this type of action to the Court of Justice. The court does not need to refer to the legal theory of government action in its determination because the exercise of state power is considered a government action. The negotiation or signing of treaties, the proposal of government legislation, or the issuance of a royal decree for opening or closing a parliamentary session often do not result in a direct argument against the rights and duties of the people. The private sector, therefore, cannot bring a case to the Court of Justice.

However, in practice, there have been cases regarding this type of action brought to the Court of Justice, such as in **the Supreme Court Judgment No.724/2490**, which concerns acts in international relations in declaration of war with other countries. The plaintiff in this case filed a lawsuit against the government of His Majesty the King. The Director-

[8] Under the Civil Procedure Code section 55, when a dispute arises concerning the rights or duties of any person under civil law, any person must exercise his rights in court. That person is free to submit his or her case to the civil court of competent jurisdiction. According to the provisions of the Civil Law and this Code, the case is therefore different from filing a lawsuit with the Administrative Court, which uses broad litigation criteria according to section 42 paragraph one, of the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999), by considering that the plaintiff is "a person who has received distress or damage or there may be trouble or damage that cannot be avoided" or not, which does not have to be to the point of being contested the legal rights and duties as provided in section 55 of the Civil Procedure Code.

General of the Public Prosecution Department claimed that the Thai government's alliance with Japan and declaration of war against England, America, and United Nations forces resulted in the allied military forces destroying the plaintiff's property and causing unnecessary damage. Such an act was a violation, and the plaintiff requested the court to compel payment of compensation for a rental house at a cost of 35,000 Baht. The Supreme Court confirmed the judgment of the Court of Appeals, which did not accept the case for consideration. The reason being that the person who will sue or be sued as a defendant in court must be a person, of which there are 2 types: namely, natural persons and juristic persons. However, to be a juristic person requires the power of the provisions of the law. Therefore, the government is not a juristic person according to the Civil and Commercial Code. As well, there are no other laws that define the government as a juristic person. Therefore, the government cannot be litigant or alleged to be a defendant in court. Other cases concerned the exercise of administrative power to take action in parliamentary relations. For example, in **Supreme Court Judgment No.103/2521 (1978)**, the plaintiff sued the Council of Ministers et al., arguing that the Royal Decree that was issued to dissolve the House of Representatives to hold a general election was not effective and void because the draft Royal Decree presented to His Majesty was not done by the National Assembly and without consent from the House of Representatives and requested that the elected members of the House of Representatives and the established the Council of Ministers were void. The Council of Ministers must stop its performance and assign the duties to the previous legal government. The Court of First Instance found that the plaintiff's case had no grounds to sue and, therefore, passed an order not to accept the plaintiff's complaint. The Court of Appeals upheld the decision. The Supreme Court found that because the Administrative Reform Council later took over the governing power of the country and ordered that the constitution be suspended, the

National Assembly and the Council of Ministers also ended. Later, on October 20th, 1977, the coup d'etat seized power to govern the country. In addition, on November 9th, 1977, there was a royal command to use the Constitution of the Government of the Kingdom, B.E. 2520 (1977), which is the supreme law on the governance of the country. Consequently, the plaintiff's complaint could not be enforced. It was, therefore, unnecessary to consider the appeals of the plaintiff. The Supreme Court issued an order of disposal of a case.

Considering the Supreme Court's judgment on these two matters, it still cannot be concluded whether or not the Courts of Justice will accept the plaintiff's complaint concerning these matters for consideration. In the first case, the Supreme Court upheld the refusal to accept the plaintiff's complaint for consideration because the government is not a juristic person and cannot be sued in court. In the second case, the Supreme Court dismissed the case from the registry because the National Assembly and the Council of Ministers have ended and there is no benefit to further consideration. The issue is whether the Court of Justice will accept these cases for consideration and adjudication, and on what legal basis, or will decide by referring to the theory of government action as decided by the Constitutional Court if there are no technical legal problems regarding being a juristic person or a party, or if the coup d'etat did not seize the governing power of the country before the Supreme Court's judgment.

This idea of government action is nevertheless present in some Thai laws, though. Take the Council of State Act, B.E. 2522 (1979), for instance, which established the Petition Council, a kind of Council of State, with the authority and responsibility as stated in section 7 (2), including the review of complaints under this Act's provisions and appeals of decisions made by a Committee established under another law concerning its legal matters[9] in order to prepare for the establishment

[9] Council of State Act 1979 section 7 (2) (a) and (c)

of the Administrative Court. In addition, complaints are the source of administrative cases[10] as provided in section 19, which stipulates the nature of complaints that the Petition Council can accept and consider, and section 20 limits the powers of the Petition Council not to consider certain types of complaints. Section 20 (1) provides an exemption for "complaints that have the nature of being policy directly for which the government must be responsible to parliament." This exemption covers some executive branch actions that lawmakers consider should not be subject to review by administrative dispute adjudicative bodies, either the Petition Council or even a court.[11] After that, when the Administrative Procedure Act, B.E. 2539 (1996) was enacted, section 4 of the said Act provided an exemption from the application of this Act to... (3) consideration by the Prime Minister or Minister on direct policy work... (6) operations regarding foreign policy. Some Thai lawyers see that policy work is what is known in international law as a political act. This is the performance of duties for which the responsibility cannot be measured by the law. Usually it is policy work, including the type of work that if a person holding a political position performs inappropriately, he must be responsible to parliament. That may eventually lead to a no-confidence debate. Foreign affairs are one aspect of political action *(acte de gouvernement)*, which is a sub-type of *acte politique* (Chaiwat Wongwattanasnant, 1997: 172-173).

[10] The Remarks at the end of the Council of State Act, B.E. 2522 (1979), states the reason for the promulgation of this Act: As the law on the Council of State has been enacted since B.E. 2476 (1933), various provisions are therefore outdated and inconvenient for the performance of government duties...

[11] Amorn Chantarasomboon gave his opinion that there are still some principles that are exempt from the control of the courts (Courts of Justice or Administrative Courts), namely the Act of State of the Anglo-Saxon countries and principles of government action (Act of Government) of the countries in the legal code group (Amon Chantarasomboon, "Should we still have an administrative court?" Journal of Law 2, Ch.4 (1971): 25.

In foreign countries, the principles of "government action" *(acte de gouvernement)* is a legal theory widely used in many countries, such as France. In France, the Council of State (Conseil d'Etat) refers to the said principles to limit the judicial power to control or inspect certain types of executive actions. The court will refuse to accept the complaint for consideration in the case against the actions of the executive branch. Originally, the Council of State would not investigate executive actions purported to be policy or politically motivated by citing the theory of political motivation (la théorie de mobile politique). Nevertheless, after the Prince Napoléon case,[12] or in a case that had a political reason, the court was therefore unable to accept the complaint for consideration. However, the French Council of State received this lawsuit for consideration and decided on the substance of the case to be dismissed. That exhibited that the French administrative court no longer used the theory of political motivation or political reasons as grounds for refusal to accept cases for consideration. After that, there were court decisions to limit the scope of executive actions that the court could not accept for consideration or consider as acts of the government. At present, the actions considered government actions are narrowed down into two main groups of executive actions.

[12] Prince Napoléon, Rec. 155 (CE 19 févr. 1875), this case is the case of Prince Napoléon-Joseph Bonaparte, relative of Emperor Napoleon III, appointed by decree of March 9th, 1854 as general (général de division) during the Second Empire. He filed a lawsuit with the Supreme Administrative Court of France because his name was struck from the list of generals in the annual report (annuaire militaire) after the fall of the Second Empire. Mr. David, the judge who spoke in this case, made a statement to the court that although the Council of Ministers' actions are, by nature, a matter of discretion by the executive branch the court cannot let the administration interpret and expand at will. It must be limited to matters in which the law deems it necessary to grant general authority to the executive branch in limiting the rights of private individuals for the more important benefit of the state. Therefore, such actions must have special characteristics that will be exempted from being subject to court scrutiny. It is not only because it is the action of the Cabinet or members of the government or an action that has been approved by the Cabinet or done for political reasons only. (Long, et al, Les grands arrêts de la jurisprudence administrative, 19e éd., (Paris:Dalloz, 2013), 16-17.

1. *Actions of the executive branch in relation to the parliament,* such as passing laws, promulgating decrees on opening or closing of the Assembly sitting, presidential order appointing justices to the Constitutional Court, order of the Prime Minister's declining to submit a request for an expedited decision in a case, etc.

2. *Actions of the executive branch in international relations*, such as actions related to negotiation and preparation of international treaties, actions related to the enforcement of international treaties, and foreign policy actions not related to the implementation of treaties, for example, using the power of the French representative in the protection of French people abroad, denying the residence of members of foreign diplomatic missions in France, the decision to use French military force in Kosovo, allowing British and American military aircraft to fly over the French border to conduct military operations in Iraq, etc., as well as acts of war.[13]

Republic of Italy, which is a country that uses a civil law system, accepted the principles of action of the government like France. The Council of State, or the Italian Supreme Administrative Court, and legal texts have named such actions L'atto politico. And, even though Article 113 paragraph one, of the Constitution of the Italian Republic provisions for the guarantee of citizens' rights in using their rights in court to challenge the actions of government agencies, section 7 of the Administrative Procedure Code, 2010 AD, expressly provides that actions or orders of the government in the exercise of political power are not under the jurisdiction of the Administrative Court. The legal textbooks separate the actions of the government into two parts. The first part includes actions in international relations. For example, Italy's decision not to sign the Convention on Confession of Sin, which was different from the Confession of Sin in Roman Catholicism,[14] or its decision to join an international agreement with the United States in the purchase of fighter planes,

[13] Rivéro & Waline, Droit administrative, 20e éd., (Paris: Dalloz, 2004), 279-282.

etc. The second part includes actions in domestic relations, such as the appointment of members of the regional council, the appointment of lifelong senators (five positions), the selection of justices of the Constitutional Court, presidential orders proposing voting, referendums on matters specified by the Constitution (Referendum costituzionale), etc. *The Supreme Administrative Court of Italy uses two criteria to determine whether or not an action is a government action. The first is subjective criteria (Carattere Soggettivo), which considers the actor or authority as an administrative organization of the state. The second is the state of affairs criteria (Carattere Oggettivo), which considers the intention of the action or use of independent power and whether or not the actor or user of power has independence in using discretion rather than administrative action, where the purpose or scope of the exercise of power will be limited in accordance with the law.*[15]

In addition to countries that use a common law system, the said principles are also used in countries that use the legal system of Anglo-Saxon countries, such as the United States and England. Only the term used may be different, such as when the term used in America is political questions,[16] while in England the term used is "act of state," which has

[14] Guido DI MUCCIO, "Atti politici e intese tra lo Stato e le confessioni religiose non cattoliche," Federalismi.it, n. 20/2013. https://federalismi.it/nv14/articolo-documento.cfm?artid=23330 (accessed on 30 October 2022)

[15] Francesco Caringella, Compendio di diritto amministrativo, 2 ed., (Roma: Dike Giuridica Editrice, 2010), 39.

[16] Kriengkrai Charoenthanawat et al., Government Actions: A Comparative Case Study Between Thailand, the French Republic, the Federal Republic of Germany, the United States, and England, Bangkok: P Press Company Limited, 2011), 235-236 including the actions of political branch and having the characteristics of genuine policy actions. Or it is about checking the actions of the president, which has the effect of limiting the power of the judicial organization to investigate acts of public administration policy, which the Supreme Court considers that it should be resolved through political means, such as whether or not the power of the president to revoke a treaty require advice and approval from the Senate. Or in the matter of dividing the electoral districts of the state.

a narrower meaning than the theory of "act of government" *(Acte de gouvernement)* according to French law. The content of the actions of the state focuses on the use of executive power in international relations,[17] which does not include the exercise of executive power concerning the political relationship between the government and parliament. However, the use of state power in the political relationship between the government and parliament, such as opening or closing parliamentary sessions, approving of the bill, appointing and removing ministers, awarding royal decorations, making treaties with other states, etc., is also not subject to judicial scrutiny. England claims the principles of common law in regard to the specific royal powers of the monarch (crown prerogatives)[18] which is a matter of common law in which the court will consider the scope of the use of such royal power. Moreover, such royal power may be changed or repealed by a law passed by the Assembly.[19]

In summary, it can be said that in many countries, whether they use a single court system or a dual court system, the court with jurisdiction over administrative cases will not accept cases for adjudication or limit their authority in controlling the actions or exercise of certain administrative powers called by the French lawyers "actions of government." The legal principles or legal techniques used may be different, but they have similar legal effects. That is, to allow the executive branch to have reasonable independence in certain matters that are "policy" or truly political matters deemed by the Court to not

[17] Amorn Chantarasomboon, "Should we have an administrative court?" 22. The author opined that the Act of State has a narrower meaning than the Act of Government of the countries using the legal code system because it has meaning only in relations with foreign countries.

[18] H.W.R. Wade, Administrative Law, 5th ed., (Oxford: Clarendon Press, 1982), 213-215, 350-351.

[19] Garner & Jones, Administrative Law, 6th ed. (London: Butterworth & Co (Publishers) Ltd., 1985), 12-13.

control or should be controlled by other means. For example, it is more appropriate to use political control by parliament or the people[20] in order to be in accordance with the principles of separation of powers, which is an important principle of governance in a democratic regime.[21]

Therefore, Supreme Administrative Court Order No.178/2550 (2007) and Constitutional Court Ruling No.9/2549 (2006) are important. Because it confirms the acceptance of the principles of government action in Thai law, consistent with the evolution of Thai law and foreign laws. It is also criteria for determining the scope or limitations of the Thai Administrative Court's power to control and inspect the actions or exercise of power by the executive branch.[22]

Based on the judgment of the Supreme Administrative Court Order No.178/2550 (2007), **actions that will be "actions of the government" in the view of the Thai Administrative Court must be an action or use of state power by the executive branch that meets two criteria:**

1. The use of the state administrative power according to the provisions of the constitution to carry out any act in the capacity of a constitutional organization. This is because the exercise of power by constitutional organizations such as the Council of Ministers may be the exercise of administrative power according to the Act or the Organic Law. It may also be a direct exercise of administrative power according to the provisions of the Constitution, which is an act of the government.

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20 Ruthai Hongsiri, Administrative Law, (Bangkok: Legal Education Center of the Thai Bar Association, 2004)

21 Kriengkrai Charoenthanawat et al., Government Actions: A Comparative Case Study between Thailand, French republic, Federal Republic of Germany, the United States, and England, V.

22 However, in subsequent cases, the Supreme Administrative Court has applied these principles in a flexible manner, not strictly following characters as specified in Supreme Administrative Court Order No.178/2550 (2007) (such as in Supreme Administrative Court Order No. 283/2550 (2007)

The exercise of administrative power in the first case is considered an administrative act that is still under investigation by the Administrative Court.

2. The use of the state administrative power according to the constitution only in two main matters: in parliamentary relation or international relations. The power of the court to inspect the administrative branch is limited to these two main matters. In addition, when considering the provisions of the Constitution of the Kingdom of Thailand, B.E. 2560 (2017), examples of government actions according to the provisions of the Constitution may be given as follows.

The use of state administrative power according to the constitution to act in parliamentary relations, such as enacting a royal decree opening or closing parliamentary sessions,[23] proposing the Council of Ministers' draft law to the House of Representatives,[24] enactment of a royal decree to dissolve the House of Representatives to allow for a general election,[25] the Prime Minister's certification in the case where not less than twenty members of the House of Representatives submit their names to propose a money bill,[26] and the Council of Ministers' statement of policy to the National Assembly with no vote of confidence,[27] the Prime Minister's notification the President of the National Assembly, requesting a general discussion to be held at a joint sitting of the National Assembly in the event that there was an important problem regarding the administration of the country that the Council of Ministers deemed appropriate to listen to the opinions of members of the House of Representatives and senators,[28] the Council of Ministers' request for a referendum on any

[23] Constitution of the Kingdom of Thailand, B.E. 2560 (2017), Section 122

[24] Constitution of the Kingdom of Thailand, B.E. 2560 (2017) Section 133 and Supreme Administrative Court Order No.283/2550 (2007)

[25] Constitution of the Kingdom of Thailand, B.E. 2560 (2017), Section 103

[26] Constitution of the Kingdom of Thailand, B.E. 2560 (2017), Section 133 paragraph two

[27] Constitution of the Kingdom of Thailand, B.E. 2560 (2017), Section 162

[28] Constitution of the Kingdom of Thailand, B.E. 2560 (2017), Section 165

matter that is not contrary to or inconsistent with the Constitution or a matter involving an individual or a group of persons,[29] removing ministers according to the Prime Minister's advice.[30]

The use of the state administrative power according to the Constitution to act in international relations, such as the power to declare war upon approval of the National Assembly,[31] authority to conclude a peace treaty, armistice, and other treaties with other countries or international organizations.[32]

However, some public law lawyers are of the opinion that using two criteria, i.e., the "organization" that acts must be a constitutional organization, and the exercise of power must be according to the provisions of such a constitution, makes the interpretation of the scope of the government's actions narrow and is not consistent with the criteria used in developed countries. The nature of the act criterion, *"la nature des actes,"* is used as the basis by developed countries. The action may be an action of the head of state, the Cabinet, the Legislative Assembly, or an organization or institution with legal authority to use power in the capacity of the "government" or "state," and such action does not always require specific provisions of the Constitution.[33]

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[29] Constitution of the Kingdom of Thailand, B.E. 2560 (2017), Section 166

[30] Constitution of the Kingdom of Thailand, B.E. 2560 (2017), Section 171

[31] Constitution of the Kingdom of Thailand, B.E. 2560 (2017), Section 177 paragraph one

[32] Constitution of the Kingdom of Thailand, B.E. 2560 (2017), Section 178 paragraph one

[33] Amorn Chantarasomboon, "the Central Administrative Court Order, Black case No.984/2551 (2008) is correct or not?? (Imposition of temporary protection measures. In the case of suing to revoke the joint Thai-Cambodian statement on the registration of Preah Vihear Temple)", Public Law Net, http://www.public-law.net/publaw/view.aspx?id =1265, accessed October 2021. The author considers that two conditions or principles ("organizations" that act must be a constitutional organization and the exercise of power by the organization must be the exercise of power according to the Constitution) written in the Supreme Administrative Court Order No.178/2550 (2007) (JTEPA case) has made the decision guidelines on this "matter" of the Thai Administrative Court going outside the framework of the theory of *acte de gouvernment* of developed countries, which depends on "The nature of the act - la nature des actes" not the person doing

Concerning why the courts have been unable to review these executive actions, French lawyers have different theories as follows:

The first theory is that government action does not exist. Nevertheless, there is no need to apply the theory of "action of the government." The reason the court cannot control or examine the legality of the said action is because the dispute related to it is not an administrative case by nature. The use of the executive power of the state in matters related to the National Assembly, whereby the Administrative Court has no power to control or examine the actions or exercise of powers of the National Assembly. The use of administrative power by the state in international relations is not under the jurisdiction of the Administrative Court because the Administrative Court only examines the administrative actions of state agencies and does not include the actions of other states or international organizations.[34] Therefore, these cases concerning the exercise of power by the executive branch are not administrative cases or cases under the jurisdiction of the Administrative Court.

The second theory is that the actions of the government are actually the use of "executive power" (fonction gouvernementale) of the executive branch, not "administrative power" and therefore

the action whether it must be an "organization (according to the constitution)" or an organization according to the Act, and using "characteristics (of the action)" as a criterion will have the following results: First, it limits the "actor" because it is an organization or institution that has legal authority. There are only a few organizations that can use power as a "government" or "state." What is seen here is the head of state, the government (the Council of Ministers), and the legislature. Even the Prime Minister himself as the "Prime Minister" does not seem to have the power to act as a "government" or "state". If we follow this concept even countries without a written constitution, such as England, can use the principles or theory of act of state. Second, by implication, vice versa, if the organization with authority is the "government" or "state" (Whether it is the head of state or the Council of Ministers and the Legislative Assembly) has committed an act that is not in the nature of a government act. That action It will be under the examination of the Administrative Court.

[34] M. Virally, L'introuvable acte de gouvernement, RD Publ., 2004: 283.

not under the control and inspection power of the Administrative Court.[35] When we consider the decisions of the Administrative Court and Constitutional Court,[36] there was a reasoning characteristic that was similar to this second theory. The ruling was that such action was either an exercise of executive power by the executive branch or a genuine exercise of power by the executive branch. Therefore, it was not an exercise of administrative power or administrative operations that are under the jurisdiction of the Administrative Court.

After the Supreme Administrative Court has decided to lay down the precedent in Supreme Administrative Court Order No.178/2550 (2007), the Supreme Administrative Court in subsequent cases has made decisions according to the said precedent, such as lawsuits regarding the draft of Chulalongkorn University Act, B.E.... was unlawful. The Supreme Administrative Court decided that it was a matter of proceeding in order for the Council of Ministers to propose a draft law in accordance with the provisions of the Constitution and that "It is an act of the government" that was not within the power of adjudication or an order of the Administrative Court.[37] Another case is the filing of lawsuit concerning

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35 M. René Chapus, quoted in Rivéro & Waline, Droit administratif, 20e éd., (Paris: Dalloz, 2004), 284.

36 Many justices of the Thai Constitutional Court have the same opinion as shown in their personal decisions that government actions such as using the power to dissolve parliament are an exercise of the power of the executive branch or a matter within the knowledge, opinion or decision of executive branch or the Prime Minister in particular. Therefore, it is not subject to judicial review. (Royal Gazette, Volume 123, Section 71 A, 12 July 2006, pages 69, 92, 203 and 251)

37 Supreme Administrative Court Order No.283/2550 (2007). In this case, the four plaintiffs alleged that processing of the draft Chulalongkorn University Act B.E. .... was not legal, especially in the part that a public hearing was not held. According to the regulations of the Office of the Prime Minister regarding public hearings B.E. 2539 (1996) which can be seen that the actions of the ten defendants, especially from the part of the 1st defendant to the 4th defendant, are preparations leading to the 9th defendant (the Council of Ministers) presenting the draft bill to the National Legislative Assembly. The effectiveness of the draft bill as law has an impact on the general public, including the four plaintiffs.

the Council of Ministers' resolution that did not approve the draft bill to return some forfeited assets according to the Prime Minister's order No. S.L.R. 39/2517, dated 1 August B.E. 2517 (1974), to Field Marshal Thanom Kittikachorn and his wife, Field Marshal Prapas Jarusathien and his wife, and Colonel Narong Kittikachorn and his wife, B.E. ...[38], etc.

It is worth noting that in the first case regarding the drafting of Chulalongkorn University Act, B.E. ..., the Supreme Administrative Court ordered not to accept the complaint against the 1st to the 4th defendants, namely: Chulalongkorn University Council, President of Chulalongkorn University Council, Chulalongkorn University, and President of Chulalongkorn University, which are not a constitutional organization and will not accept lawsuits filed in connection with the operations of the defendants in these cases as well. Even though it was not an action or exercise of power that is specifically guaranteed by the constitutional provisions. It is considered to be preparation or action related to the National Assembly's proposal of a draft law. This made the application of legal principles more flexible and had the effect of expanding the scope of actions, making it impossible to file a broader case with the Administrative Court.

Later on, nevertheless, a ruling cast doubt on the Supreme Administrative Court's continued application of this standard. The Preah

It will inevitably have to go through the legislative process which may be amended in the provisions from the draft. Therefore, the Act proposed by the 9th defendant can be seen that the suffering or damage that may occur to the four plaintiffs will result from the provisions of the Act that have been considered by the legislative body until they have been enacted into law. That is, in this case, it must be sued on wrongful act which is an argument and opposition to a genuine legislative action (currently the said draft Act has not yet been enacted into law). Even if considering only the operations before the said draft Act will be considered by the National Legislative Assembly, it is a matter of proceeding in order for the 9th defendant to propose a draft law in accordance with the provisions of the Constitution. which is the action of the government mentioned above, not matters of administrative acts

[38] Supreme Court Order No.301/2551

Vihear case is one that has generated a great deal of discussion among scholars. A lawsuit was filed by all 13 plaintiffs in the Administrative Court, requesting that the court revoke the resolution made by the 2nd defendant (the Council of Ministers) on June 17th, 2008, which approved the draft Thai-Cambodian Joint Communiqué on the registration of Preah Vihear Temple as a World Heritage Site of Cambodia, along with a map, and named the 1st defendant (Minister of Foreign Affairs) as the signatory to the joint statement. The 1st to the 9th plaintiffs have asked the court to specify protective measures or ways to grant interim relief prior to judgment during the Administrative Court of First Instance proceedings. Until the case is resolved or the court orders otherwise, it was requested that the court issue an order barring the two defendants from engaging in any activity that makes reference to or capitalizes on the 2nd defendant's resolution approving the joint statement of the Thai and Cambodian governments. The Administrative Court of First Instance's order, which included protective measures or procedures to offer interim relief prior to judgment until a decision to the contrary was made, was upheld by the Supreme Administrative Court. In this order, the Supreme Administrative Court ruled that even though the two defendants acted in their capacity as the government in matters related to international relations, such action affected the rights or legitimate interests of Thai people. In addition, the two defendants prepared a joint statement without receiving consent from the National Assembly in accordance with section 190 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2550 (2007.) The actions of the two defendants mentioned above were therefore unlawful resulting in the preparation of the joint statement was not subject to parliamentary scrutiny and an act other than the provisions of section 190 of the said Constitution that also affected the rights of the people. Therefore, it was an administrative operation of state officials under the jurisdiction of

the Administrative Court.[39] Therefore, it was an administrative operation of state officials under the jurisdiction of the Administrative Court. Considering the words used in this case, it can be seen that the Supreme Administrative Court did not reject the principles of government action but confirmed these principles by ruling at the beginning that "Even though the two defendants were acting in their capacity as the government in matters relating to international relations," which was an action of the government. However, in this case, the court viewed that there may be administrative actions that the Administrative Court may also investigate, which implied that such actions of the Thai government were actions or exercises of administrative power that may be considered separately from international relations matters, which was an action of the government. Because of the actions of the two defendants in preparing the statement jointly without having received approval from the National Assembly, according to section 190 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2550 (2007), the preparation of a joint statement was not within the power of parliamentary scrutiny. Therefore, it was an action that did not comply with the procedures and methods provided under section 190 paragraph three, of the Constitution of the Kingdom of Thailand, B.E. 2550 (2007), which violated the law and may be considered separately from the action of the government. The Administrative Court therefore has the authority to investigate such action on this issue.[40]

[39] Supreme Administrative Court Order No.547/2008

[40] Supreme Administrative Court Judgment No. A. 338/2553 (2010). The French Supreme Administrative Court has previously ruled using similar principles that even though it is an executive action in the matter of international relations but the action that is enforced international treaties are considered acts of government or is an act that may be separate from the treaty (l'acte détachable) which may bring a case to the Administrative Court. It depends on whether the problem is international relations or a matter of internal law specifically (pur droit interne) (Rivéro & Waline, 2004: 282). However, there are many scholars who disagree with this decision. For example, Prof. Borwornsak Uwanno, Ph.D., Faculty of Law Thammasat University, Prof. Nantawat Boramanand, Ph.D., etc. (Worachet Pakeerut. 2008 and Amorn Chantarasomboon. 2008)

After that, the Supreme Administrative Court has applied these principles in deciding subsequent cases. Some cases concerning the actions of the executive branch in international relations are: Cases filed regarding the conduct of the 1st defendant (Minister of Foreign Affairs) and the 2nd defendant (the Council of Ministers) related to the preparation of the Memorandum of Understanding B.E. 2543 (2000) (MOU) concerning requirements and master plan for the survey and establishment of land boundary markers between the Kingdom of Thailand and the Kingdom of Cambodia (TOR 2003). The resolution of the National Assembly that approved the framework for negotiating, the survey and establishment of the Thai-Cambodian land boundary along the entire length within the framework of the Thai-Cambodia Joint Boundary Commission and other mechanisms under this framework. The submission of the three minutes of meeting of the Thai-Cambodian Joint Boundary Commission, approved by the 2nd defendant for the National Assembly to consider and approve the draft interim agreement between the Government of the Kingdom of Thailand and Government of the Kingdom of Cambodia regarding border problems in the area (Thailand-Prasat Preah Vihear) (Cambodia-Prasat Priyawihir).[41] Another case is the case where the plaintiff's request for asylum to the United Nations High Commissioner for Refugees based in Thailand was not approved. A lawsuit was filed

[41] Supreme Administrative Court Order No.460/2011 ruled that the said action of the 1st defendant (Minister of Foreign Affairs) and the 2nd defendant (the Council of Ministers). In this case, it is an exercise of administrative power of the state by the executive branch according to the provisions of the constitution. When the provisions of section 190 of the Constitution of the Kingdom of Thailand determined the inspection process of the exercise of power by the executive branch in such matters to be examined and approved by the National Assembly as Legislative branch first which is political control according to the principles of democratic governance with the King as Head of State. The said actions of the two defendants are therefore an exercise of the power of the executive branch according to the provisions of the Constitution. It is not the exercise of administrative power according to law or the carrying out of administrative functions. This case is therefore not a dispute under the jurisdiction of the Administrative Court.

asking the court to have judgment or order refusing to comply with Agreement No.3703, which was an agreement between the United Nations and Thai Government regarding the headquarters of the Economic Commission for Asia and the Far East (ECAFE) in Thailand,[42] etc. Another case is a case concerning the actions of the executive branch in matters relating to the National Assembly, where the 1st defendant (Prime Minister) and the 2nd defendant (the Council of Ministers) resolved to approve the Budget Office's proposal on improving the annual budget calendar for the fiscal year B.E. 2563 (2020) and the criteria for improving the request for annual expenditure budget for the fiscal year B.E. 2563 (2020).The matter was approved by the 1st defendant before the 2nd defendant completed the policy presentation to the National Assembly. The resolution of the 1st defendant and the 2nd defendant was, therefore, only an adjustment of the request according to the budget framework of the previous government. It was not a new document prepared after the presentation of the policy of the 2nd defendant to the National Assembly, which was an unlawful act, etc.[43]

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[42] Supreme Administrative Court Order No. KR. 185/2562 (2019). The Court considers that Agreement No.3703, which is an agreement between the United Nations and the Thai Government regarding the headquarters of the Economic Commission for Asia and the Far East (ECAFE) in Thailand, are characterized as an agreement for international cooperation which is the use of power in international affairs of the Council of Ministers as executive branch. Therefore, it is not the exercise of administrative power or the carrying out of administrative activities within the power of the Administrative Court.

[43] Supreme Administrative Court Order No. KR. 28/2563 (2020), the Court considers that the actions of the 1st defendant and the 2nd defendant were preparations for the Budget Office to draft Budget Expenditure Act for the fiscal year B.E. 2563 (2020) to be proposed to seek approval from the 2nd defendant. The 2nd defendant will present it to the National Assembly for further consideration in accordance with section 133 paragraph one, in conjunction with section 141 paragraph one, of the Constitution of the Kingdom of Thailand, B.E. 2560 (2017), where the 2nd defendant is an organization that the Constitution of the Kingdom of Thailand specifies to be able to propose draft annual budget expenditure bills. This principle has been enshrined in various previous versions of the Constitution of the Kingdom of Thailand. This is because the 2nd defendant is

Therefore, at present it can be said that Principles of government action or actions of the certain types of executive matters that are not under the control or inspection of the courts is accepted by both Thai law and Thai courts. In some cases, the Administrative Courts and the Constitutional Court have made decisions by directly citing such legal principles. This principle covers the actions or exercises of power by the executive branch in two major matters: actions of parliamentary relations or international relations. Although the wording of Supreme Administrative Court Order No.178/2550 (2007) has a rather narrow scope as some lawyers have noted,[44] in practice, however, the Supreme Administrative Court has applied these principles in a flexible manner and ordered not to accept lawsuits against the organization's actions or officials related to such actions even if the organization or official was not a constitutional organization or there was no direct guarantee by provision of the Constitution.

Concerning **the legal consequences of deciding whether an executive's action is an action of the government,** that is, such actions are not under the control and scrutiny of the judiciary but by other means or other organizations, such as political control by the National Assembly or by the people, etc. *Therefore, in terms of Thai law the dispute concerning such action cannot be filed with the court,*

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a state administrative organization whose mission is to run the country. The fact that whether or not and when the 2nd defendant will propose which draft law or which matter to the legislative organization political responsibility towards the said organization. This is considered an action of the government that will be politically responsible to the legislature. It is a matter of political relationship between the administrative organization and the legislative organization of the state. That is not within the power of inspection of judicial state organization. The Administrative Court was therefore unable to accept the complaint for consideration.

44 Amorn Chantarasomboon, "Order of the Central Administrative Court Black case number 984/2551 (2008) is correct or not? (Imposition of temporary protection measures. In the case of filing a lawsuit to revoke the joint Thai-Cambodian statement on the registration of Preah Vihear Temple)".

whether the Constitutional Court, courts of justice, or administrative courts regardless of whether the lawsuit is against unlawful actions or violations according to section 9 paragraph one (1) or (3) of the Act on Establishment of Administrative Court and Administrative Court Procedure B.E. 2542 (1999).[45] However, in foreign countries, even if the injured person has no right to sue for damages from the state even though it is a violation, but the French Supreme Administrative Court has decided *in the Compagnie générale d'énergie Radio-Electrique*[46] that those who suffer damage from enforcement of a treaty which is an act of government have the right to demand compensation from the state under the rules and conditions determined by the court. This is other liabilities of the state based on the principles of equality before public offices (Le principe de l'égalité devant les charges publiques). This is to ensure fairness to persons who have suffered damage due to the use of state power.[47]

In summary, it can be seen that the principles or theory regarding the actions of the government (or government actions) have a universal characteristic and are used in both Thai and foreign courts. The mentioned principles do not mean that the exercise of certain executive powers

[45] Borwornsak Uwanno, Commentary on Public Law (Volume 3), (Bangkok: Nititham Publishing House, 1995), 285. For example, Supreme Administrative Court Orders No.283/2550 (2007) and No.301/2551 (2008), in which most of the cases filed usually ask the court to decide that such executive action is unlawful and request to suspend or revoke that action, such as Supreme Administrative Court Orders No.178/2550 (2007), No. F. 28/2549 (2006), No. F. 36/2549 (2006), KR. 185/2562 (2019), KR. 28/2563 (2020), etc.

[46] Compagnie générale d'énergie Radio-Electrique, Rec. 257 (CE Ass. 30 mars 1966)

[47] Long, et al, Les grands arrêts de la jurisprudence administrative, 563-570.The said right to receive compensation is subject to two conditions: the first is the said international treaty and the laws that allow in accordance with the said treaty. There must be no intention not to provide compensation to those who are injured in this case. The second is that the damage must be done to the specific person who is harmed (spécial) and must be a damage that has characteristics that is more serious than normal (anormalment grave).

cannot be examined. It should be examined through other methods or means other than the courts, such as the legislature or by the people. At present, the Administrative Court has already decided and laid down the principles for determining which actions will be considered government actions, even though some cases are still difficult to determine.[48] Therefore, we have to wait for the evolution of this matter.

[48] Such as declaring martial law and the announcement of the end of martial law in which the Supreme Administrative Court Order No. F. 42/2551 (2008) ruled that it is the use of power to carry out military operations in order to protect and maintain the security of the Kingdom from both external and domestic threats. This is the use of power that has special characteristics in the matter of Security of the Kingdom according to the Constitution of the Kingdom of Thailand and the Martial Law Act B.E. 2547 (2004), have specified criteria and practices in particular. Therefore, it is not an administrative act that the Administrative Courts can accept the complaint for consideration. The court did not decide whether it was an action of the government or not, etc. For this reason, some academics proposed to amend the law by giving the power of the Constitutional Court to decide whether any action is an action of the government (Ass. Prof. Kriangkrai Charoenthanawat, Ph.D., and colleagues, 2554 (2011): 206-208). While in the current situation the Administrative Court is the main court for deciding this issue because of this type of litigation often is a lawsuit regarding an action or exercise of power by an administrative agency or government official that is within the jurisdiction of the Administrative Court, and the Thai administrative court procedure uses broad litigation criteria. The damage does not have to be severe up to dispute of legal rights or duties being contested. If a person suffered the damage, he has the right to sue. While suing the case before the Court of Justice is often limited by section 55 of the Civil Procedure Code, the same is true for bringing cases to the Constitutional Court which has to be the case that the constitution or law provides.

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Bibliography

Book

Francesco Caringella. 2010. Compendio di diritto amministrativo. 2 ed., Roma: Dike Giuridica Editrice.

H.W.R. Wade. 1982. Administrative Law. 5th ed. Oxford: Clarendon Press.

J.F. Garner & B.L. Jones. 1985. Administrative Law. 6 ed. London: Butterworth & Co (Publishers) Ltd.

Long, Weil, Braibant, Delvolvé & Genevois. 2013. Les grands arrêts de la jurisprudence administrative. 19e éd., Paris:Dalloz.

M. René Chapus cited in Rivéro & Waline. 2004. Droit administratif. 20e éd., Paris: Dalloz.

M. Virally. 1953. L'introuvable acte de gouvernement. RD Publ.

Rivéro & Waline. 2004. Droit administratif. 20e éd. Paris:Dalloz.

Weil, Braibant, Delvolvé & Genevois. 2013. Les grands arrêts de la jurisprudence administrative, 19e éd. Paris: Dalloz.

Kriengkrai Charoenthanawat et al. 2011. Government actions: a comparative case study between countries. Thailand French Republic Federal Republic of Germany United States and England Courthouses Constitution. Bangkok: P Press Company Limited.

Chaiwat Wongwattanasan. 1997. Administrative procedures law. Bangkok: Jirarat Publishing.

Borwornsak Uwanno. 1995. Explanation of public law (Volume 3). Bangkok: Nititham Publishing House.

Ruthai Hongsiri. 2004. Administrative law. Administrative law study guide. Bangkok: Bureau Legal training of the Thai Bar Association.

Amorn Chantarasomboon. 1971. "Should we have an administrative court?" Journal of Law, Year 2, Issue 4.

Electronic Media

G. DI MUCCIO. (2013). Atti politici e intese tra lo Stato e le confessioni religiose non cattoliche. in Federalismi.it. n. 20/2013. Accessed October 2021. Available from https://federalismi.it/nv14/articolo-documento.cfm?artid=23330

Amorn Chantarasomboon. (2008). Order of the Central Administrative Court. Black case number 984/2008 is correct or not?? (Imposition of temporary protection measures in the case of filing a request to revoke the joint statement of Thailand – Cambodia Registered "Prasat Preah Vihear" accessed in October 2021. Accessible from http://www.public-law.net/publaw/view.aspx?id=1265

Worachet Phakheerat. (2008). Government actions and orders of the Central Administrative Court. Black case number no.984/2008. Accessed in October 2021. Accessible from http://public-law.net/publaw/view.aspx?id=1264

Legislative Process

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Chapter 8: Legislative Process

The legislative process is the heart of the exercise of legislative power in a liberal democratic state (Vinx, 2021, pp. 437). Attaching great importance to the value of representative democracy, the process focuses on the respect for people's rights through deliberations to ensure participation in country government (Dixon, 2018, pp. 135). In other words, under a liberal democratic state, the legislature, as a people's representative organization (Aguja and Born, 2017, pp. 65) performs the authority validly (Benoit and Rozenberg, 2020, pp. 143) via different processes involving rules, procedures, and actions as provided by the Constitution to ensure that the exercise of different legislative powers is always an output of decision-making via thorough and comprehensive deliberations on an equal basis (Cammack, 2020, pp. 9) among people's representatives.

1. Quorum

Constitutional Court Ruling No.2/2551 (2008): Case of an insufficient quorum

The National Legislative Assembly deliberated on, and voted to adopt, the principles of the Organic Bill on the Ombudsman, B.E. ... and the Bill on the Office of the Ombudsman, B.E. ... in the first reading. Then, it established an Ad-hoc Committee to deliberate on these two bills. After completing considering the bills, the Ad-hoc Committee presented a report to the President of the National Legislative Assembly to further present to the National Legislative Assembly. After the National Legislative Assembly deliberated on the bills reviewed by the Ad-hoc Committee,

and the President of the National Legislative Assembly submitted the Organic Bill on the Ombudsman, B.E. ... to the Constitutional Court to determine its constitutionality under section 141 of the Constitution of the Kingdom of Thailand.

The Constitutional Court considered that on the day of voting by the National Legislative Assembly for the first reading 1: Adoption of the principles of the Organic Bill on the Ombudsman, B.E. ..., out of a total of 242 members of the National Legislative Assembly, 212 members signed up to attend the meeting. Nonetheless, the National Legislative Assembly Voting Record submitted by the President of the National Legislative Assembly to support the Constitutional Court's deliberation revealed that the sitting of the National Legislative Assembly to vote in the first reading was attended by only 86 members, all of whom approved, with none disapproving, abstaining from voting, or voting 'no vote.' As this number was below 121, the quorum was not constituted and the proceedings could not be deemed as a resolution of the National Legislative Assembly.

The quorum of the National Assembly is clearly specified in the Constitution, which any other law or National Assembly's Rules of Procedures cannot be contrary to, or inconsistent with. Referring to the National Assembly's Rules of Procedures or any convention to avoid conformity to the provisions in, and intent of, the Constitution is prohibited. The Rules of procedure of the National Legislative Assembly, B.E. 2549 (2006), clause 18 paragraph two, states: "Once no less than half of all members sign up to attend a meeting, this constitutes a quorum." This provision is related to opening a meeting only, which states that a meeting of the National Legislative Assembly can be opened once no less than half of its existing members sign up to attend the meeting; however, once the meeting is opened, in the voting session, as a result of deliberations and expression of intent in the form of resolutions of the National Legislative Assembly's meeting, the quorum must be maintained

throughout the deliberation and voting sessions. This does not mean, that once the members sign up to attend the meeting and the meeting is opened, their presence and the number of members present at the meeting are not taken into account. If this is not taken into account, a consequence is that once the meeting is opened, despite only a few members remaining at the meeting, they may cast votes which may constitute majority votes, which is not the intent of the Constitution.

Claiming the privilege not to vote following section 130 of the Constitution is a different matter from the quorum, which must be composed of no less than half of the members of the National Assembly. Despite having the privilege to vote to approve or disapprove, abstain from voting, or vote no vote, the members who don't wish to vote must be present at the meeting to express their intent that their opinions must appear at the meeting. Once the voting in the first reading, on principle adoption, was not in accordance with section 126 paragraph one of the Constitution, it became unconstitutional, resulting in the enactment of the Organic Bill in the first reading being unconstitutional and failing to proceed with the second and third readings.

Remarks:

1. The Constitutional Court Ruling involved determining the constitutionality of the bills before their promulgation under the Constitution of the Kingdom of Thailand, B.E. 2550 (2007). This may be one of the first rulings by which the Constitutional Court set the precedent for determining the constitutionality of the legislative process by focusing on the "quorum" of the National Legislative Assembly, which at that time was an "element" of the legislative process pursuant to the Constitution. This has guided the rulings by the Constitutional Court Rulings for subsequent cases concerning the constitutionality of the legislative process. The Constitutional Court Rulings No.3/2551 (2008), No.4/2551 (2008), No.8/2551 (2008), No.16/2551 (2008), No.17/2551 (2008), and No.15/2552 (2009) were consistent with the said ruling.

2. There are some technically interesting aspects in the Constitutional Court Ruling, which resulted in lapsing of the Organic Bill on the Ombudsman, B.E. ..., which had undergone unanimous votes in three readings. Given the reasons behind the Constitutional Court's ruling, the legislative process involved a case where there were only 86 members of the National Legislative Assembly attending the meeting, which was less than half of its total number (121 out of 242). This failed to meet the conditions prescribed in section 120 of the Constitution, which stipulates that a meeting of the House of Representatives and the Senate shall consist of no less than one-half of the total number of existing members of each house to reach a quorum for the legislative process (different from interpellation). Thus, this bill was an output of the legislature lacking adequate deliberation, which is contrary to the Constitution's main purpose of defining "a quorum." The Constitutional Court's explanation is consistent with the ideas and principles of constitutional law and parliamentary law. The concept of "quorum" arose at the same time when the concept of "Democratic Government" was developed, especially "Representative Democracy," whereby the parliament serves as the core political institution that acts on behalf of people, who have limitations involved in forming a collegiate body. In other words, the concept of "a Quorum of Majority" can guarantee that actions taken by the legislature will be subject to prudent, clear, and fair deliberations to bring about the decisions collectively made by people's representatives – members of parliament, in response to public interests (DÖring, 1995, pp. 40), not personal interests. Thus, the principle of "a Quorum of Majority" is an important condition for performing the duties of the parliament (Madison, 1778).

3. Another issue worth deep dives into is the fact that the insufficient quorum of the National Legislative Assembly caused the Constitutional Court to rule that the bill should lapse. This manifested that the Constitutional Court considered a "quorum" to be an important

condition or element of the constitutional legislative process and considered that exercising legislative power to enact laws with inadequate deliberations among the members of parliament was characterized as a flaw that was so serious that the bill should lapse. This issue can be explained based on the constitutional theory that legislative power is important in the democratic regime because of its close linkage to people through their representatives. It can be said that legislative power exercised by the parliament must be derived from the acceptance of the people's representatives, which demonstrates the acceptance by their people (Locke, 1823, pp. 172). If the elected representatives fail to perform duties or to raise voices on their behalf of, and for, their people during deliberations of laws, this will have a serious effect on the "principle of chain of legitimacy," which connects the representatives with their people (Patberg, 2016, pp. 635). An issue is how law, as a product of the parliament's exercise of legislative power, can be considered as being endorsed by, or following, the people's will. This explanation is consistent with the German Federal Constitutional Court Ruling No.2 BvR 739/17 (2020), concerning granting the legislative power to the House of Representatives (Bundestag) to ratify international treaties. In this case, the German Constitutional Court ruled that such act was unconstitutional because of an insufficient quorum, reasoning that the insufficient quorum, as a procedural issue, led to a failure to transfer the sovereignty of the people to their representatives to perform the ratification function. This was because the legitimation context (legitimations zusammenhang) between the representatives and people was missing. If the members of the House of Representatives as an "unqualified majority" were allowed to take action, it would be characterized as being "beyond the powers" *(ultra vires)*, which would be against the people's will and contradict the principle of "people sovereignty," which was endorsed in the German Constitution. It is noteworthy that apart from constitutional law, administrative law attaches great importance to the quorum, especially

for duty performance of the Ad-hoc Committee holding the power to deliberate on administrative cases. The Administrative Procedure Act, B.E. 2539 (1996), section 79, stipulates that a quorum is constituted by at least half of the Ad-hoc Committee members. If the quorum is not achieved, the resolution passed by the Ad-hoc Committee will be unlawful, based on the Supreme Administrative Court Judgment No. A. 245/2552 (2009) and A. 650/2555 (2012).

4. Another point worth reflection and understanding is whether, under the provision of the Constitution requiring no less than half of all members to form a quorum, the members must be present throughout the meeting. The Constitutional Court explained that the members constituting a quorum had to be always present during the deliberation and voting on law enactment. This does not mean, that once the members sign up to attend the meeting and the meeting is opened, their presence and the number of members present at the meeting are not taken into account. If this is not taken into account, a consequence is that once the meeting is opened, despite only a few members remaining at the meeting, they may cast votes which may constitute majority votes, which is not the intent of the Constitution. The Constitutional Court's opinion is similar to that of the Supreme Court, as witnessed through the Supreme Court Judgment no.3623/2527 (1984) for the case of a shareholder meeting, where once its quorum was reached and the meeting was opened, some company directors left the meeting, and finally, there was a voting session. The Supreme Court believed that the resolutions passed by the meeting were unlawful because the quorum was not reached. An observation derived from the Constitutional Court's explanation about the quorum can be argued that this conduct might be inconsistent with the principles of parliamentary law and duty performance in other countries, e.g. England and the United States, which act based on the principle of "Presumption of Quorum" (Deschler, 1977, pp. 292) so long as it is not evident that the members at the

meeting are so sparse that the insufficient quorum is spotted. If this is the case, the members are likely to raise this issue, thus leading to counting the quorum (May, 1844, pp. 228) to determine if they will proceed. To be clearer, in the eyes of the UK Parliament and the United States Congress, once a quorum is sufficient for opening a meeting for legislative deliberation, the members of parliament are not required to stay throughout the deliberation session (McKee, 1897, pp. 504) as this is against the nature of the legislature's work. In practice, the members may need to leave the meeting to perform other legislative tasks in the parliament. Accordingly, they divide the parliamentary quorum into two types–the opening quorum and voting quorum (Escola do Legislativo, 1997, pp. 66). This means during the voting session, if any members of parliament leave, and then return to, the meeting, they can cast a vote, which is in line with the Constitution's purpose, which attaches great importance to parliamentary votes (Rybicky, 2020, pp. 2). This principle exists to prevent and address legislative obstruction, which occurs by nature or with the intention of any side of politicians (Wawro and Schickler, 2010, pp. 302), thus affecting the efficient functioning of the legislature to achieve the Constitution's objectives as a whole.

2. Debates

The Constitutional Court Ruling No.15-18/2556: Case of banned and adjourned debates for parliamentary minority

General Somjed Boonthanom and others, 1st applicant, Mr. Wiratana Kalayasiri, 2nd applicant, Mr. Sai Kangkawekin and others, 3rd applicant, and Mr. Peerapan Saleeratwipak and others, 4th applicant, submitted a total of four applications to the Constitutional Court for a ruling that the President of the National Assembly, 1st respondent, Vice-President of the National Assembly, 2nd respondent, Members of the House of Representatives and Senators, 3rd to 312th respondents, had committed acts under section 68 of the Constitution. It was stated that the 3rd to

312th respondents had acted together in submitting a petition to propose Draft Amendments to the Constitution of the Kingdom of Thailand (No. ...) B.E. .... (amendments to section 111, section 112, section 115, section 116 paragraph two, section 117, section 118, section 120, and section 241 paragraph one, and revocation of section 113 and section 114) to the 1st respondent, which resulted in a change in the democratic form of government with the King as Head of State and aimed at acquiring national government powers by unconstitutional means. The 1st and 2nd respondents, taking turns to serve as the Presiding Chairman of the Procedures, denied the rights of 57 members, including those requesting debate in the first reading, those requesting proposing amendments, those reserving amendments, and those reserving opinions, claiming that those opinions were contrary to relevant principles despite no debate yet. They used the majority votes to adjourn the debate.

The Constitutional Court considered that although debate adjournment was subject to the Presiding Chairman's discretion and the majority had the right to vote to adjourn the debate, the use of discretion and the majority votes shall not deny the right to perform the duties of members of parliament or ignore the minority's opinions. Carrying out rushed adjournment of the debate and the meeting to call for votes and scheduling only one day for amendment proposal featured abusing power and favoring the majority in an unfair manner, which were against the rule of law and the Rules of Procedures and showed a lack of impartiality. The conduct was inconsistent with section 125 paragraph one and two of the Constitution and the rule of law under section 3 paragraph two of the Constitution.

Remarks:

1. In this ruling, the Constitutional Court's adjudication involved setting the precedent pertaining to the importance of debates among the members of parliament, especially the minority. This is linked to two key issues – Members of parliament as holders of the right to debate

and the Speaker, who moderated the meeting and ensured that the members could proceed with the debate. This was witnessed through the ruling for a subsequent similar case, which was the Constitutional Court Ruling No.1/2557 (2013), which was issued based on this precedent.

2. The Constitutional Court ruled that the fact that the minority members of parliament, who, in this case, consisted of members of the House of Representatives from the opposition parties and some senators, were blocked from debating in the parliament because of a limited number of days for proposing amendments, majority members of parliament' proposal to adjourn the debate, or the Speaker's exercise of discretion to prohibit debate, was unconstitutional. This was because this conduct was characterized as unlawful exercise of power of the Speaker and majority members of parliament. The main reasons provided by the Court consisted of ignoring the voices of the minority members of parliament and violating the rights to perform the duties of members of parliament. In summary, the Constitutional Court pointed out the illegitimacy of taking a side without respecting the minority. This is in line with technical principles and is worth elaboration. Given the fundamental concepts and principles, a National Assembly in the democratic regime should be characterized as a "Deliberative Assembly," whereby the National Assembly always performs duties through deliberations among its members, who serve as people's representatives to ensure the utmost interests of the people (Mezey, 2008, pp. 34). For this reason, Parliamentary Debate is the key to the performance of the legislature (May, 2011, pp. 235-236) since it will result in prudent decisions based on complete, comprehensive information through recommendations, deliberations, examinations, etc. Through the deliberative assembly in the democratic regime, the voices of minority members must be respected (Uhr, 1998, pp.230).

3. An emphasis on the importance of minority members of parliament, who should enjoy the right to debate as the majority

members in the democratic regime was discussed by the Thai Constitutional Court in this ruling. This is in line with what the German Federal Constitutional Court stated in Case 2 BvL 1/09 regarding the legislative procedure and in Case 2 BvE 4/14, respectively, which emphasized that a key element of Parliamentary Democracy is all parliamentary members' enjoyment of not only the right to vote but also the right to debate on lawmaking. A debate provides the parliamentary minority with the opportunity to express opinions and perspectives different from those of the majority, which is an essential element. In other words, once all members of the legislature have the right to debate, this confirms the existence of the "Principle of Effective Opposition" in the Constitution, responsible for efficiently checking the majority's performance.

4. In fact, the Constitutional Court Ruling for this case showed an effort to protect the minority members of parliament's right to debate against blocking by majority members' act. According to the parliamentary law theory, this Constitutional Court's ruling features an effort to lay down the foundation for the Thai Parliament's functioning based on the principle of Legislative Rationality (Oliver-Lalana, 2013, pp. 135) by passing laws through decision-making of meeting attendees based on all facts derived from the debate. The Constitutional Court considered that the right to debate of all members of parliament is not sufficient; there must be a "right defender" like the Speaker of the National Assembly, who must act with impartiality as required by the Constitution. It is noteworthy that the Court defined the preferable role of the President of the National Assembly as the Presiding Chairman of the legislature meeting. The Court believed that the President and Deputy President of the National Assembly did not perform duties impartially since they did not provide the opportunity for the parliamentary minority members to debate, which violated section 125 of the Constitution (Constitution of the Kingdom of Thailand, B.E. 2550 (2007)), which prescribes that duties must be performed with impartiality (Current Constitution, B.E. 2560

(2017) in section 80). The Speaker's impartiality appears as part of the principle of Speaker's impartiality and fairness, as a general constitutional principle of the legislature (Alder, 2002, pp. 268), which requires that the Speaker as "the head of the procedures and the legislature" be unbiased or involved in any political parties (non-partisanship) (Bäck, 2021, pp. 198) even though he or she was or is a member of a political party. This is witnessed through the fact that the Speaker does not vote in a meeting unless there are equal votes. Furthermore, the principle requires the Speaker to moderate the debates to ensure orderliness, thoroughness, and equality. Ultimately, the principle of "political impartiality and fairness" (Barnet, 2002, pp. 461) serves as a mechanism and a guarantee that the decisions made by the legislature are independent, prudent, and comprehensive decisions of the members of parliament as peoples' representatives in order to be in line with the intent of the Constitution and law to respond to the true public interests. The South African Constitutional Court in the case *"United Democratic Movement v Speaker of the National Assembly and Others (2017),"* in which parliamentary minority members filed a request with the Court to deliberate on the Speaker's roles discussed in this principle, suggesting that the Speaker's impartiality and fairness are crucial factors in the decision-making of members of the National Assembly to serve the best interests of people. Although it is generally accepted that the Speaker must perform duties impartially, once any questionable actions occur, one technical question that needs to be reflected on about suitability is whether the judicial body should adjudicate on the impartial performance of the Speaker, who is on the political process. If the judicial body is allowed to do so, the question is whether this conflicts with the principle of separation of powers (Reddy and Bhargava, 2020, pp.337). This issue has been heavily debated among scholars in India after the Supreme Court of India considered the case *"Keisham Megchachandra Singh v. the Hon'ble Speaker,"* where parliamentary minority members filed a

request with the Court to consider a lack of impartiality of the Speaker for delaying the deliberation of an application to resign from parliamentary membership, which might give the government political advantage. The Court explained and emphasized that the Speaker had to perform duties with impartiality, and it ruled that the Speaker had to expedite the deliberation of the resignation application. Such technical criticisms were also found in South African countries (Cachalia, 2016, pp. 382).

5. Another question worth further analysis is whether the "principle of impartiality and fairness" of the Speaker in the Constitution appears in other laws. In administrative law, the principle of impartiality appears in section 16 of the Administrative Procedure Act, B.E. 2563 (2020). The Supreme Administrative Court Ruling No.A795/2555 (2012) portrayed something similar to the case of impartiality issue of the Speaker. In this case, an applicant requested the Supreme Administrative Court to revoke the order to dismiss him from civil service in the position of Labor Technical Officer. The Court regarded that earlier Mr. Pho had been appointed as the Chairman of the Subcommittee on Disciplinary Investigation against the applicant and Mr. Pho believed that the applicant committed a serious disciplinary misconduct and should be dismissed from civil service. Later, Mr. Pho attended a meeting with the Subcommittee on Civil Servants of a government Department as a member of the Committee on Consideration of Disciplinary Investigation Results. The Court considered that because Mr. Pho had chaired the Subcommittee on Disciplinary Investigation against the applicant, he should have an adversarial opinion against him, and this might lead to a lack of impartiality in administrative consideration. The Court believed that the order to penalize the applicant by dismissing him from civil service was unlawful. Although the details of this case are different from those provided in the constitutional cases in relation to the Speaker's impartiality, a careful examination suggests that the administrative law system requires the administrative body, which has the authority to issue administrative orders, to perform duties with

impartiality, without subjectivity by prohibiting the involvement in the matters in consideration. This aims to ensure that administrative orders will be issued to achieve the utmost public interests and fairness in line with the intent of law (Woraphot Wisarutpit, 2019, pp. 73-74) with the highest degree of "objectivity." Its core concept does not differ from the true objective of the Constitution as described earlier since it also links to the principle of public law.

6. An observation from the case ruling is the fact that the Constitutional Court's ruling that the Speaker and the majority members used the majority votes while ignoring the minority votes was characterized as an unfair exercise of power, thus violating the rule of law under section 3 paragraph three, of the Constitution. This indicates that democracy includes the rule of law. More simply speaking, the Constitutional Court believed that democracy and the rule of law are the same things, and the rule of law is one component of democracy. Technically, democracy and the rule of law are not the same things, as explained by Hans Kelsen (Bongiovanni, 2007, pp. 304), but they are two different principles complementing each other in a liberal democratic state, or the so-called democratic state under the rule of law (May and Winchester, 2018, pp.38).

3. Voting

The Constitutional Court Ruling No.15-18/2556 (2013): Case of self-identification and piano voting

Concerning filing a motion to amend the Constitution, which involved self-identification for quorum counting before voting to approve the draft Constitutional Amendment, some members of parliament inserted the members of parliament ID cards of others into the card reader machine and pressed the self-identification button to vote on behalf of the owners of the cards for quorum counting who were not present in the meeting room. Thus, the quorum counting and voting results

were factually incorrect. This act featured casting more than one vote, which violated section 126 paragraph three of the Constitution. Depicting a failure to perform duties with integrity and to serve the interests of Thai people, this act did not follow section 122 and section 126 paragraph three of the Constitution. Thus, the Constitutional Court was requested to decide the case and issue an order indicating that the deliberation of the Draft Constitution of the Kingdom of Thailand, Amendment (No. ...) B.E. ... is contrary to, or inconsistent with, the Constitution, and must be void.

The applicants had eyewitnesses to testify and important evidence to present, which comprised three parts of video recordings showing that some members of parliament inserted other members' electronic self-identification cards into the voting machine to vote on their behalf during the deliberation of the draft Constitution Amendment on the source of Senators. Miss Rangsima Rodrasamee, a member of the House of Representatives from the Democrat Party, as the witness of the 2nd applicant and 4th applicant testified with three parts of video recordings to confirm that during that time the people appearing in the video recordings inserted electronic self-identification cards into the voting machine and pressed its self-identification button to cast multiple votes at a time, which was against proper principles and methods.

In addition to the fundamental principle of memberships of the House of Representatives, as representatives of Thai people, who shall perform duties free from any mandate or domination and shall maintain integrity for the common interests of Thai people free from conflicts of interests as provided under section 122 of the Constitution, this conduct violated the Rules of Procedures of the National Assembly, the principle of integrity that members of parliament took an oath to adhere to under section 123 of the Constitution, and the principle of voting under section 126 paragraph three, which granted each member only one vote. This resulted in the voting of the National Assembly during the session being

dishonest and inconsistent with the true intent of Thai people because the voting process did not conform with the Rules of Procedures and the Constitutional, as stated above. The resolution passed by the meeting could not be considered valid in the process of deliberation of the draft Constitution Amendments.

Remarks:

1. This case concerned voting on behalf of other members of parliament. The Constitutional Court regarded the fact that some members inserted electronic self-identification cards of others to vote on their behalf caused the quorum and vote counting results to be factually incorrect. The Court ruled that such act was unconstitutional. The act violated two legal principles: "Free Mandate," endorsed in section 122 of the Constitution of the Kingdom of Thailand, B.E. 2550 (2007) (Current Constitution (B.E. 2560) (2017) in section 114) and "one man one vote," endorsed in section 126 paragraph three (Current Constitution (B.E. 2560) (2027) in section 120 paragraph three).

2. The principles laid down by the Constitutional Court in this case were the constitutional principles which are mainly about members of parliament, including the "Free Mandate" of people's representatives, as a result of the fact that they are elected by people to act on their behalf in the parliament through the election process (Boggero, 2018, pp. 119) and "one man one vote," derived from the concept of political equality, whereby all people have equal rights and voices (Rohrschneider, 2004, pp. 250). Once people choose someone to represent them in expressing political opinions or making any political decisions, this must on the basis of equality as well. That is, no representatives from either majority or minority political parties have more privileges or power. All the representatives are key men to the promotion of the fulfillment of responsibilities of the members of parliament in response to the needs of people as their representatives under representative democracy (Buratti, 2016, pp.56).

3. In this case, the Constitutional Court believed that the behavior of self-identification and voting on behalf of others undermined the independent duty performance of people's representatives and ruined the equality among the representatives. The Court might believe that voting on behalf of other members was an interference with other members' duty performance. On the other hand, the members were dominated by other members, which significantly undermined their independent functioning. The German Federal Constitutional Court interestingly discussed the key elements of the free mandate principle in Ruling No.2 BvE 1/06 that the free mandate principle is closely linked to the transparency principle as transparency can ensure that the members can vote or make any decisions in the legislative process in an independent fashion as the people's representatives for public interests, which will boost public confidence, as the heart of parliamentary democracy (OECD, 2011, pp. 56). Another issue to reflect on is whether voting on behalf of other members with good faith is allowed. This question has been debated quite intensely, but in most cases, it is not allowed because of the concern over dishonesty and even an absence of deliberations in the parliament (Wolfensberger, 2001, pp. 186). Erskine argued that the members of parliament who do not show up cannot vote (May, 1844, pp.221). The Constitutional Court in Ukraine, confronting the piano voting issue among members of parliament as the same of Thailand, issued Ruling No.9-v2019, clearly suggesting that as the people's representatives in the parliament, they must act without any conditions, including in voting. In the United States, piano voting among members of the United States Congress is generally prohibited as it is inconsistent with the Code of Ethics, except for some provisions under certain circumstances, e.g. the House Rules of the State of Massachusetts, section 16A (7), which states that piano voting is prohibited unless there is an issue with the voting system and the secretary records this issue.

4. It should be noted that the fact that the Constitutional Court ruled that piano voting, in this case, was unconstitutional because it was not in line with the true intent of the representatives of Thai people manifested that voting is specific to individual representatives or "unique qualifications," which they cannot transfer to anyone, or ask other people to do on behalf of them (unless the provisions of the Constitution and law provide otherwise). Given the issue of "unique qualifications," this relates to the Supreme Court Supreme Court Judgment for a case of a company shareholder meeting. The Supreme Court Supreme Court Judgment no.89/2512 (1969) was issued to a case where at a shareholders' meeting of a company, non-shareholder participants expressed their opinions and voted. The Supreme Court ruled that even if the meeting also consisted of shareholders and the shareholders voted unanimously, the resolution of the meeting was unlawful (section 1176 of the Civil and Commercial Code). Concerning administrative law, there was a similar case. In the procedures of a committee having the authority to perform administrative consideration, which required quorum counting, the committee had to consider if the meeting attendees as committee members conformed with the intent of law, some of whom were "advisory committee members" or specifically selected committee members. In this case, opinions were provided by the Council of State (Group 1) in Completed Matter No.135/2544 (2001) and Completed Matter No.464/2562 (2019) stating that the committee members could not assign other people to attend the meeting to act on their behalf. This is consistent with the administrative law principle, which requires the specific expertise of particular committee members to ensure the efficiency in the exercise of administrative power.

5. Given the fact that the Constitutional Court viewed that piano voting contradicted the principle "one member, one vote," the law on parliamentary procedures, as a fundamental principle of parliamentary law states that "one member has one vote" (Butler, Bogdanor, and

Summers, 2004, pp. 163) despite having other positions in the parliament (Jennings, 2016, pp. 14). This principle follows the principle of political equality, which is derived from the transfer of sovereignty from the people to their representatives through the election process (Harvard Law Review Association, 1975, pp. 1184) as the Supreme Court of the United Kingdom stated in the case *"R (Miller) v the Prime Minister and Cherry v Advocate General for Scotland* – "representatives in the parliament exist because the people elect them." Once some elected representatives do not attend meetings to vote, this leads to other representatives at the meeting to "overstep" by voting on behalf of them. This violates the principle of political equality, with other members having only one vote. Nevertheless, apart from constitutional and parliamentary law, administrative law embodies this principle. For instance, section 82 of the Administrative Procedure Act, B.E. 2539 (1996) regarding administrative proceedings of a "group of persons," such as a committee, stipulates that voting at a committee meeting must adhere to the majority votes, with each member having one vote.

6. It is noteworthy that there were three Constitutional Court Rulings for the case of piano voting among members of the National Legislative Assembly – the Constitutional Court Rulings No.15-18/2556 (2013) (Constitutional Amendment Case), the Constitutional Court Ruling No.3-4/2557 (2014), (Case of the Bill on Authorizing the Ministry of Finance to Borrow for the Development of the Country's Transportation Infrastructure), and the Constitutional Court Ruling No.2-3/2563 (2020) (Case of the Bill of Annual Appropriation for Fiscal Year, B.E. 2563 (2020)). Although the Constitutional Court ruled that such act involved an unconstitutional legislative process, in which the meeting resolutions "did not represent the true intent of people's representatives," the legal outcomes of the rulings varied interestingly. In some cases, this resulted in the entire bill lapsing; in others, the Court requested the rectification of the improper parts of the legislative process. Technically, this suggests

that the Court might define the levels of severity of the misconduct by determining whether or not the act completely ruined the entire process. However, technical analysis and explanation are needed for more clarity.

4. Legislative process

The Constitutional Court Ruling No.3-4/2545 (2002): Case of consideration of bills without passing through both Houses

In the deliberation of the Bill on the Protection of the Operations of the Organization for the Prohibition of Chemical Weapons, B.E. ..., the House of Representatives approved and proposed the bill to the Senate. The Senate resolved to provide amendments to the Bill and returned it to the House of Representatives. The House of Representatives disapproved of the Senate's amendments, so the Joint Committee for both Houses was established to review the bill. After the Joint Committee completed reviewing the bill, it submitted a report to both Houses. The House of Representatives included the bill in the reading for the meeting scheduled on 21 November 2001, while the meeting for the Senate was scheduled on 23 November 2001. The meeting of the House of Representatives resolved to disapprove of the Joint Committee's version of the bill. The members of the House of Representatives proposed a motion to the House of Representatives meeting. The motion suggested that as this bill was financially related, the meeting of the House of Representatives should exercise its right to reaffirm the bill under section 176 of the Constitution immediately. A member argued that the House of Representatives should wait for the Senate's exercising the right to review the Joint Committee's version of the bill before the House of Representatives exercised the right to reaffirm the bill. Finally, the meeting of the House of Representatives resolved that the House of Representatives could exercise the right to reaffirm the bill without waiting for the Senate's review and resolved to reaffirm the original bill,

approved by the House of Representatives with the majority votes exceeding half of the members of the House of Representatives.

The Constitution Court considered that the legislative process had to undergo scrutiny by both Houses before it was considered as being approved by the parliament, as per section 92 and section 90 of the Constitution. The Senate made amendments to the bill approved by the House of Representatives, but the House of Representatives disapproved of those amendments. Therefore, they set up Joint Committee. To both Houses, the Joint Committee presented a report and its version of the bill, which had gone through its review process. In case both Houses approved the Joint Committee's version of the bill, this could be proceeded with according to section 93 of the Constitution. In case either of the Houses disapproved of the version of the bill, it could exercise veto over it. This meant in case either House disapproved of the Joint Committee's version of the bill, thus resulting in it being rejected, both Houses had to jointly review the Joint Committee's version of the bill through the legislative process outlined in the Constitution.

Given the fact that the House of Representatives reviewed and resolved to disapprove of the Joint Committee's version of the bill during the session on 21 November 2001, the bill could not be considered as being rejected until the Senate reviewed it, thus making it impossible to bring it up to reconsider immediately and to resolve to reaffirm the original version of the bill belonging to the House of Representatives under section 176 of the Constitution even though it was financially-related.

Remarks:

1. Although the details of the bill were financially related, the essence of this case was the fact that the Constitutional Court examined, and adjudicated on, the legislative process of the parliament to determine its constitutionality. A crucial issue lay in the deliberation on the bill after the Senator exercised the Power of Suspensive Veto

(McHugh, 2017, pp. 138) to pass a resolution for amendments to the bill through the approval of the House of Representatives, leading to the establishment of the Joint Committee for further deliberation. After the Joint Committee's deliberation was finished, it reported to both Houses. The Constitution indicated that the next step should require awaiting the decisions by both Houses. It appeared that once the House of Representatives disapproved of the Joint Committee's version of the bill, it endorsed the original bill by exercising the Ultimate Power (Bhangwan and Bhushan, 2010, pp. 211) and resolved to reaffirm it immediately without waiting for the Senate's consideration, through the votes by more than half of the members. The House of Representatives reasoned that the bill was financially related, for which the Constitution granted it the power to carry out decision-making. This might be because the House of Representatives did not approve the bill submitted by the Joint Committee and section 176 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) empowered the House of Representatives to reaffirm the bill without waiting for the Senate's deliberation. It is noteworthy that concerning the use of the ultimate power of the House of Representatives in the case of financial bills, the provisions of the current Constitution (B.E. 2560 (2017)), do not contain the same criteria. That is, under the current Constitution, there are two main categories of financially related laws: 1. Annual appropriation law, supplementary appropriation law, and transfer of appropriation law (section 143) and 2. Other general laws, in addition to Category 1 (section 138). The laws in the first category can be reaffirmed immediately by the House of Representatives as the laws are required to be urgently promulgated, while the House of Representatives is not allowed to do so for the second category of laws and must wait for 10 days from the date of the legislative veto.

2. In a simple explanation, the Constitutional Court considered that the use of "Ultimate Power" by the House of Representatives

after the Joint Committee's consideration was a "procedural shortcut." This shortcut was significant to the legislative process of the parliament. To be clearer, the House of Representatives' procedural shortcut was characterized as "cutting the step" of legislative consideration carried out by the Senate. The House of Representatives did not provide the opportunity for the Senate to jointly deliberate on the bill. It is noteworthy that the Constitutional Court considered that a lack of the Senate's participation in the legislative consideration resulted in the legislative process being incomplete, which was a "serious flaw" in the legislative process, not to mention the use of constitutional rules to examine the constitutionality of the legislative process. The Court stated that in this case, the legislative power of the parliament was not exercised yet. Technically, the Constitutional Court's opinion can be explained as follows: Under public law, a parliament is a Constitutional Organ for Bicameralism. Dicey suggested that the emergence of legislation involves the exercise of power of the House of Representatives, the Senate, and the monarchy (Royal Assent) (Dicey, 1982, pp. 88). On the other hand, bicameralism is characterized as the exercise of collective power (Carmichael and Dickson, 1999, pp. 85), comprising collective the House of Representatives' and the Senate's power decision-making about (Baldwin and Shell, 2001, pp. 39) the "Principle of Separate Deliberation" (Rao, 2018, pp. 45). This differs from Unicameralism, which features unilateral decision-making power of the House of Representatives (Bingham, 2011, pp. 122). Actually, Thailand has a bicameral legislative structure, whereby the exercise of legislative power to legislate must be based on the collective use of the power of the House of Representatives and the Senate. In principle, given the case ruling, it can be understood that once the House of Representatives exercised unilateral decision-making power without involvement of the Senate, this could not be considered as exercising legislative power on behalf of the parliament." (Gagnon and Poirier, 2020, pp. 103).

3. It is interesting to note that in other countries, such as England, as the world's model country of bicameralism, and Thailand, there were judgments on flawed legislative processes dating back to 1450 in the case *Pylkington's Case* (Cowen, 1953, pp. 276). The House of Commons passed a law to enforce; however, before that, the House of Lords had amended the effective date of the law. This led to filing a case with the Court to determine its legal validity. Constitutional lawyers in England considered that the Court's explanation was not very clear as to whether the legislative process of the parliament was correct as there was no clear evidence of the official ruling (Steilen, 2016, p. 786). In practice, given the various facts of this case, eventually, the law in question was not enforced but was returned to the Houses for reconsideration until it was recognized as an "old precedent" to the exercise of legislative power by the English bicameral parliament, which required collective deliberation by both Houses before it was considered as an enforceable "Act of Parliament" (Lloyd, 1920, pp. 21).

4. Furthermore, an interesting piece of information is that the Supreme Court of the United States' ruling for the case *INS v. Chadha,* as a landmark case, was comparable to the Constitutional Court Ruling. The legislative process clearly involved the exercise of power by the bicameral Congress for the case of Chadha, an Indian Kenyan student who overstayed in the United States under a student visa. The US authorities detected and deliberated on this case and issued an order to allow him to continue his stay in the United States since repatriation could cause significant difficulty. However, according to the Immigration and Nationality Act, the Attorney General of the Department of Justice shall send the order to the Congress for consideration for any veto. Subsequently, the House of Representatives had a resolution to exercise a veto over the order to allow the student to continue his stay in the country by referring to legal provisions. The resolution was not forwarded to the Senate and the President for further consideration or

approval. Chadha appealed the order, leading to a lawsuit. The case was filed with the Supreme Court of the United States, which ruled that concerning the House of Representatives' veto over sending Chadha back to his home country, in terms of forms, although it was not a law, it was characterized as a law (Elliott, 1983, pp. 134) as it defined individuals' rights and duties. Thus, the Congressional action (Nowak and Rotunda, 2000, pp. 305), which involved the exercise of legislative power, required deliberations step by step (Goldfeld, 2004, pp.394). The principle of bicameralism provided in section 1, Clauses 1 and 7 of the Constitution requires the exercise of legislative power to undergo deliberations by both Houses (Fisher, 1993, pp.274). Therefore, the use of the power by only the House of Representatives based on facts of the case was against the Bicameralism (and Presentment) Clause and was unconstitutional (Petserson, 2017, pp.222).

5. Nevertheless, caution should be exercised on the veto over the bill in relation to the Senate's amendments to the bill after it was deliberated on by the House of Representatives. Section 137 (3) of the current Constitution has a provision containing "new text" to change the legal effects of the Constitution Court Ruling No.3-4/2545 (2002). Section 137 includes an additional provision in (3) stating: "regardless of whether or not the other House has considered the bill yet, the bill shall be suspended first." After the bill was successfully reviewed by the House of Representatives and was proposed to the Senate for consideration, the meeting of the Senate made amendments to the bill. After the Joint Committee was established by the two Houses to review the bill. The Joint Committee presented a report and its revised version of the bill to each House. The disapproval of the bill by either of the Houses, whether the House of Representatives or the Senate, is subject to bill suspension under section 137. This case was different from the Constitutional Court Ruling No.3-4/2545 (2002), which laid down a criterion for "defining the constitutional status of vetoed bills", under

the provisions of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) staying: if either of the Houses disapproves of the bill, the bill is not considered to be suspended. The suspension will be valid under the Constitution if both Houses consider it and vote.

5. Committee

The Constitutional Court Ruling No.17/2563 (2020): Case on the unconstitutional investigative power of the Committee in the National Assembly

Mr. Paiboon Nititawan filed an application requesting the applicant to present a matter and opinions to the Constitutional Court that the Demand and Summons of the Committees of the House of Representatives and of the Senate Act, B.E. 2554 (2001), section 5, section 8 and section 13 had an issue with constitutionality under section 129 of the Constitution. The applicant believed that the Demand and Summons of the Committees of the House of Representatives and of the Senate Act, B.E. 2554 (2001), section 5, section 8 and section 13, which was issued by virtue of the Constitution of the Kingdom of Thailand, B.E. 2550 (2017) comprise the criminal procedures and penalties for those who receive orders and violate them. However, the Constitution of the Kingdom of Thailand, B.E. 2560 (2017), section 129, prescribes that the **Committee under paragraph one has the power to demand documents from any person or summon any person to give statements of fact or opinions on the act or the matter under its investigation or study**, which involves different enforcement measures. It states that the Minister who is responsible for the matter of **investigation** or study of the Committee shall have a duty to instruct the providing facts, submitting documents, or giving opinions as summoned by the Committee. The applicant then filed an application and opinions with the Constitutional Court for consideration and decision under section 231 (1) to determine whether section 5, section 8 and section 13 of the act have an issue with constitutionality under section 129.

The Constitutional Court considered that the Constitution of the Kingdom of Thailand, B.E. 2560 (2017), section 129, contains the amendment to the principles appearing in section 135 of the Constitution of the Kingdom of Thailand, B.E. 2550 (2007). The current version of the Constitution shows the change in the Committee's duties and powers – from "issue an order to summon" to "summon" and from "inquire" to "investigate" because the Committee's action involves investigation, not inquiry under the Criminal Procedure Code. Furthermore, it prescribes legal effects in section 129 paragraph five as a compulsory measure, whereby the Minister who is responsible for the matter of investigation or study of the Committee shall have a duty to instruct a State official under his or her supervision or control to provide facts, submit documents or give opinions as summoned by the Committee to allow the Committee to conduct activities to support parliamentary work in an efficient manner. Hence, imposing criminal penalties on those who defy the Committee's summons is not in line with the purpose of the imposing of criminal penalties on persons and the severity of the misconduct. In addition, this does not affect public peace or good morals according to section 5, section 8 and section 13 of the Demand and Summons of the Committees of the House of Representatives and of the Senate Act, B.E. 2554 (2001), Thus, the provision is contrary to, and inconsistent with, section 129 of the Constitution.

Remarks:

1. This may be the first case where the Constitutional Court explained and laid the foundation of the Committee in the parliament in relation to investigation (CQ Press, 2013, pp. 304), as a key mechanism for the legislative branch's performance of duties, including enactment of laws or inspection of public administration of the executive branch. In Thailand, the number of the type of cases is limited compared with other countries. An interesting point is that superficially, the object of proceeding was the Demand and Summons of the Committees of the

House of Representatives and of the Senate Act, B.E. 2554 (2001). Thus, it was evident that the case was focused on the constitutionality of law. A careful consideration suggests that the Constitutional Court's examination involved the explanation of the substantive matters of the law in terms of the powers of the Committee in the parliament, which is very important for the parliamentary functioning mechanism. In other words, the Court's decision had an unavoidable direct impact on defining the roles and mandates of the parliament through defining the roles and mandates of the Committee.

2. In this case, although the Constitutional Court ruled that section 5, section 8 and section 13 of the Demand and Summons of the Committees of the House of Representatives and of the Senate Act, B.E. 2554 (2001) was contrary to, or inconsistent with, section 129 of the current Constitution (B.E. 2560 (2017)), which describes investigative duties of the Committee. This was primarily because the provisions in the current Constitution and the previous Constitution, B.E. 2550 (2007) comprise different principles. However, the reasons and explanations provided by the Court contain some interesting observations that should be reflected on and explained technically. Given legal implications, this features significant modification in two key aspects: 1) The Committee's powers and 2. The Committee's roles and duties. Under the principles of constitutional law regarding the legislature and parliamentary laws, both issues are interconnected, so they can be explained together. In this case, the Court believed that "rewording" in the current Constitution regarding the Committee's exercise of power from "issue an order to summon" to "summon" is the change in the principle from the previous Constitution as if the powers were different or had a different objective, thus decreasing the "intensity" of the power and the roles and duties of the Committee as "right holder," which technically, may not be like that. No matter what it is called, it is the same constitutional power, which is a legislative power. By its nature and purpose, the Committee's power

involves the establishment of the obligations (Garrison, 2013, pp. 182) of the persons receiving a summon or order to present facts or submit documents and other evidence. Judge Warren, former President of the Supreme Court of the United States clearly stated in the case *"Clinton v. City of New York"* that Congress's investigative power also lies in the legislative process, with no doubt that once the power is exercised, it is a "duty of all citizens" to cooperate with Congress in performing duties (Mason and Stephenson, 2016, pp. 104). The next noteworthy issue is the fact that the Constitutional Court further ruled that the Committee's power is not inquiry according to the Criminal Procedure Code, especially given the fact that the term "inquire" in the previous Constitution has been changed to "investigate" in the new Constitution. In this case, a technical observation suggests that the Committee's task has a legislative purpose, which is an investigative purpose (Hall, Ely, Jr., and Grossman, 2005, pp.309), which aims to inform the legislature's decision-making in the legislative process, as endorsed in the Supreme Court of the United States's ruling for the landmark case *"McGrain v Daugherty"* and in rulings in many other countries (Ponson, 2015, p. 205). Thus, in terms of forms, given the case of investigative officers, this may follow the Constitutional Court Ruling. However, substantively, they are not different because under the constitutional law's principles on the legislature, this power is derived from being people's representativeness of the parliament, as "legislative privilege" (Chafetz, 2007, pp. 145), with main responsibilities including reducing hardship and nurturing happiness of those electing them through the grievance system and redressing their grievances (Alder, 1999, pp. 223) to safeguard their rights and freedom. It can be said that this power is the same power of investigative officers (May, 2019), involving the same process of the work of police officers in relation to investigation or inquiry. The difference is that the Committee's actions are in the "legislature's arena" (Horne, 2013, pp. 340), known as "parliamentary proceedings," while those of investigative officers or

police officers are in the "legal arena," known as "justice proceedings." (Meerts, 2019, pp. 165). The Constitutional Court Ruling in this case which discussed the differences between the nature of the power of the Committee prescribed in the previous Constitution (B.E. 2550 (2007)) and the current Constitution (B.E. 2560 (2017)) may not be very consistent with technical explanations. The fact that the Court linked the issue with the change in the intensity of enforcement may be a different issue.

3. This decision has an interesting point in comparison with other countries that once the Constitutional Court linked the Committee's power to the provisions of the Constitution, that is, the Court explained the nature of the investigative power while relatively strongly adhering to the written provisions of the Constitution so that it rules that section 5, section 8 and section 13of the Demand and Summons of the Committees of the House of Representatives and of the Senate Act, B.E. 2554 (2001), are contrary to, or inconsistent with, the Constitution, the questions to respond to include: In the future, under the current Constitution, if the parliament encounters the issue of enforcement of the power of the Committee, which does not receive cooperation from individuals or entities, thus affecting the legislature's duty performance in different aspects, the questions are: Can a law be made to define the enforcement as the previous Constitution?; "Will the law be contrary to the provision of section 129 of the current Constitution?; and "Why did the countries that have no provision in their Constitutions that the parliamentary committee's power must involve legal enforcement (Similar to the 2007 Constitution) enact the law to define mechanisms and enforcement conditions of the investigative power without the concern over constitutionality.

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Bibliography

Thai books

Ponson Liengboonlertchai. **Concepts and Principles on Abuse of Parliamentary Power.** 1st Education. (Bangkok: King Prajadhipok's Institute, 2015).

Worapot Wisarutpit. **Basic Ideas and Principles of Administrative Law.** 3rd Edition. (Bangkok: Winyuchon, 2019).

English books

Alain-G. Gagnon and Johanne Poirier. **Canadian Federalism and its Future: Actors and Institutions.** (Canada: McGill-Queen's University Press, 2020) pp.103.

Alpheus Thomas Mason and Grier Stephenson. **American Constitutional Law: Introductory Essays and Selected Cases.** (USA: Routledge, 2016) pp.104.

Andrea Buratti. **Western Constitutionalism: History, Institutions, Comparative Law.** (Italy: Springer, 2016) pp.56.

Andrew Lintott. **The Constitution of the Roman Republic.** (New York: Oxford University Press, 2002) pp.70.

Arthur H. Garrison. **Supreme Court Jurisprudence in Times of National Crisis, Terrorism, and War.** (Maryland: Lexington Books, 2013) pp.182.

C. Alan Jennings, PRP. **Robert's Rules for Dummies.** (New Jersey: John Wiley & Sons,Inc., 2016) pp.14.

Christopher May and Adam Winchester, **Handbook on the Rule of Law.** (UK: Edward Elgar Publishing Limited, 2018) pp.228.

Clarissa A. Meerts. **Corporate Investigations, Corporate Justice and Public-Private Relation: Towards a New Conceptualisation.** (Switzerland: Palgrave Macmillan, 2019) pp.165.

CQ Press. **Guide to Congress.** (United States: SAGE Publications, Inc., 2013) pp.304.

Cyril Benoit and Oliver Rozenberg. **Handbook of Parliamentary Studies: Interdisciplinary Approaches to Legislatures.** (UK: Edward Elgar Publishing Limited, 2020) pp.143.

David Butler, Vernon Bogndor, and Robert Summers. **The Law, Politics, and the Constitution: Essays in Honour of Geffrey Marshall.** (New York: Oxford University Press, 2004) pp.163.

Donald R. Wolfensberger. **Congress and the People: Deliberative Democracy on Trail.** (USA.: The Woodrow Wilson Center Press, 2001) pp.186.

E. Donald Elliott. **Ins v. Chadha: the Administrative Constitution, the Constitution, and the Legislative Veto**. in the Supreme Court Review (1983), pp 134.

Elizabeth Rybicki. **Voting and Quorum Procedures in the House of Representatives.** (USA.: Congressional Research Service, 2020) pp.2.

Escola Do Legislativo. **Glossario de Termos Parlamentares.** (Portugal: BeloHorizonte, 1997) pp.66.

Giovanni Boggero. **Constitutional Principles of Local Self-Government in Europe.** (Boston: Brill, 2018) pp.119.

Hanna Back, Marc Debus, and Jorge M. Fernandes. **The Politics of Legislative Debate.** (United Kingdom: Oxford University Press, 2021) pp.198.

Herbert Doring. **Parliaments and Majority Rule in Western Europe.** (Frankfurt: Campus Verlag, 1995) pp.40.

Hilaire Barnett. **Constitutional and Administrative Law.** (Great Britain: Cavendish Publishing Limited, 2002) pp.461.

Kermit L. Hall, James W. Ely, Jr. and Joel B. Grossman. **The Oxford Companion to the Supreme Court of the United States.** (United States: Oxford University Press, 2005) pp.309.

Lewis Deschler. **Deschler's Precedents of the United States House of Representatives.** (Washington D.C.: U.S. Government Printing Office, 1977)

John Alder. **Constitutional and Administrative Law.** (London: Macmillan Press Ltd., 1999) pp.

John Locke. **Two Treatises of Government.** (London, 1823) pp.172.

John Uhr. **Deliberative Democracy in Australia: the Changing Place of Parliament.** (United Kingdom: Cambridge University Press, 1998) pp.230.

Joshua A. Chafetz. **Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitution.** (London: Yale University Press, 2007) pp.145.

Michael L. Mezey. **Representative Democracy: Legislators and their Constituents.** (The United States of America: Rowman & Littlefield Publishers, Inc., 2008) pp.34.

Nicholas Baldwin and Donald Shell. **Second Chambers.** (Great Britain: Frank Cass and Company Limited, 2006) pp.39.

OECD. **Asset Declarations for Public Officials: A Tool to Prevent Corruption.** (OECD Publishing, 2011) pp.56.

Paul Carmichael and Brice Dickson. **The House of Lords: Its Parliamentary and Judicial Roles.** (UK: Hart Publishing, 1999) pp.85.

Pietro Costa and Danilo Zolo. **The Rule of Law History, Theory, and Criticism.** (Netherland: Springer, 2007) pp.304.

Robert Rohrschneider. **Learning Democracy: Democratic and Economic Values in Unified Germany.** (New York: Oxford University Press, 2004) pp.250.

Rosalind Dixon. **Australia Constitutional Values.** (Great British: Hart Publishing, 2018) p.135.

Thomas Erskine May. **A Treatise upon the Law, Privileges, Proceedings and Usage.** (London: Charles Knight & Co. Ludgate-Street, 1844) pp.228.

Thomas H. McKee. **Constitution of the United States. Jefferson's Manual. The Rules of House of Representatives of the Fifty-Forth Congress, and A Digest and Manual of the Rules of Practice of the House of Representatives of the United States.** (Washington: Government Printing Office, 1897) pp.504.

Tom Bingham. **Lives of the Law: Selected Essays and Speeches 2000-2010.** (NewYork: Oxford University Press, 2011) pp.122.

Vishnoo Bhagwan and Vidya Bhushan. **World Constitutions-A Comparative Study.** (New Delhi: Sterling Publishers Private Limited, 2010) pp.211.

William Scott Ferguson. **Greek Imperialism.** (New York: Biblo and Tannen, 1963) pp.50.

English articles

Charith Reddy and Shagun Bhargava. **For Laws May Come And Law May Go, But Defections Go On Forever: A Critical Analysis of the Role of the Speaker in Indian Anti-Defection Laws.** in NLIULaw Review Vol.X Issue.I. (2020) pp.337.

Firoz Cachalia. **Judicial Review of Parliamentary Rule making: A Provisional Case for Restraint.** in NYSL Law Review Vols.22-63 (2019) pp.382.

Gregory J. Wawro and Eric Schickler. **Legislative Obstructionism.** in Annu. Rev. Polit. Sci. (2010) pp.302.

Hans Kelsen. **Foundations of Democracy.** in Ethics Vol.66 No.1 (1955) pp.7.

Harvard Law Association. **Developments in the Law: Elections.** in Harvard Law Review, Vol.88 No.6 (1975) pp.1184.

Lars Vinx. **Hans Kelsen and the Material Constitution of Democracy.** in Jurisprudence, Vol.12 No.4 (2021) pp.437.

Louis Fisher**. The Legislative Veto: Invalidated**, It Survives. in Law and Contemporary Problems Vol.56 No.4 (1993) pp.274.

Markus Patberg. **Against Democratic Intergovernmentalism; The Case for a Theory of Constituent Power in Global Realm.** in International Journal of Constitutional Law. Vol.14 No.3 (2016) pp.635.

Mario J. Aguia and Hans Born**. Who is Policing the Police? - The Role of Parliament** in Police Governance in Asia and Europe. in Themenschwerpunkt Vol.35 No.2 (2107) pp.65.

Matthew Steilen. **Bill of Attainder.** in House. L. Rev.767 (2016) pp.786.

Neomi Rao. **Why Congress Matters: The Collective Congress in the Structural Constitution.** in Florida Law Review Vol.70 Issue1 (2018) pp.45.

Todd David Petserson. **Procedural Checks: How the Constitution (And Congress) Control the Power of the Three Branches.** in Duke Journal of Constitutional Law & Public Policy Vol.13:1 (2017) pp.222.

Victor Goldfeld. **Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation Through Judicial Review of Congressional Processes.** in New York University Law Review Vol. 79:367 (2004) pp.394.

Internet sources

Library of Congress.Federalist Papers No.58.Library of Congress. **<https://guides.loc.gov/federalist-papers/full-text#TheFederalistPapers-58>** (14 September 2021)

Erskine May. Erskine May's treatise on the law, privileges, proceedings and usage ofParliament, (2019) online. **<https://erskinemay.parliament.uk/section/6368/complaints/highlight=police%20investigation>** (23 September 2021)

Laws

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

Constitution of the Kingdom of Thailand, B.E. 2550 (2007)

Constitution of the Kingdom of Thailand, B.E. 2560 (2017)

Administrative Procedure Act, B.E. 2539 (1996)

The Meaning of Treaty under the Constitution of Thailand

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Introduction

From the first to the current Constitution of the Kingdom of Thailand, B.E. 2560 (2017), in the sections regarding treaties, the term "Treaty" has been used by constitutional drafters consistently. However, none of these documents provide a definition or explanation of the term, nor do they offer examples of the formats it may take. When the Executive developed international instruments without seeking parliamentary approval, a question arose regarding whether these international instruments required such approval. To determine if these international instruments fall under the category of *'Treaties'* and necessitate parliamentary approval, it was essential to preliminarily decide if the status of the Executive's international instruments was classified as *'Treaties'* according to the Constitution. This led to the first relevant case ruled by the Constitutional Court in the Constitutional Court Ruling No.11/2542 (1999). This Ruling established a key precedent for the interpretation of the term *'Treaties,'* which is used in section 224 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The Constitutional Court of Thailand subsequently referred to this Ruling when interpreting the term *'Treaties'* in three other Rulings, namely Constitutional Court Ruling No.33/2543 (2000),[1] Constitutional Court Ruling No.6-7/2551 (2008),[2] and Constitutional Court Ruling No.3/2560 (2017).[3]

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1 It relates to Thailand being a party to the Convention on Biological Diversity.

2 It concerns the legal status of the Thai-Cambodian Joint Communiqué.

3 It pertains to the legal status of the draft MOU on the Transit of Goods between the Customs Department of the Kingdom of Thailand and the General Department of Customs and Excise of Cambodia.

Summary of the background and ruling for the case of the Letter of Intent submitted by the Thai Government to the International Monetary Fund (IMF)

As Thailand suffered an economic crisis in 1997 under Prime Minister General Chavalit Yongchaiyudh's administration, the Thai Government sought financial aid from the International Monetary Fund (IMF) by submitting its first Letter of Intent on 14th August, 1997. Some members of the Democrat Party subsequently raised concerns that the first Letter of Intent violated section 224 of the Constitution because the Letter of Intent is classified as a 'treaty,' requiring the issuance of an Act or Emergency Decree to ensure compliance. Subsequently, General Chavalit Yongchaiyudh's government was pressured to resign due to their failure to resolve the economic issues and Mr. Chuan Leekpai took office as the new Prime Minister. During his tenure, the government, led by Mr. Chuan Leekpai, submitted a total of six Letters of Intent to the IMF. General Chavalit Yongchaiyudh as the opposition leader along with 126 members of the House of Representatives, petitioned the Senate President to impeach the Prime Minister and the Minister of Finance. They accused the officials of deliberately acting against section 224 paragraph two of the Constitution. The Senate President forwarded the petition to the National Anti-Corruption Commission (NACC) for investigation. The NACC, in turn, referred the matter to the President of the National Assembly to seek the Constitutional Court's ruling of whether the government's Letters of Intent to the IMF fell under the category of *'Treaties,'* mandating parliamentary approval as per section 224 paragraph two of the Constitution or not.

After consideration of facts from relevant documents and statements made by related parties, the Constitutional Court ruled that **"the Letters of Intent requesting technical and financial assistance" submitted by the government to the IMF are not qualified as under section 224 of the Constitution, hence not requiring parliamentary approval under paragraph two of the same section.**

Notes:

The Ruling No.11/2542 (1999) marked the first Constitutional Court ruling to include the explanation of the term 'Treaties' in accordance with section 224 of the Constitution B.E. 2540 (1997). The issue in this case pertained to the fact that the opposition party did not request the court to adjudicate as to the status of the Letters of Intent but the only issue sent to the Constitutional Court was whether the Letters of Intent are classified as treaties necessitating parliamentary approval or not. However, in juristic methodology, this case encompassed two distinct matters. The first matter focused on ascertaining if the Letters of Intent had a legal status of treaties under section 224 of the Constitution B.E. 2540 (1997),[4] or not. This issue is considered an incidental problem. The second matter delved into whether parliamentary approval was required if the Letters were classified as such, which was the principal problem of the case. To address the principal problem, the court had to adjudicate on the incidental problem first, because the principal problem depended on the adjudication of the incidental problem.

Regarding the first matter, although since the first Constitution[5] to the current one, the term 'Treaties' has always been used, but[6] there is a lack of definition or explanation of the term in any Acts or secondary laws, including the ruling of the constitutional court or the constitutional judiciaries. Therefore, the Constitutional Court was required to establish

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4 Section 224 of the Constitution B.E. 2540 (1997) states:

"The King has the prerogative to conclude a peace treaty, armistice and other treaties with other countries or international organizations.

A treaty which provides for a change in the Thai territories or the jurisdiction of the State or requires the enactment of an Act for its implementation must be approved by the National Assembly."

5 Section 5 of the Interim Constitution prescribes:

6 Apart from treaties, the terms used in the Constitutions include 'treaty' and 'international agreement.' However, their provisions on the King's foreign affairs prerogatives in consistently prescribe: *"The King has the prerogative to conclude Treaties".*

a common criterion for elucidating the meaning of the term Treaties. In this case, the Constitutional Court referenced the 1969 Vienna Convention on the Law of Treaties, to provide the elucidation for the term. The Court justified its use by adopting the Vienna Convention's origins in the codification of international customs and practices. This usage has the following observations:

Firstly, Thailand is not a party to the Vienna Convention; therefore, it is not legally bound by the Convention. However, the Vienna Convention is derived from the codification of rules that qualify as customary international law, wherein unwritten law is formalized into a written convention. However, not all the provisions in the Vienna Convention hold the status of customary international law, with several articles being newly established by the International Law Commission of United Nation, referred to as progressive development.

The term 'Treaty' as defined in Article 2 (a)[7] of the Vienna Convention holds the status of customary international law.[8] Therefore, Thailand is bound by this Article under customary international law.[9] However, the Constitutional Court did not explicitly state that Article 2 of the Vienna Convention is recognized as customary international law; it only generally mentioned that the Vienna Convention is a widely recognized customary practice.

Secondly, it is noteworthy to consider how the Constitutional Court utilized or referenced customary international law in this case, especially considering that Thailand's Constitutions, from the first to the current one, have never acknowledged the status of customary

[7] "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

[8] See Mark Villiger, Commentary on the Vienna Convention on the Law of Treaties 1969, (The Netherlands: Martinus Nijhoff, 2009), p. 83.

[9] But not as a convention because Thailand has not ratified, or acceded to it.

international law within the Thai legal system. In contrast, many constitutions in other countries explicitly recognize the status of customary international law, such as the Constitution of South Africa 1993,[10] Constitution of Germany,[11] and Constitution of Austria.[12] Another interesting aspect to explore is whether section 4 of Thailand's Civil and Commercial Code recognizes customary international law as a source of Thai law or not. Considering the Travaux préparatoires during the drafting of section 4 of Thailand's Civil and Commercial Code, there was no mention of customary international law by any drafting committee members. The term "local custom" used in section 4 of the Civil and Commercial Code should refer to customary local law applicable to civil or commercial legal relations. Additionally, the term "local custom" inherently suggests that it is a local practice. However, in practice, concluding a treaty is the state's practice on an international level, not having the characteristics of local practices or under customary local law.

Thirdly, the Constitutional Court referenced the Vienna Convention as a criterion for elucidating the definition of the term *'Treaties,'* starting from the four elements of a treaty:

1) Agreement between states or between a state and an international organization.

2) Written form.

3) Imposing legal obligations or legally binding.

4) Governed by international law.

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[10] Section 231 (4) provides: The rule of customary international law binding on the Republic, shall unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic.

[11] Section 25 provides: "The general rules of public international law shall be an integral part of federal law. They shall take precedence over statutes..."

[12] Section 9 provides: "the generally recognized rules of international law are held to be component parts of Federal law."

During the Court's clarification of the term "treaty" in accordance with the Vienna Convention, it asserted that the term *'Treaties'* under the Constitution of Thailand carries the same meaning as "treaty" under the Vienna Convention. Subsequently, the Court determined that the Letters of Intent requesting technical and financial assistance were unilaterally signed by the Minister of Finance and the governor of the bank of Thailand, and the IMF considered that the assistance plan did not hold the legal status of a treaty or an international agreement. Consequently, the Constitutional Court ruled that the Letters of Intent requesting technical and financial assistance were not qualified as *'Treaties'* under section 224 of the Constitution of Thailand, B.E. 2540 (1997).

There is an observation concerning the elements of a treaty. Actually, the phrase "Imposing legal obligations or legally binding" is contained within the phrase "governed by international law." Nevertheless, many Thai law textbooks have included this element.

Fourthly, the Constitutional Court ruled that the status of the Letters of Intent did not align with the term *'Treaty'* under the Constitution. However, the Court did not distinctly specify the status of these Letters of Intent. Regarding this issue, the author opines that the Letters of Intent requesting technical and financial assistance constitute a unilateral act of the state. When compared with civil law, a unilateral act is the state's expression of its unilateral intention to bind itself in accordance with the intent conveyed to the external party, such as a commitment, and last will and testament. In any event, none of Constitutions of Thailand have made reference to the state's 'unilateral act'; they only mention "Treaties" despite the Thai government's historical international unilateral acts, such as the declarations recognizing the jurisdiction of the International Court of Justice, the reservations made in the case of the Preah Vihear Temple, and the declaration of exclusive economic zones and the recognition of the Palestinian state.

Fifthly, among the individual opinions, that provided by the former Justice Suchinda Yongsunthorn's was the most compelling one since he provided explicit analysis and explanation of the terms *'Treaties'* under the Constitution of Thailand and "treaty" under the Vienna Convention. This was likely due to his background at the Department of Treaties and Legal Affairs, as well as his ambassadorship at the Ministry of Foreign Affairs, which equipped him with deep knowledge and understanding of both the legal principles and practices surrounding entering into treaties.

Furthermore, the author concurs with Yongsunthorn's argument that the Letters of Intent requesting technical and financial assistance are not classified as a *'Treaty'* under the constitution. Consequently, the need for parliament approval was deemed unnecessary to adjudicate as parliamentary approval relates specifically to a *'Treaty,'* not unilateral acts. Therefore, with the Constitutional Court's majority vote affirming that the Letters of Intent are not classified as *'Treaties'* under the constitution, the question of parliamentary approval did not need to be addressed. The Constitutional Court ruled that the House of Representatives' approval was not required in this instance, in accordance with section 224 paragraph two.

Lastly, this ruling holds vital importance as it establishes the precedent for the interpretation of the term *'Treaties,'* equating it with the word "treaty" as defined by the Vienna Convention. Subsequent to this ruling, the Constitutional Court ruled three other cases addressing whether the Executive's *'Treaties'* requires parliamentary approval or not. Prior to the ruling or adjudication, the Court first determined whether they are classified as *'Treaty'* under the Constitution or not. The Court clarified the definition of *'Treaties'* as demonstrated in the case involving the submission of Letters of Intent requesting technical and financial assistance by the government to the IMF, confirming the equivalence of *'Treaties'* to "Treaty" under the Vienna Convention, as evident in Ruling

No. ... concerning the Thai-Cambodian Joint Communiqué on the Preah Vihear Temple.[13] The core issue in this case revolved around establishing whether the status of the Joint Communiqué constituted *'Treaties'* under section 190 of the constitution or not. The Constitutional Court affirmed that the definition of *'Treaties'* aligns with the treaty specified in the Vienna Convention, citing Ruling No.11/2542 (1999) as the authoritative source providing its meaning.[14]

The most recent ruling on the matter, focused on the consideration of the draft Memorandum of Understanding between the Royal Government of Cambodia and the Government of the Kingdom of Thailand on the Facilitation of Goods in Transit[15] under the current Constitution B.E. 2560 (2017), specifically examining if the draft Memorandum of Understanding should be classified as *'Treaties'* according to section 178 paragraph one of the Constitution B.E. 2560 (2017).[16] The Constitutional Court cited Ruling No.11/2542 (1999) as the precedent for interpreting the term *"Treaties."*[17] The Court determined that the Draft MOU qualified as *'Treaties,'* aligning with the meaning established in Ruling No.11/2542 (1999) by the Constitutional Court.

In the ruling concerning the case "Thai-Cambodian Joint Communiqué on the Preah Vihear Temple," the Constitutional Court clearly referred to a previous ruling in the case of "Letters of Intent requesting technical and financial assistance submitted by the government to the IMF and the acceptance to be a state party to the Convention on Biological Diversity, which defined the term *'Treaties'* as

[13] Ruling No.6-7/2551 (2008).

[14] See Ruling No.6-7/2551 (2008), p. 21.

[15] Ruling No.3/2560 (2017).

[16] Section 178 paragraph one of the Constitution of Thailand, B.E. 2560 (2017) states: *"The King has the prerogative to conclude a peace treaty, armistice and other treaties with other countries or international organizations."*

[17] The Ruling No.3/2560 (2017), p.9.

provided in section 190 of the Constitution B.E 2550 (2007), equating it to the concept of a "treaty" under the Vienna Convention.

Furthermore, the Constitutional Court's ruling in the case of "Letters of Intent requesting technical and financial assistance submitted by the government to the IMF" has become a precedent for the Office of the Council of State when concluding whether certain documents, such as the Office of the Council of State's Memorandum of the Agreement on the Establishment of the LMT-GT Sub-Regional Cooperation Center[18] and the Office of the Council of State's Memorandum on the Agreement on the Quality Inspection Process between the Department of Livestock Development and the Canadian Food Inspection Agency qualify as *'Treaties'* under section 190 of the Constitution of the Kingdom of Thailand or not.[19]

Section 178 of the Constitution B.E. 2560 (2017) states: *"The King has the Royal Prerogative to conclude a peace 'treaty', armistice, and other treaties with other countries or international organizations,"* reflecting the text from previous constitutions under the Chapter "The Council of Ministers," without any alteration, addition, or deletion of the term *"Treaty."* Thus, the term *'Treaties'* under section 178 of the constitution refers to 'international treaties' (not the state's unilateral act) that is internationally legally binding between states or between a state and an international organization as per the precedent established in the Constitutional Court Ruling No.11/2541 (1998).

Constitutional Court Rulings in other countries

1. Ruling of Constitutional Court of Taiwan

The Constitutional Court of Taiwan interpreted the term "treaty" as outlined in their Constitution, defining it as written agreements between the Republic of China (Taiwan) and other states or international

[18] Completed Matter No.422/2552 (2009), prepared by the 6th Panel.
[19] Completed Matter No.388/2552 (2009).

organizations. These agreements may be referred to as treaty, convention, or agreement. They cover significant matters like self-defense, diplomacy, finance and economy or issues affecting the people's rights and obligations. If there are provisions regarding ratification, they must be submitted for parliamentary approval.[20] Unlike the Constitutional Court of Thailand, the Constitutional Court of Taiwan did not take into account the Vienna Convention when interpreting the term "treaty" as stated in section 141 of the Taiwanese Constitution on foreign affairs.[21]

2. Ruling of the Constitutional Court of South Africa

In the case *"Harksen v President of the Republic of South Africa and Others,"*[22] the Constitutional Court of South Africa interpreted the term "international agreement" as defined in section 231 of their Constitution. While the Constitutional Court of South Africa did not directly make reference to the Vienna Convention, it construed the term "international agreement" to have a similar meaning to "treaty" under the Vienna Convention.[23] Essentially, it is an agreement that establishes legal relations (rights and obligations). On other words, international agreements that do not create rights and obligations under international law do not qualify as "treaties."

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[20] The Ruling signed on 24/12/1993. See more in "Wen-Chen Chang, An Isolated Nation with Global-minded Citizens: Bottom-up Transnational Constitutionalism in Taiwan", National Taiwan University Law Review, vol. 4, 2009, p. 209.

[21] Section 14 of the Constitution of Taiwan: The foreign policy of the Republic of China shall, in a spirit of independence and initiative and on the basis of the principles of equality and reciprocity, cultivate good-neighborliness with other nations, and respect ***treaties*** and the Charter of the United Nations, in order to protect the rights and interests of Chinese citizens residing abroad, promote international cooperation, advance international justice and ensure world peace.

[22] **Case Number:** CCT 41/99.

[23] Michele Olivier, Interpretation of the Constitutional provisions relating to international law, p.12.

Comparisons between the rulings of the Constitutional Court of Thailand and those of the Constitutional Court of South Africa

Firstly, the Constitutional Court of South Africa did not affirm that all provisions in the Vienna Convention constitute customary international law. Instead, it acknowledged that certain provisions of the Vienna Convention had attained additional status to enhance the criteria's comprehensiveness and contemporaneity.

Secondly, South Africa's Constitution recognizes customary international law as part of the country's law, permitting the South African Constitutional Court to apply the Vienna Convention even though South Africa is not a state party. Conversely, the Constitutions of Thailand have never acknowledged customary international law as part of the Thai legal system. This raises questions regarding which sections of the Thai Constitution, the Constitutional Court relied on and whether the Court used the Vienna Convention as a criterion for considering the term *'Treaties,'* despite Thailand not being a state party to the Vienna Convention, like South Africa.

Furthermore, it is worth noting that the Court of Justice of the European Union (CJEU) had interpreted the term "agreement" within the context of European Union law. While the CJEU referenced the meaning of "treaty" as defined in the Vienna Convention, it adopted a broader and more flexible interpretation of the term "agreement" than the Vienna Convention. Whereas the Vienna Convention defines a "treaty" as an agreement between states, or between a state and organization, the CJEU's interpretation includes agreements made by other entities. Additionally, while the Vienna Convention mandates that both parties must intend to be legally binding, the CJEU has interpreted that such intention is not a prerequisite.[24]

[24] Jed Odermatt, The Use of International Treaty Law by the Court of Justice of the European Union, Cambridge Yearbook of European Legal Studies, 2015, pp.

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"No Crime without Law" *(Nullum Crimen Sine Lege)*

Surasit Sangviroatjanapat, Ph.D.
Justice of the Court of Appeal

1. Brief facts and reasons of the Constitutional Court Ruling

According to the Constitutional Court Rulings No.3-5/2550 (2007), the following facts are presented: The Attorney-General submitted three applications to Constitutional Court in request of dissolution orders against the Pattana ChartThai Party, Thai Ground Party, and Thai Rak Thai Party because the Political Party Registrar found it evident that between 24th February 2006 and 2nd April 2006, the parties violated the Organic Act on Political Parties B.E. 2541 (1998). The Constitutional Court accepted the application for review, and the parties involved prepared the responses to the allegations. The Council for Democratic Reform declared that the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) was abrogated on 19 September 2006. Following this, the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) was promulgated on 1st October 2006. According to section 35 of the Interim Constitution, any Constitutional Cases that were being considered by the Thai Constitutional Court before 19th September 2006 were to be transferred to the Constitutional Tribunal. The three political parties subsequently filed their responses to the allegations, and the applicant also requested an amendment to the original application, as outlined as follows: Referring to the Announcement of the Council for Democratic Reform No. 27, dated 30th September 2006, regarding the revocation of the election rights of the party executives whose parties were dissolved for five years, the applicant requested an amendment to the application, requesting the court to issue an order to dissolve the three parties and revoke the election rights of their party executives for five years, effective from the party dissolution order date, in accordance with

clause 3 of the Announcement of the Council for Democratic Reform No.27. The respondents argued that the Announcement of the Council for Democratic Reform No.27, dated 30th September 2006, did not have retroactive effect, as it imposed an additional punishment – the revocation of election rights for five years – which was not stipulated in section 69 of the Organic Act on Political Parties, B.E. 2541 (1998). They contended that, while the revocation of election rights was not a criminal punishment, it restricted individuals' rights and freedoms to exercise political rights, serving as a political penalty and being more severe than some criminal penalties and added that the revocation contravened international criminal principles. The Constitutional Court, by a majority decision, held that the revocation of the election rights was not a criminal punishment but a legal measure as a result of the law that gave the power to dissolve political parties that had committed prohibited actions under the Organic Act on Political Parties, B.E. 2541 (1998). The Court added that the measure aimed to prevent political party executive members, who had caused damage the country and democratic regime, from causing further damage for a specific period. The Court acknowledged that while election rights are fundamental in a democratic society, it is permissible to legislate eligibility requirements to maintain societal appropriateness and democratic governance.

Remarks

Apart from the Constitutional Court rulings discussed, the Court of Justice faced a similar issue regarding whether disqualification of political rights constitutes a criminal punishment. The Supreme Court's Criminal Division for Persons Holding Political Positions opined that, while disqualification of political rights is not a punishment under the Criminal Code, it cannot be applied retroactively, as this would contravene the rule of law.[1] The Supreme Court determined that the disqualification of

[1] Ruling by the Supreme Court's Criminal Division for Persons Holding Political Positions, Red Case No. Mo 138/2562 (2019), Section: General Deliberation Law.

political rights is an accessory punishment.[2] Based on the interpretation, the Court of Justice holds that such disqualification cannot be applied retroactively, a stance differing from the Constitutional Court Rulings in this case.

The article aims to explore whether the revocation of the election rights can be applied retroactively. To address this question, it is essential to understand the meaning of the principle of prohibition of retroactivity of laws, distinguish between criminal penalties and safety measures, and examine the legal status of election rights revocation. The text is organized into three main sections. The first section covers legal principles, divided into three sub-sections. The first sub-section discusses the principle of "no crime without law" *(nullum crimen nulla poena sine lege)*, including the prohibition of retroactivity of laws, and provides historical context and justification for this principle. The second sub-section explores the differences between criminal penalties and measures for safety. The third sub-section examines the legal status of election rights revocation to determine if it constitutes a criminal punishment. The analysis includes perspectives from civil law countries, represented by the Federal Republic of Germany, and common law countries, represented by American and English jurists. The second section presents an analysis that shows the preferable outcomes of the case when the legal principles discussed in the first section are applied. The third section outlines interesting ideas of the precedents set by the Constitutional Court in the case.

2. Principle of "No Crime without Law"

2.1 Opinions of international jurists

2.1.1 Opinion of German jurists

The principle "no crime without law," referred to by German jurists as the principle of legality (das Gesetzlichkeitsprinzip) is one of the

[2] Supreme Court Ruling No.8450/2563 (2020).

key principles for legal states. In such states, criminal law protects not only the general public but also potential offenders. A legal system requires not only appropriate methods or instruments for crime prevention but also clear frameworks for enforcement to prevent excessive impacts on individuals' rights and freedoms. The abovementioned instruments consist of the principle of blameworthiness (das Schuldprinzip) and the principle of proportionality (das Prinzip der Verhaeltnismaessigkeit), which prevent the imposition of criminal penalties on individuals without blameworthiness or too severe penalties. The principle of legality is intended to prevent arbitrary criminal penalties under unexpected law or the justification for retroactivity of law or unclear law.[3]

Section 1 of the German Criminal Code and section 103 (2) of the Constitution of Federal Republic of Germany (Basic Law for the Federal Republic of Germany) provides similar wording: "A criminal punishment can be imposed for an act only when it has been prescribed by law before the act is committed." This means if an act can cause damage to society and warrants a criminal punishment, the state can impose a criminal enforcement measure against the act only if it is explicitly stated in the law. For example, when the German Criminal Code was first enforced in 1871, there were no automatic vending machines. If someone used a fake plastic coin with the same size as a real coin to obtain merchandise from a vending machine, they could not be charged with fraud (RGSt 68, 65), as vending machines cannot be deceived. Given the elements of fraud under section 263 of the German Criminal Code, deception involves convincing someone. However, vending machines cannot be convinced; only individuals can. Therefore, section 146 and section 248c of the German Criminal Code are not directly applicable to this case. The legislature had to establish a new offense under

[3] Claus Roxin, (2006), Strafrecht: Allgemeiner Teil. Band I Grundlagen. Der Aufbau der Verbrechenslehre. 4. Auflage, Chapter 5, Section 1.

section 265a of German Criminal Code to address the situation. However, section 265a of the German Criminal Code can only be used to punish offenses committed after its enforcement, due to the principle of legality. Professor Claus Roxin argues that the fact that some offenders are not criminally penalized, even though their actions cause damage to society is the price to pay for the legislature (in his opinion, the price is not high) in exchange for avoiding arbitrary use of power and ensuring legal certainty (individuals can expect the state's criminal penalties).[4]

The phrase "no crime without law" is complemented by "no punishment without law" *(nulla poena sine lege)*. This principle dictates that not only must the elements of an offense be defined by law, but the forms and levels of penalties must also be established in law before any offenses are committed. For example, if sabotage cases arise, the legislature might want to increase the penalties outlined in section 129a (1) and (2) of the German Criminal Code. However, the German Court must base its rulings on the existing punishment framework. The principle "no crime without law" does not address the issue here because the offence was already defined in law before it was committed; however, the principle guarantees that the penalties for a crime cannot be applied retroactively. The key question is whether "no punishment without law" is a constitutional principle. Section 2 (1) of the German Criminal Code prohibits retroactive increases in penalties, stating that criminal penalties and their side effects must align with the law in effect at the time the offense is committed. Because this principle is not enshrined in section 103 (2) of the Constitution of Germany, unlike section 1 of the German Criminal Code, we may think that the retroactive increase of penalties, despite being prohibited under section 2 (1) of the German Criminal Code, is not a constitutional law principle because the punishment implied by section 103 (2) of the Constitution of Germany was already

[4] Ibid, Chapter 5, Sections 2-3.

prescribed before the offense was committed. However, according to the majority opinion, the principle "no punishment without law" is a constitutional law principle. Similarly, Professor Claus Roxin argues that the punishment implied by section 103 (2) of the Constitution of Germany must be interpreted not only in terms of whether it constitutes a criminal punishment but also regarding how it is imposed. Based on the interpretation, imposing harsher penalties retroactively is prohibited under section 103 (2) of the Constitution of Germany because such penalties were not prescribed before the offense occurred. This interpretation aligns with the opinions of the constitutional law's drafters. Professor Claus Roxin suggests that this is a correct interpretation because the principle of legality, as a guarantee in the constitutional law, will lose its value if it cannot prevent changes in penalties from lighter to harsher ones. Such changes would allow government authoritiesto exercise their discretion arbitrarily, which the constitutional law is meant to prevent.[5]

The principle of legality involves four key prohibitions.[6] The first two prohibitions apply to judges, and the latter two apply to the legislature. They consist of the prohibition of analogy, prohibition of using customary law as a basis for penalties and increase in penalties, the prohibition of retroactivity of law, and the prohibition of non-maximum certainty.

Prohibition of analogy (Das Analogieverbot) *(nullum crimen nulla poenasine lege stricta)*

Analogy in law refers to applying one legal principle to another matter for which no specific law exists. Analogy is divided into two cases: the analogy of legal provisions (Gesetzesanalogie) and the analogy of legal principles (Rechtsanalogie). The analogy of legal provisions deals

[5] Ibid, Chapter 5, Sections 4-6.

[6] Kress, Claus, (2010), *Nulla poena nullum crimen sine lege*. Max Planck Institute for Comparative Public Law and International Law, p. 1.

with the analogy of individual sections of law, while the analogy of legal principles involves the analogy of legal principles that consist of several sections of legal provisions. These two types of analogy are acceptable in other fields of law but not in criminal law, according to section 103 (2) of the Constitution of Germany, as they have an adverse effect on the defendant. This is because when the law prescribes only similar cases, it means the law does not prescribe penalties. In cases involving automatic vending machines, the defendant could not be penalized through analogy under the fraud provisions of section 263 of the German Criminal Code. Thus, the case was dismissed, and the defendant was released.

Prohibition of using customary law as a ground for punishment and increase in punishment (Das Verbot strafbegruendenden und strafschaerfenden Gewohnheitsrechts) *(nullum crimen nulla poena sine lege scripta)*

Besides civil law, customary law is a source of laws. In criminal law, using customary law as a basis for penalties or increases in penalties is prohibited because penalties must be explicitly prescribed by written law.

Prohibition of retroactivity of law (Das Rueckwirkungsverbot) *(nullum crimen nulla poena sine lege praevie)*

Retroactivity of law can occur in several scenarios. The first scenario involves criminalizing acts that were not considered crimes at the time they were committed. The second scenario entails changing the forms of penalties after the fact, such as substituting a fine with a prison sentence. The third scenario concerns increasing the severity of penalties, for example, from a 5-year to a 10-year imprisonment. All three forms of legal retroactivity are prohibited under constitutional law because criminal penalties – whether they pertain to the nature, form, or severity of the penalties – must be prescribed by law before the commission of the offense.

The prohibition of non-maximum *certainty* (Das Verbot unbestimmter Strafgesetze und Strafen) *(nullum crimen nulla poena sine lege certa)*

If a provision in criminal law states, "Any person who acts against public order in an unacceptable way is subject to a punishment of up to five years in prison," it will eliminate the need to specify many sections in the criminal law. However, the provision is ineffective because it doesn't specify what constitutes a crime. In this case, the punishment **is not prescribed** by law before the offense is committed. Judges would need to interpret which acts violate the provision. Additionally, a lack of maximum certainty in criminal penalties is also prohibited. For instance, according to section 303 of the German Criminal Code, any person who unlawfully damages or destroys another's property is subject to a punishment. This provision is contrary to the constitution and unenforceable because it does not specify the criminal punishment or the punishment level applicable to the defendant.[7]

2.1.2 Opinions of common law jurists

German jurists have explained the principle of legality through four characteristics as mentioned above.[8] American jurists have provided similar explanations, though with some differences. Some opinions identify three key characteristics of the principle: a particular act cannot be defined as a crime unless its elements are prescribed by law *(nullum crimen sine lege)*; penal statutes must be strictly construed *(nulla poena sine lege)*; and the law involving criminal penalties cannot be applied retroactively.[9] Others argue that the principle of

7 Roxin, Claus (Footnote1), Chapter 5, Sections 7-11.

8 Joecks, Wolfgang/Jaeger, Christian, (2018), Studienkommentar StGB. 12. Auflage, Section 1, Titles 2-16; Kuehl, Kristian/Heger,Martin, (2014), Strafgesetzbuch Kommentar, 28. Auflage, Section 1, Titles 1-7; Frister, Helmut, (2008), Strafrecht: Allgemeiner Teil. 3. Auflage, p. 37-48; Jescheck, Hans-Heinrich, (1988), Lehrbuch des Strafrechts :Allgemeiner Tei. 4. Auflage, p. 119-126.

9 Hall, Jerome, 'Nulla poena sine lege' (1937) The Yale Law Journal 47, p. 165.

legality means a particular act cannot be defined as a crime unless its elements are prescribed by law *(nullum crimen sine lege)*, which implies that common law crimes are not allowed. Furthermore, criminal law must not be retroactive and must be clear.[10] Despite diverse opinions, there is a common view that a crime must be defined by the legislature not by the judiciary.[11] Wayne R. LaFave outlines that the principle of legality includes nonretroactivity of criminal law, strict construction of penal statutes, maximum certainty, and the prohibition of common law crimes.[12]

Regarding the nonretroactivity of criminal law, the Constitution of the United States prohibits both federal and state governments from enacting retroactive laws.

Andrew Ashworth, a British jurist highlights that the principle of *nullum crimen sine lege*, also known as the principle of legality, consists of three key elements: nonretroactivity, maximum certainty, and strict construction of penal statutes.[13]

In essence, the principle of nonretroactivity ensures that individuals cannot be judged guilty or penalized unless their actions were prohibited by law at the time they were committed. This principle prevents the legislature from applying criminal laws to actions that occurred before those laws were enacted. Without this assurance, individuals, as free and rational beings, would lack prior notice of whether their actions are prohibited, which would infringe on their fundamental right to be aware of laws in advance.[14] In the United Kingdom, similar justifications for nonretroactivity are provided as in Germany. It is considered unjust for an act that was legal at the time

[10] Hessick, Carissa Byrne, 'The Myth of Common Law Crimes' (2019) Virginia Law Review, 105 (5), p. 973.

[11] Ibid, p. 973-974.

[12] La Fave R., Wayne, (2010), Criminal Law. Fifth Edition, p. 11.

[13] Ashworth, Andrew, (1991), Principles of Criminal Law, p. 59.

[14] Ibid, p. 59-61.

of commission to later become a crime or for the punishment for an act to be increased after the fact. However, some opinions suggest that criminal penalties are ineffective in preventing crime because individuals weigh the potential benefits of their actions against the penalties they might face. If the perceived benefits outweigh the penalties, deterrence is undermined. Jerome Hall argues that, given the principle of punishment which considers the offender's moral culpability and harm to society, so long as the law mandates criminal liability for the offender, the focus should be on the principle of prohibition of criminal analogy rather than on retroactivity or nonretroactivity.[15]

The principle of maximum certainty is closely related to the principle of nonretroactivity, as vague legal provisions can lead to retroactive applications by leaving individuals uncertain about whether their actions fall within or outside the law. This principle encompasses two constitutional and political aspects. First, it supports the codification of criminal laws rather than relying on common law, as codification makes laws more unified and allows individuals to be aware of existing laws. This aligns with constitutional principles that state law-making is the responsibility of the legislature, not the judiciary. Second, without maximum certainty, law enforcement officials might exercise discretion to interpret particular acts as crimes without legislative deliberation. In such cases, criminalization is determined not by the legislature but the executive.[16]

The principle of strict construction of penal statutes is a judicial duty and is unrelated to the roles of the legislature and judiciary as in the case of nonretroactivity of criminal law. It dictates that in cases of ambiguity in statutory language, the law should be interpreted narrowly to favor the defendant. However, this narrow interpretation is not

[15] Hall, Jerome (Footnote 7), p. 171-172.
[16] Ashworth, Andrew (Footnote 11), p. 64.

applied from the outset but only when the legislative intent cannot be determined. The rationale is that the judiciary is the final body to define the scope of the law through interpretation, and judges are not elected members of the legislature. Thus, extending the framework of crimes should be the responsibility of the legislature. If the judiciary interprets the law narrowly and the legislature believes the law should be interpreted more broadly, the legislature will amend the law[17]

Having discussed some key elements of the principle of legality, the next section will address the historical development of these principles.

2.2 Historical development of the principle "no crime without law"

The basic elements of the principle of legality, which asserts that penalties can only be imposed for actions defined as offenses by law, have roots tracing back to ancient Greco-Roman and medieval times. In Roman law, during Sulla's era, there was evidence that criminal offenses and penalties were clearly pre-defined in law as a basis for prosecution, and they could not be applied retroactively. During Augustus's era, it was announced that many laws with criminal penalties could not be applied retroactively.[18] Moreover, criminal laws were not limited to written statutes. The idea that crimes must be explicitly defined in writing dates back to Cicero, who distinguished between statutes that criminalized specific acts and those that declared certain acts as inherently wrongful *(mala per se).* Thus, the prohibition against retroactive application of criminal law did not apply to acts that were intrinsically criminal. The Constitutio Criminalis Carolina (CCC), the most important German Criminal Code of the Middle Ages (1532), incorporated elements of this principle, though it was not fully adopted.[19] In England, the

[17] Ibid, p. 67-70.
[18] Hall, Jerome (Footnote 7), p. 166.
[19] Hall, Jerome (Footnote 7), p. 166.

principle emerged during the reign of King Henry I. It was restated in the 1164 Clarendon Constitution, and Magna Carta later became a symbol of the principle of legality in England.[20] England was ahead of other countries in continental Europe regarding the principle of legality. For example, the 1721 Prussian Code allowed for criminal penalties based on the principle of justice *(ex aequo et bono)* when crimes were not explicitly prescribed in law, with the king deciding on the criminality of acts in complex cases. The 1751 Bavarian Code mandated that adjudication on unspecified acts be based on the principle of *ex aequitate et analogia juris.* The 1769 Austrian Code required that decisions on acts not prescribed by the Code be made according to other principles included in the Code. Before the French Revolution, there was a movement towards codification, and the concept of legality began to be enshrined in legal codes. For example, King Joseph II's 1787 Austrian Code was the first to prohibit the use of analogy.[21] Although the principle of legality was present in earlier periods, it was not understood as it is today.

The principle of legality, as understood today, emerged during the Enlightenment and was derived from the Social Contract Theory, which aimed to limit judicial power through the principle of separation of powers. This paved the way for legal codification in line with the principle of legality. Montesquieu and Beccaria were key figures in the transformation, with Feuerbach coining the Latin phrase *"nullum crimen nulla poena sine lege."*[22] The principle is enshrined in the 1776 United States Declaration of Independence, the 1789 French Declaration on Human and Civil Rights, as well as international treaties, e.g. the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, and the 1950 Convention for the Protection

[20] Hall, Jerome (Footnote 7), p. 167.
[21] Ibid, p. 168.
[22] Kress, Claus (Footnote 4), p. 3.

of Human Rights and Fundamental Freedoms.[23] The 1789 French Declaration on Human and Civil Rights enshrined the principle of legality, which served not only as a constitutional safeguard against the tyrannical use of government power but also as a fundamental principle in criminal law. This principle was restated in the Constitution of France dated 3 September 1791, although it was not included in the French Criminal Code of 1791. It was later enshrined in the Military Criminal Code and re-prescribed in the Criminal Code of 1810. In Germany, the principle of legality was enshrined in the 1813 Bavarian Criminal Code, drafted by Feuerbach. Before 1850, the principle was not provided in the Prussian Constitution or the Prussian Code. It was not until 1871 that the principle was incorporated into the Reich's Code, though it was part of the constitutions of other German states, such as the 1818 Bavarian Constitution and the 1819 Württemberg Constitution.[24]

The next section will address the reasons behind the principle "no crime without law."

2.3 Reasons behind the principle "no crime without law"

The principle "no crime without law," has its full Latin expression – *"nullum crimen, nulla poena sine lege scripta, praevia, certa, stricta."* Despite its Latin origins, it is not a principle of Roman law but was developed by Feuerbach, a German law professor during the 18th century. It serves as a foundational principle for the entire criminal law system.[25]

The significance of the principle "no crime without law" is that, in addition to being prescribed in the Criminal Code, it is enshrined in constitutional law in both Thailand and Germany. It is articulated in section 103 (2) of the Constitution of Germany, and it is found in section 29

[23] Gradinaru, Daniel, (2018), The Principle of Legality. Research Association for Interdisciplinary Studies. Conference Proceedings, p. 289.

[24] Hall, Jerome (Footnote 7), p. 169.

[25] Schmitz, Roland, (2003), Muenchener Kommentar zum Strafgesetzbuch. Band I Paragraph 1-51, Section 1, Title1.

paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2560 (2017). It is also enshrined in various international laws, as previously mentioned. The author argues that this legal principle is superior to constitutional law principles and is a principle of human right law.

When discussing the principle "no crime without law," most Thai legal textbooks identify four main aspects: maximum certainty of criminal law, nonretroactivity of criminal law, prohibition of using customary law to harm the defendant, and prohibition of analogy to harm the defendant.[26] However, they often lack explanations of the political theories and criminal law concepts underlying these principles. Professor Claus Roxin, in his book "Criminal Law: General Part. Volume I Basics" discusses the roots of these principles into two parts.[27] The first part addresses political theories, including political liberalism (Der politische Liberalismus) and democracy and separation of powers (Demokratie und Gewaltenteilung). The second part covers criminal law theories, focusing on general prevention and blameworthiness (Das Schuldprinzip). German jurists offered similar explanations to those provided by Professor Roxin.[28] The author believes that understanding the roots of these concepts is essential for interpreting the principle "no crime without law." The following section will discuss the main contents of his book.

The principle "no crime without law" is rooted in liberalism, which specifies that both the executive and judiciary must adhere to prescribed laws to ensure the protection of individuals' liberties. Historically, the success of people's resistance against state power stemmed from the fact that administrative bodies and judges, who were often dependent on the administrative authorities, could not impose criminal penalties arbitrarily but only in accordance with the law. Despite significant changes

[26] Taweekiat Meenakanit, (2022), Penal Code. Reference Edition, 46th printing, p. 48.
[27] Roxin, Claus (Footnote 1), Chapter 5, Sections 18-25.
[28] Kress, Claus (Footnote 4), p. 1-2.

in government regimes – from absolute monarchy to democracy – liberalism has been referred to as the foundation of the principle "no crime without law" until today.

The second equally important justification involves the principles of democracy and the separation of powers. Criminal penalties most severely infringe on the people's freedom, so the body responsible for enacting laws be representative of the people, such as the House of Representatives. Under the principle of separation of powers, judges are tasked with interpreting laws rather than making them, while the executive is prohibited from involvement in punishment, which falls under judicial authority. This separation helps safeguard individual freedoms.

The third justification is derived from general preventive theory, which comes from the criminal law principle. Criminal penalties are intended to deter individuals from committing offenses by punishing those who do. The objective of criminal penalties can be achieved if prohibited acts are clearly defined before the offenses are committed. If crimes are not defined prior to their commission or if the law is ambiguous, it fails to deter others because individuals cannot be certain whether their actions will result in criminal penalties.

The final justification relates to the principle of blameworthiness. This principle posits that criminal penalties should only be imposed if offenders are blameworthy, meaning they must be aware or reasonably should be aware that their actions are illegal before committing the offense. This can be achieved by specifying in the law that committing the act is subject to criminal penalties.

In addition to German jurists' explanations of the principle "no crime without law," American jurists have also contributed to its understanding in common law textbooks.

George P. Fletcher, an American jurist has defined two aspects of legality: negative and positive legality. The principle of negative legality

emphasizes protecting individuals from the illegitimate use of state power and confirms the principle of *nulla poena sine lege* – no punishment without prior legal notice. There are two reasons for this requirement: First, since people have varying moral perspectives, they must be informed in advance about which acts will lead to criminal penalties. For instance, activities like gambling and lying to police officers may not be universally recognized as crimes without prior notice. Second, prior legal notice prevents judges from making arbitrary decisions based on their personal or political views. On the other hand, the principle of positive legality dictates that if there is sufficient evidence to punish offenders, prosecutors must prosecute all cases without discretion for selective non-prosecution. Fletcher argues that the principle of positive legality conflicts with the Constitution of the United States, which obligates state and federal governments to protect the rights of the accused but does not mandate prosecution to safeguard society or victims. In his book, Fletcher suggests that the Germany's rule of law (Rechtsstaat) is more robust than the United States' principle of negative legality because it encompasses both negative and positive legality. For Germany, the rule of law acts as a sword, whereas, for the U.S.A., it serves more as a shield protecting individuals from state power.[29]

A legal textbook titled "The Myth of Common Law Crimes," written by Carissa Byrne Hessick outlines several values rooted in the principle of legality, particularly the concept of notice. Common law crimes fail to provide such a guarantee, whereas statutory prescriptions of crimes allow the general public to be aware in advance of what actions are prohibited by law. This aligns with the principle of democratic accountability, as the legislature is composed of elected representatives, while judges are not directly accountable to the public. This is also consistent with the principle of separation of powers. The legislature's power to enact laws includes the power to

[29] Kress, Claus (Footnote 4), p. 1-2.

determine if particular actions are crimes, while the judicial power involves the interpretation of criminal laws enacted by the legislature. This separation not only adheres to the provisions of the Constitution of the United States but also protects individual rights by ensuring that state power is checked and that individual freedoms are safeguarded. Furthermore, requiring that crimes be prescribed by statute rather than determined by judges limits the discretion of government officials and helps prevent government abuse. Allowing judges to determine criminality on a case-by-case basis could lead to inconsistent application of the law, potentially influenced by factors such as a defendant's skin color or religious beliefs. In contrast, statutory definitions of crimes apply uniformly to all individuals based on the general characteristics of their actions. Last, defining crimes through statutes increases uniformity and deterrence as legal and illegal acts are clearly specified. This approach allows judges to make confident decisions about acquittals or punishments while ensuring that ones are aware of what conduct should be avoided.[30, 31]

The next section will explore the differences between criminal penalties and measures for safety, which are essential considerations when analyzing Constitutional Court rulings.

3. Differences between criminal penalties and measures for safety

Understanding the distinction between criminal penalties and measures for safety is crucial to comprehending modern criminal law. Criminal penalties are imposed based on the offender's blameworthiness for past actions, while measures for safety address the potential future harm an offender might cause. Blameworthiness is the basis for

[30] Hessick, Carissa Byrne (Footnote 8), p. 975-978.

[31] Carissa Byrne Hessick argues that all of these advantages are debatable. She suggests that defining common law crimes offers stronger protections for civil liberties compared to the principle of legality. See Hessick, Carissa Byrne (Footnote 8), pp. 997–1022.

determining criminal penalties, in accordance with the German Criminal Code, section 46 (1) 1. Offenders who are nonblameworthy due to mental impairment (German Criminal Code, section 20) or due to a lack of awareness of acting unlawfully, if the mistake was unavoidable (German Criminal Code, section 17) cannot be punished. Conversely, even if offenders are not blameworthy, measures for safety can be applied if they pose a potential threat to the public (German Criminal Code, section 63 (1)). For example, mentally ill individuals may not be criminally penalized for murder due to their lack of blameworthiness; however, measures for safety, such as hospitalization, can be implemented according to section 63 of the German Criminal Code. Criminal penalties and measures for safety are not always mutually exclusive. For instance, in traffic offenses where offenders are deemed blameworthy but also found unfit to drive, the court may impose both a prison sentence or fine and a measure for safety, such as revoking their driving license. Although blameworthiness is not a prerequisite for applying measures for safety, these measures can still be used in conjunction with penalties for blameworthy offenders.

Given the reasons mentioned above, the term "criminal law" (Strafrecht) alone is incorrect; instead, the terms "criminal law and measures for safety law" (Straf-und Maßregelrecht) should be used. Historically, measures for safety were first enshrined in law on 24 November 1933. Initially, only criminal penalties were enforceable. Once measures for safety were included in law, the legal system became known as a dual-legal system, differing from a single-legal system, where either criminal punishment or measures for safety could be applied. In terms of criminal policy, measures for safety address situations where criminal penalties alone cannot adequately protect society due to their reliance on the offender's blameworthiness. For nonblameworthy offenders who pose a potential threat, measures for safety are imposed to deter further offenses and ensure public safety. Even slightly

blameworthy offenders may require measures for safety in addition to criminal penalties to prevent potential harm. Measures for safety thus represent an essential societal need. Although measures for safety were legislated in 1933, during the Nazi regime, the concept itself could be traced back over a decade earlier. Amendments to criminal laws have expanded this concept. Most modern penal codes incorporate the principles of both criminal penalties and measures for safety.

As mentioned above, in addition to criminal penalties, the German Criminal Code includes provisions for measures of safety. Both criminal penalties and measures of safety are fundamental components of the basic structure of the rules on legal effects under the German Criminal Code. Given the theories on criminal penalties, we can see why criminal law based on the principle of blameworthiness should incorporate measures for safety, as the second choice. Criminal penalties are grounded in this principle, which limits the punishment to what is commensurate with the offender's blameworthiness. Generally, penalties based on this principle adequately protect both the state's and the defendant's interests. However, there are cases where offenders pose such a significant threat to society that penalties based solely on blameworthiness are insufficient. For instance, mentally-disordered, *doli capax* individuals who commit violent action and are expected to recommit it may only be subject to minor criminal penalties due to their reduced blameworthiness. In such cases, it is crucial to send them to mental health facilities for societal protection. Similarly, drug addicts or alcoholics, despite their lower degree of blameworthiness, may need to be sent to rehabilitation facilities (German Criminal Code, section 64) to prevent further harm. Measures for safety, as outlined in section 61 of the German Criminal Code, are based on the basic concept that offenders are harmful to society and criminal penalties alone are inadequate to safeguard society.

The primary objective of measures for safety is special prevention, aiming to prevent offenders from recidivism. Additionally, most measures for safety have a general preventative effect, as its secondary objective. For example, regarding the revocation of a driving license under section 69 of the German Criminal Code, many traffic offenders fear losing their driving license more than facing criminal penalties. Therefore, the objectives of criminal penalties and measures for safety are fundamentally similar. One key difference lies in their scope of application. The severity and duration of measures for safety are not governed by the principle of blameworthiness as they are with criminal penalties. Instead, they are guided by the principle of proportionality, which impacts the rights of those subject to these measures rather than criminal punishment. Thus, legitimacy of imposing measures for safety is a pertinent question. Professor Claus Roxin argues that the answer lies in the concept of weighing goods (die Güterabwägung), which holds that freedom may be restricted if its exercise is highly likely to cause significant harm to others. Thus, individuals subjected to measures for safety must accept these restrictions if the potential harm from their actions outweighs the loss of their freedom. This concept aligns with section 62 of the German Criminal Code, which asserts that even if offenders are harmful, measures for safety cannot be applied if their use is disproportionate to the significance of their past acts and future acts and the levels of their harm. The principle of proportionality, as an element of the rule of law, is embedded in constitutional law. Therefore, even if measures for safety offer preventive benefits, they must be balanced against the loss of freedom experienced by those subjected to them.

According to Professor Claus Roxin, both criminal penalties and measures for safety share the same fundamental objective, but they differ in how they are applied. For Roxin, both forms of enforcement aim in a similar direction. However, from the perspective of retributive theory,

criminal enforcement measures are based on two distinct approaches that differ in their objectives and scopes. Specifically, criminal penalties address past actions and are grounded in the principle of blameworthiness. In contrast, measures for safety are forward-looking and focus solely on the offender's potential harm. Roxin argues that contemporary criminal penalties cannot be fully explained using retributive theory alone; the preventive aspect of criminal penalties must also be taken into account. Thus, the current system of criminal enforcement measures, which are based on the dual system and single system (ein zwischen Zwei-und Einspurigkeit stehendes Sanktionensystem), offers a proper system for understanding modern criminal penalties.[32]

The next section will address criminal enforcement measures concerning the disqualification of political rights under German law.

4. Criminal enforcement measures for the disqualification of political rights

The legal effects of German criminal law are categorized into two main types. The first type is the direct legal effect of criminal law, known as criminal penalties (die Strafe). Criminal penalties involve adverse effects inflicted by the state (staatliche Übelszufügung) and reflect the ethical condemnation and blame associated with the offenses committed. This distinguishes criminal penalties from disciplinary fines and disciplinary action measures. Moreover, criminal penalties are applied based on the principle of blameworthiness, as specified in first sentence of section 46(1) of the German Criminal Code. The general preventive purpose of criminal penalties is to deter others from committing similar offenses. Additionally, criminal penalties aim to have a preventive effect on individual offenders, aiming to facilitate their social reintegration. German criminal law encompasses two primary types of penalties: imprisonment and fines. Additional penalties,

[32] Roxin, Claus (Footnote 1), Chapter 3, Sections 63-68.

such as the suspension of a driving license under section 44 of the German Criminal Code, can only be imposed in conjunction with a primary penalty.[33]

The second form of criminal enforcement measures is measures for safety. Section 61 of the German Criminal Code outlines various measures for safety, including the withdrawal of driving licenses or the prohibition of certain occupations. The specific characteristics of measures for safety include protecting both society and offenders. The key distinction between criminal penalties and measures for safety is that criminal penalties are based on the principle of blameworthiness, whereas measures for safety do not consider offenders' blameworthiness but their harm.[34]

The reform of German criminal law led to the abolition the revocation of civil rights (die Aberkennung der Buergerlichen Ehrechte). Consequently, section 45 of the German Criminal Code now only stipulates the loss of the right to work in government service, apply for electoral candidacy, and vote in elections as consequences to the status of individuals resulting from criminal penalties imposed by the criminal court. These consequences are termed by the legislature "side effects" (Nebenfolgen), which indicates that they are not additional penalties (Nebenstrafen). The 1962 Draft Criminal Code section 56 dictates that the loss of the right to work in government service, the right to apply for electoral candidacy, and the right to vote in elections are additional criminal penalties, as the same of the suspension of a driving license pursuant to section 44 of the German Criminal Code. Also, they are not classified as measures for safety, under sections 61 to 72 of the German Criminal Code but as special sanctions (Sanktionen eigener Art) related to criminal convictions based on legal provisions or court judgments.[35]

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[33] Nelles, Ulrich,'Statusfolgen als "Nebenfolgen" einer Straftat (Paragraph 45 StGB)' (1991) JZ, p. 17.

[34] Ibid, p.17-18.

[35] Jescheck (Footnote 6), p. 712.

Loss of the right to work in government service, the right to be voted for, and the right to vote in elections

Section 45 of the German Criminal Code prescribes the loss of rights to work in government service, apply for electoral candidacy, and vote in elections for specified periods:

1. Loss the right to work in government service: This refers to the disqualification from becoming a civil servant (Oeffentliche Aemter), including the removal of current civil servants convicted by the court, unless specified otherwise by law. Reapplication for government service is permitted after the legal or court-imposed period ends. The loss of the right to be voted for refers to the loss of the right to be officially elected and the loss of the legal status among convicted individuals (German Criminal Code, section 45 (4)), such as State Assembly representatives. They have no right to apply for official elections (oeffentiche wahlen), which refer to any national official elections, such as the elections of federal or state legislative bodies. Religious elections, such as elections of church officials, are not subject to section 45 of the German Criminal Code, which are secular rules only.[36]

2. Automatic or court judgment-based loss of the right to work in government service and the loss of the right to be voted for

a) The right to work in government service and to be voted for is automatically revoked following a prison sentence of at least one year for a serious crime (German Criminal Code, section 45 (1)). The loss of the right to work in government service and to be voted for lasts for five years.[37]

b) The court may revoke these rights for 2-5 years if specially mandated by law (German Criminal Code, section 45 (2)). The right to vote in elections can only be revoked by court decision if specifically provided by law (German Criminal Code, section 45 (5)).

[36] Ibid, p.713.
[37] Ibid, p.713.

The three measures are addressed by section 92a, section 101, section 102 (2), and section 109i of the German Criminal Code, with specific provisions covering the loss of the right to work in government service and the right to be voted for, in section 129a (6) and first sentence of section 264(5). The loss of the right to be voted for and the right to vote in elections are covered by section 108c of the German Criminal Code, and the loss of the right to work in government service is prescribed in section 358. These provisions aim to protect states, state institutions, and state affairs. The consequences to the person status defined by the court judgment are termed "additional penalties" (als Nebenstrafe). When it comes to additional penalties, the provisions in section 46 of the German Criminal Code regarding the discretion in determining penalties must be applied. However, as the legislature has explicitly classified the loss of personal status as a side effect not as an additional punishment, judges should consider other frameworks. Key considerations include general and special prevention, especially the necessity of preventing offenders from holding state responsibilities and ensuring that members of society respect the law. In these instances, judges are not required to adhere strictly to the principle of blameworthiness (das Schuldprinzip)[38]

Nelles argues that side effects are neither criminal penalties nor measures for safety. Thus, to interpret the side effects, the court must deliberate on a case-by-case basis. In cases involving the right to work in government service, civil service law (Beamntenrecht) must be taken into account. The first consideration is the substantive conditions for the appointment of civil servants, as outlined in section 45 of the German Criminal Code, which pertains to eligibility for civil service; the second consideration is the conditions for civil service appointment and termination. To the revocation of the right to be elected, electoral

[38] Ibid, p.713-714.

law (die Wahlgesetze) is applicable. According to federal election law, individuals ineligible to be elected are those who have been judicially determined to lack the right to be elected or who are otherwise barred from government service. Therefore, the election law defines non-eligibility based solely on court judgments, without additional substantive conditions. As a result, the court must consider provisions from civil service law but is not required to determine whether or not the individuals are currently civil servants. When revoking the right to vote, the court must apply election law, disqualifying individuals whose election rights have been removed due to court judgments.[39]

Under German law, disqualification of political rights, including the right to apply for electoral candidacy and the right to vote in elections, is considered as a criminal side effect, akin to a criminal punishment. This view is supported by at least two reasons. First, the 1962 Draft Criminal Code classified it as an additional criminal punishment. The legal effect of an additional criminal punishment is that offenders are subjected to it only after they have received a primary punishment, such as imprisonment or a fine; an example is the suspension of a driving license. This measure can only be imposed in conjunction with a primary punishment, meaning that additional criminal penalties depend on primary penalties. Thus, additional criminal penalties share similarities with criminal penalties in their nature. Second, criminal side effectsdo not apply to acts committed before the provision of the measures for criminal side effects, as prescribed in section 2 (1) of the German Criminal Code, which is in line with the principle of criminal penalties. The next section is dedicated to the analysis of the Constitutional Court Rulings to determine if the disqualification of political rights can be applied retroactively and, if so, why.

[39] Nelles (Footnote 31), p 22-23.

5. Analysis

Despite some differences regarding the principle of "no crime without law," the German, British, and American legal systems all uphold the principle of nonretroactivity in criminal law. The Constitutional Court rulings under discussion, which permitted the retroactive disqualification of political rights, suggest an acceptance of such retroactivity, particularly when the actions in question were committed by the defendants before the prohibition and were cited by the prosecutor as an offense for prosecution. The primary issue is understanding why the Constitutional Court deemed it legitimate to allow the retroactive disqualification of political rights. This can be summarized in two points: First, the Constitutional Court justified retroactivity by treating disqualification not as a criminal punishment but as a legal measure derived from the effects of the law that gives the power to dissolve parties under the Organic Act on Political Parties B.E. 2541 (1998). This measure aims to prevent party executives causing harm to the country and democratic regime from having the opportunity to pose further harm. Given this reasoning, it is clear that the Constitutional Court did not consider the disqualification of political rights as a criminal punishment. Considering section 18 of the Criminal Code, we should be more likely to agree with the Constitutional Court's opinion. Although section 18 provides criminal penalties, it does not necessarily mean that other enforcement measures that are not included in the section are non-criminal penalties, at least in theory. The current Thailand Penal Code was enacted over 60 years ago, and section 18 has not never been amended, although other enforcement measures have been issued, such as the suspension or revocation of driving licenses under the Land Traffic Act B.E. 2522 (1979) and disqualification of political rights, including the right to vote and the right to apply for electoral candidacy. According to the German Criminal Code, such disqualification is a criminal side effect, while the 1962 Draft German Criminal Code classified it as an additional punishment. Regardless of whether it is termed an additional punishment or a criminal

side effect, under the German Criminal Code, such disqualification is governed by criminal law. Section 2 (1) of the German Criminal Code states that both criminal penalties and criminal side effects must be governed by the principle of "no crime without law," meaning that the applicable law must be in force at the time the offense is committed. If the German concept is applied, the disqualification of political rights should be subject to criminal law and the principle of "no crime without law," thus rendering nonretroactivity inapplicable. This contrasts with measures for safety, which are governed by the law at the time of judgment not the time of the offense.

The Constitutional Court confirmed that such disqualification was not a criminal punishment but did not definitively classify disqualification as a measure for safety. However, the Court's justification was in line with the concept of measures for safety, as a way to prevent further harm to society. This aligns with the opinion expressed by Professor Taweekiat Meenakanit, Ph.D., in the Daily Matichon Newspaper before the Constitutional Court ruled on the case. Meenakanit argued that the disqualification of political rights is not a criminal punishment but a measure for safety regarding the prohibition of certain occupations. Consequently, it could be applied retroactively from the time the court issued its judgment.[40] The author holds the opinion that the primary distinction between criminal penalties and measures for safety lies in their focus. Criminal penalties address offenders' blameworthiness, implying that they commit an act prohibited by the state although they could avoid such act. In contrast, measures for safety do not consider blameworthiness but rather their harm to society. Therefore, if the disqualification of political rights is viewed as a measure for safety, it must be justified by explaining the extent of harm posed by the disqualified politicians to society. Importantly, this harm refers to the

[40] Taweekiat Meenakanit, Mr. Taweekiat Meenakanit's opinion about the Ruling on the Case of Political Party Dissolution: https://www. blogging.com › viewblog, p. 7.

individual offenders' potential harm, not the harm resulting from their acts or occupations. For example, individuals who commit sexual crimes against children may be detained after their prison sentences to protect society. Similarly, teachers who sexually abuse students must be barred from teaching to prevent further abuse. On the other hand, corrupt politicians should face criminal penalties, such as imprisonment, because the harm stems from their wrongful acts, not from their inherent nature. Given the Constitutional Court Rulings on the disqualification of political rights, it is crucial to evaluate whether all disqualified politicians were genuinely harmful to society.

Another reason cited by the Constitutional Court was that although the right to vote is a fundamental right in a democratic society, it is permissible to legislate eligibility requirements to maintain societal appropriateness and democratic governance. While acknowledging the importance of political rights, the Constitutional Court held that these rights can be limited. This contrasts with the perspective of American jurists, who emphasize the significance of political rights for a democratic society.[41] The Constitutional Court placed less emphasis on political rights compared to American jurists.

Criticisms against the Constitutional Court's rulings include both complete and partial disagreements. Partial disagreements were articulated by, for example, Professor Kanit Nanakorn, Ph.D., who argued that disqualification from political rights in this case followed public law and could be applied retroactively for the public interest. However, he contended that retroactivity should apply only to the right to apply for electoral candidacy, not to the right to vote, as retroactive application to the right to vote would violate the principle of proportionality.[42]

[41] Levine, Eli L., (2009), 'Does the Social Contract Justify Felony Disenfranchisement? 1 Washington University Jurisprudence Review, p. 193.

[42] Kanit Nanakorn, 'Problems with Retroactive Law in the Party Dissolution Case (Final Part)), (2017) Matichon Weekly, Issue. 6-12 July 2017, Year 27, Vol. 1403, p. 34-35.

The author believes that although the measure to disqualify political rights is not explicitly prescribed in the Criminal Code, it is a criminal measure that is resembles criminal punishment due to its harmful effects on the individuals subjected to the measure. Furthermore, in countries like Germany and the United States, disqualification of political rights is typically considered a criminal punishment. According to American law, such disqualification generally applies to felonies.[43] The author maintains that disqualification from political rights, whether regarding electoral candidacy or voting, should be nonretroactive. Similarly, Worachet Pakeerut et al. argued that enforcing the Announcement of Council for Democratic Reform No.27 dated 30 September 2006, to revoke the election rights was contrary to the rule of law, as it involved retroactive harm. They assert that the prohibition of retroactivity extends beyond criminal offenses and penalties to include the revocation of election rights.[44] The primary difference between the author's view and that of Worachet Pakeerut et al. lies in their perspectives on criminal versus public law.

6. Conclusion

In summary, as I indicated above, the restriction of political rights is akin to criminal punishment, so such actions must adhere to the principle of 'no crime without law' which prohibits retroactivity in a harmful way to defendants. Consequently, I disagree with the Constitutional Court ruling in this case. To ensure clarity and consistency with this legal principle, it is the legislative branch's responsibility to explicitly define the legal effects of political rights disqualification to reflect whether it should be treated as a criminal punishment or not.

[43] Eli L. Levine (Footnote 39), p. 200.

[44] Worachet Pakeerut et al., Analysis of the Constitutional Tribunal Ruling on the Case of Political Party Dissolution, Prachatai, accessed on 7 June 2007.

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Bibliography

Thai publications

Kanit Nanakorn (2007). Problems of Retroactive Law in the Case of Political Party Dissolution (Final Part). Matichon Weekly, Volume 6-12 July 2007, Year 27, Issue 1403, pp.34-35.

Taweekiat Meenakanit, Criminal Code, Reference Edition, 46th Printing, 2022. Bangkok: Winyuchon Publication House.

Worachet Pakeerut et al., Analysis of the Constitutional Tribunal Ruling on the Case of Political Party Dissolution, Prachatai, accessed on 7 June 2007.

Taweekiat Meenakanit's opinion about the Ruling on the Case of Political Party Dissolution: https://www.bloggang.com>viewblogviewblog.

English publications

Ashworth, Andrew. (1991). Principles of Criminal Law. New York: Oxford University Press.

Fletcher, George P. (1998). Basic Concepts of Criminal Law. New York: Oxford University Press.

Frister, Helmut. (2008). Strafrecht: Allgemeiner Teil. 3. Auflage. Muenchen: C.H. Verlag

Gradinaru, Daniel. (2018). The Principle of Legality. Research Association for Interdisciplinary Studies. Conference Proceedings, November 19-20: 289-294

Hall, Jerome. (1937). Nulla poena sine lege, The Yale Law Journal Vol. 47 December No.2: 165-193

Hessick, Carissa Byrne. (2019). The Myth of Common Law Crimes. Virginia Law Review. Vol. 105 September 2019 No. 5: 965-1024.

Jescheck, Hans-Heinrich. (1988). Lehrbuch des Strafrechts :Allgemeiner Tei. 4. Auflage. Berlin: Duncker &Humblot.

Joecks, Wolfgang/Jaeger, Christian. (2018). StudienkommentarStGB. 12. Auflage. Muenchem: C.H. Beck Verglag

Kress, Claus. (2010). *Nulla poenanullum crimen sine lege*. Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press.

Kuehl, Kristian/Heger, Martin. (2014). StrafgesetzbuchKommentar. 28. Auflage. Muenchen : C.H. Beck Verlag

La Fave R., Wayne. (2010). Criminal Law. Fifth Edition. USA: West Publishing Co.

Levine, Eli L. (2009). Does the Social Contract Justify Felony Disenfranchisement? Washington University Jurisprudence Review Vol 1 Issue 1: 193-224.

Meier, Bernd-Dieter. (2001). StrafrechtlicheSanktionen. Heidelberg: Springer Verlag

Nelles, Ulrich. Statusfolgenals "Nebenfolgen" einerStraftat (Paragraph 45 StGB), JZ 1991, 17-24)

Roxin, Claus. (2006). Strafrecht :Allgemeiner Teil. Band I Grundlagen. Der Aufbau der Verbrechenslehre. 4. Auflage. Muenchen: C.H. Beck Verlag.

Schmitz, Roland. (2003). MuenchenerKommentarzumStrafgesetzbuch. Band I paragraph 1-51. Muenchen: C.H.Beck Verlag.

The Privilege against Self-Incrimination

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Justice of the Court of Appeal

1. Brief Facts and Reasons of the Constitutional Court's Ruling

In the Constitutional Court's Ruling No.2/2562 (2019), there is an issue to be considered as to whether the Announcement of the Council for Democratic Reform No.25, Re: Proceedings Relating to Criminal Justice, dated 29th September 2006, only with respect to the prescription of offences and penalties[1], was contrary to or inconsistent with section 3, section 26, section 28 paragraph one, and section 29 paragraph four of the Constitution or not.

In terms of the facts brought before the Constitutional Court for consideration, the Pathumwan Kwaeng Court submitted the defendant's arguments, which were sued on the charge of not complying with the Announcement of the Council for Democratic Reform No.25, which states that: "a person alleged to have committed a criminal wrongdoing is under a duty to provide a fingerprint, handprint or footprint pursuant to the order of a public prosecutor, police prosecutor or an inquiry officer; any violator shall be held to have committed the offence of wrongdoing relating to justice and liable to a term of imprisonment not exceeding six months or a fine not exceeding one thousand baht, or both'' The defendant gave four reasons for his objection, namely:

1. Announcement of the Council for Democratic Reform No.25 was contrary to section 3 of the Constitution.
2. Announcement of the Council for Democratic Reform No.25 contained content that was contrary to the rule of law as stipulated in section 26.

[1] The term "Announcement of the Council for Democratic Reform No. 25" will be used hereinafter for ease of reference.

3. Announcement of the Council for Democratic Reform No.25 violated the principle of proportionality under section 28 paragraph one.
4. Announcement of the Council for Democratic Reform No.25, which forced individuals to provide fingerprints without consent, was in violation of the principle of the privilege against self-incrimination as guaranteed by section 29 paragraph four of the Constitution, because being forced to provide fingerprints and to provide such fingerprints to inquisitors was considered to be the testimony of the alleged offender.

The Constitutional Court ruled that the Announcement of the Council for Democratic Reform No.25 was contrary to or inconsistent with the Constitution, section 3 paragraph two, section 26 paragraph one, and section 28 paragraph one. The Court gave two main reasons: First, the announcement violated the harm principle because the acts that violated the prohibitions of the announcement were not a serious act or effect on public order to the extent of requiring the enactment of an offence punishable by a criminal penalty. Second, the announcement violated the principle of proportionality because there were other government measures that could deal with the problem in a similar manner to the prohibitions of the announcement, such as section 368 paragraph one of the Criminal Code and section 131/1 of the Criminal Procedure Code. However, when the Constitutional Court found that the Announcement of the Council for Democratic Reform No.25 was contrary to or inconsistent with section 3 paragraph two, section 26 paragraph one, and section 28 paragraph one of the Constitution, it did not make any ruling on the issues under section 29 paragraph four of the Constitution.

On the issue of whether being forced to make a fingerprint and submit the fingerprint to the inquisitor whether or not it is considered that the alleged offender's testimony is as the defendant has argued,

according to the Supreme Court's judgment, such issue has not yet been considered for consideration. However, according to the Supreme Court's judgment No.1368/1957, the Supreme Court ruled that the alleged offender who refused to write his name on the paper as ordered by the inquisitor to examine the fingerprint was not guilty of disobeying the order of the officer. From the above reasons, it can be said that the Supreme Court's judgment in question is similar to the Supreme Court's principle that the inquisitor has no authority to force the alleged offender to write his name on the paper to examine the fingerprint. In addition, there is the Supreme Court's judgment No.6969/2001, which lays down a similar principle. Although the Supreme Court in the said case stated that the inquisitor had the authority and duty to collect evidence in the case, in the said case, since the victim voluntarily signed his name to prove that the signature on the withdrawal slip was not his signature and it was a forged document, so there was no issue of forcing him to sign.

Remarks

The content of this writing is divided into three parts. First, it will discuss the legal principles on the right to silence, which will be divided into two main issues. First, it will discuss the historical development of the principle of the right to silence or the principle of not incriminating oneself[2], how it has developed. This will lead to the second issue of how wide or narrow the scope of this principle is. When we know the historical development of this principle, we will be able to determine the scope of this principle, which will lead to the answer to the question of whether the Announcement of the Council for Democratic Reform No.25 was contrary to or inconsistent with article 29 paragraph four of the Constitution. Both issues will use the law of the civil law countries, mainly Germany. In the common law group, England and the United States will be the main ones. We will start with the common law

[2] The term "right to silence" will be used hereafter for ease of reference.

countries first because the right to silence was originally developed from the common law courts of England. Therefore, the development of the right to silence will use the content of English law. The scope of the right to silence will use American law as the main one. After that, we will discuss the principle of the right to silence. Both in terms of historical development and the scope of the concept under German law, in the second part the note taker will analyze what the outcome of the case should be if the legal principles stated in the first part are applied. In the final part, there will be a conclusion to the Constitutional Court's ruling in this case.

2. Legal Principles on the Privilege against Self-Incrimination

2.1 The Development of the Right to Silence in English Law

The right to silence in England has evolved over hundreds of years. Its emergence in England can be said to be the product of the struggle between the accusatory system (common law courts) and the inquisitorial system (religious courts), in which the common law courts ultimately won. In this regard, Professor Wigmore divides the development of the concept into two periods: The first period, between 1200 and 1600, during which individuals exercised their right to silence as a defense when compelled by religious courts to swear an oath and to incriminate themselves. The second period, beginning in the early 1600s, during which defendants asserted their right to silence when interrogated in a manner that would make them liable in a common law court.[3]

During this period, from 1200 to 1600, both common law and religious courts had jurisdiction in England, with different forms of legal procedures. That is, up until the early 13th century, England adhered to the accusatory system in common law courts and the inquisitorial system in religious courts, which were influenced by European courts. Both common law and religious courts adhered to the legal procedures

[3] Gregory W. O' Reilly,' England Limits the Right to Silence and Moves towards an Inquisitorial System of Justice' (1994–1995) J. Crim. L. & Criminology 85, p. 407.

of oaths and trial by ordeal to prove the truth. However, in the early 13th century, the practice of oath-taking began to be abolished, due to concerns about corruption associated with oath-taking. In this system, the defendant, often advocated by another person, would swear an oath of innocence. Although, at first, the advocate was often an individual with direct knowledge of the events, this requirement was later abolished and replaced by a more elaborate form of oath-taking and secrecy. Until the early 13th century, trials involving contested disputes were seen as just because the outcome of the disputes was seen as God's judgment. However, in 1215, such trials were abolished and a new form of judicial review[4] was introduced. At that time, it could be said that the search for truth in criminal cases, whether in the accusatory system by the common law courts or the inquisitorial system by the religious courts, was not clearly distinguished.

The accusatory and inquisitorial systems of trial were clearly differentiated by the early 13th century, when both common law and religious courts still had jurisdiction in England. Although initially most criminal offenses were tried in common law courts, religious courts began to have wider jurisdiction and were no longer limited to religious offenses. In common law courts, by the early 13th century, the practice of adversarial trials had been gradually reduced and replaced by jury trials. In the early days of the jury system, it was the jury's decision whether there was sufficient evidence to bring a person to trial. This was in accordance with the guaranteed collateral by the Magna Carta, namely, that no bailiff for the future shall, upon his own unsupported complaint, put anyone to his law, without credible witnesses brought for this purposes. Until the 16th century, such a jury, consisted of local people with knowledge of the charges, would accept the indictment; in deciding whether to accept the indictment, the jury may not come to examine the defendant's testimony or call the person to swear an oath.

4 Ibid, p. 408.

Some lawyers, such as Professor Wigmore, had suggested that in the early development of the jury system, the right to silence was only used in the court of first stance. That is, whether the court will accept the indictment for consideration or not, but it will not be used in the trial and judgment. The task of the jury at this court stage is only to believe or not that the defendant has actually committed the crime. If they believe that the defendant has committed the crime, the indictment will be officially accepted and the defendant will enter the trial process. However, the jury is not the one who decides whether the defendant is guilty or innocent. When the adversarial process was abolished in the 13th century, the traditional trial ended and judges began to fill the gap by having juries, who were originally responsible for receiving indictments, also serve the part of the trial as adjudicators. That is, deciding whether or not the defendant was guilty, often by adding a number of jurors who are members of the community. However, it was seen as unfair to have a jury that was responsible for receiving the indictment also deliberate the case, and later developed a split jury into two groups: a presenting jury and a trial jury, and the defendant was given the right to defend oneself. In 1352, the defendant had the right to object to the jury that it had failed to give a fair verdict. Over the next hundred years, juries have evolved from being eyewitnesses to being impartial and independent individuals who decide cases based on the evidence presented in court rather than on what they have learned in the past.[5] In the common law court system, there is no use of oaths as was used in religious courts in England, in that very same time,[6] as will be discussed later, but a jury system is used in the trial consideration instead.[7]

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5 Ibid, p. 408-410.

6 Moylan, Charles E./Sonsteng, John O., 'The Privilege against Compelled Self-incrimination' (1990), 16 William Mitchell Law Review, p. 256.

7 Randall, Charles H. Jr, 'Sir Edward Coke and the Privilege against Self-Incrimination' (1956) 8 S.C.L.R., p. 421.

While common law courts have developed the fact-finding in criminal trials through the aforementioned accusatory system of jury trial without the use of oath by the alleged offender, in contrast, at the same time, in religious courts, the fact-finding in criminal trials, both at the investigation and sentencing stages, were carried out by inquisition.[8] That is, using oaths as a method to find out the truth from the confession obtained from the alleged offender and using such confession as primary evidence. By such oath, at the beginning of the trial process, the judge will be the person who tells the parties to swear that they must answer every question truthfully because the defendant in a criminal case does not need to know clearly what interrogates he will be asked when he takes the oath. Therefore, the result of his own oath becomes evidence against oneself later.[9] In an interrogation under oath, the interrogator can make the suspect answer not only to acts that the interrogator does not yet know, but also to reveal the suspect's secret thoughts or even any personal suspicions that the suspect might have that could constitute a crime of heresy.[10] According to the Professor, Levy, the fact-finding method -which originated from religious court investigations which used the method of interrogating people under oath. When the trial that allowed the parties to defend the case was abolished and replaced by the new forms of investigation and trial in the three inquisitorial systems, the introduction of the inquisitorial system in religious courts accelerated. The three forms of investigation and trial are as follows: The first form is called *accusation*, which is the oldest form of trial in which a person voluntarily accuses another person and has the duty to prove the facts as he has accused and must accept the risk of being punished if he cannot

8 Walker, Jeffrey K., 'A Comparative Discussion of the Privilege Against Self-Incrimination' (1993) NYLS Journal of International and Comparative Law, 14 (1), p. 2-3.

9 Helmholz, Richard H, 'Origins of the Privilege against Self-Incrimination: The Role of the Europeanlus Commune' (1990) New York University Law Review 65, p. 964-965.

10 Moylan, Charles E./Sonsteng, John O. (Footnote 5), p. 254.

prove the truth as he has accused. The second form is called *denunciato*, which a private person acts as an accuser - similar to the first form, but the accuser in the second form does not have the burden of proof and does not risk being punished. In this case, the person secretly accuses the defendant before the judge who will then prosecute the defendant. The third is called *inquisition*, in which the judge acts as both accuser, prosecutor and judge. The trial process in the inquisitorial system gives the judge unlimited power. Taking a case to court may, therefore, only result in the defendant's reputation being infamied. Moreover, the lack of evidence is not an obstacle to the trial in an inquisitorial system because in such a trial it is up to the subsequent proceedings to seek evidence from the defendant's testimony.[11] That is, the inquisitorial process begins with the defendant being required to take an oath *(de veritatedicenda)* to answer all questions honestly. This oath is designed to persuade the defendant to testify in such manner causing self-incrimination, since confessions are an essential part of an inquisitorial trial. It is more likely that changes to what the defendant has said can be interpreted to his detriment, since the defendant is not aware of the charges, the accuser, and the evidence. If the content of the defendant's statement in itself does not convict the defendant criminally, the defendant may still be convicted of perjury. In an inquisitorial system, it can be said that a suspect cannot avoid giving an oath. If a suspect refuses to give an oath, one will be considered guilty of *pro confesso*, which is equivalent to the person having confessed, or may be sentenced to imprisonment for the crime of intentional disobedience to a public authority (contempt). In addition, in some cases, suspects may face life imprisonment if they refused to testify.[12] The oath known as *de veritableicenda* began to be known in England as *the oath ex officio*, a system that originated in 1215 during the reign of Pope Innocent III and the Fourth Lateran Council. The council

[11] Gregory W. O'Reilly (Footnote 2), p. 411-412.
[12] Ibid, p. 411.

consisted of full body of bishops who were tasked with dealing with the problem of heresy. The council chose to use the inquisition method to deal with the problem. The inquisitors took the form of a committee that sought out the people who were guilty of heresy and exonerated them.[13]

In the inquisitorial system, therefore, the judge acts as both accuser, prosecutor and judge. In England, there has been opposition to the inquisitorial system of trial in which the defendant must take an oath since 1246. In the following century, Parliament passed laws prohibiting such trials, but despite these laws, the Church continued to use oaths in trials of heresy, whereby firstly initiated in the Catholic Church and later in the English Church, and eventually the Crown Court (which was not a common law court) adopted the method. A major change occurred in the 16th century, when the inquisitorial process was opposed to oaths. In 1525, William Tyndale published the reprint of the second part of the Bible, in England, for the first time, which reiterated Matthew's strong condemnation of oaths and called for a revival of the Bible. Later in 1528, William Tyndale commented further in his own writings, condemning the oath as being against a person's conscience. In 1532, John Lambert, who was tried for a heresy prosecution, may have been the first to criticize oath-taking as illegal, arguing that no person could be compelled to take an oath before the person being accused by a credible jury. In that same year, the respected jurist and scholar Christopher St. Germain published a book attacking religious courts and, in particular, the practice of swearing, arguing that common law was the supremacy of religious law and that swearing was unfair and forced upon innocent people to testify without clear accusation. Eventually, in that year, the Parliament petitioned the King to amend the trial procedure regarding oaths, namely that oaths would only be taken after

[13] Moylan, Charles E./Sonsteng, John O., (Footnote 5), p. 253-254.

fair and open accusations had been made against the defendant.[14] While the Crown Court was based on an inquest system that relied primarily on oaths, in contrast to the ancient English common law principles, self-incrimination was prohibited. This principle was also found in the *glossaordinaria to the Decretals* (1234) of Pope Gregory IX, considered the most important medieval religious legal treatise. It was reiterated and endorsed by *Innocent IV* and *Panormitanus*, considered the most important medieval religious legal writers. It was also incorporated into European civil and criminal manuals.[15]

In the mid-16th century, the conflict, which had originally involved government officials attempting to use oaths and citizens asserting their right to silence, evolved into a conflict between the Empire and the Church as the Reformation began in England. When Henry VIII (1491–1547) established the Church of England and rejected the authority of the Church in Rome, the post-Henry VIII era, during the reign of Mary I, there was a violent reaction when Mary, a Catholic, brought England back under the Church in Rome. And further violence arose when Elizabeth I, who succeeded Mary to the throne, attempted to bring the Church under the control of the Empire. During the reign of Elizabeth I, Parliament recognized this power through issuing the Act of Supremacy, which gave the Empire (Crown) power to try religious matters. In the latter half of the 16th century, religious matters became the Empire matters and acts that were considered crimes under religious law became crimes under the Empire law. It is not surprising that the Empire (Crown) courts adopted religious court methods. That is, the introduction of the inquisitorial system to offences under the Empire's law. The adoption of the inquisitorial system by the Empire courts led the Empire's High Commission and the Court of Star Chambers to develop the principle

[14] Gregory WHelmholz, Richard H., (Footnote 8), p. 9.
[15] O'Reilly (Footnote 2), p. 410-411.

of the right to silence. In the early 14th century, the Court of Star Chamber evolved from an advisory council to the king into a judicial body. Initially, the trials were conducted in secret and were largely based on discretion, including inquisitorial methods such as anonymous accusers, ignorance of the alleged offender, and even torture. However, by 1580, the Star Chamber's trials had become more open and its jurisdiction was limited to violations of the king's orders. Although torture, burning, and imprisonment were allowed, no harsh punishments such as the death penalty were imposed. This non-violent trend ended in the late 16th century, when kings used the Star Chamber along with the High Commission as inquisitorial enforcers of religious and political beliefs.[16]

The methods of the Crown Court's inquisitorial system, namely the Court of Star Chamber and the High Commission, began to clash with those of the Common Law Courts. In 1568 Dyer, the Chief Justice of the Court of Common Pleas, issued a warrant for the release of prisoners who had been compelled to swear an oath, stating his objection to oath-taking in a proverb that later became widely accepted: *nemo tenetur se ipsum prodere*, or one need not be compelled to give evidence to his own harm. While Dyer sees the proverb as having religious origins, its historical roots and legitimacy remain obscure. Such ambiguity as to the origins of the proverb was common in the late sixteenth century, as evidenced by various arguments for the legitimacy of the right to silence when taking an oath. For example, Thomas Cartwright, a Puritan who was accused of religious guilt, argued that taking an oath was in breach of personal rights, a violation of one's conscience, and a violation of religious principles. Soon, common law and the Magna Carta became the first legitimacy for opposition to oath-taking. James Morice, a prominent jurist and Member of Parliament, has argued that oaths are contrary to common law because they force a defendant to be presumed guilty

[16] Gregory W. O'Reilly, (Footnote 2), p. 412-413.

and require him to prove his innocence. According to James Morice, mandatory oaths are in breach of Article 29 of the Magna Carta, which ensures that criminal proceedings must be conducted in accordance with laws made by Parliament and not by the King (Crown) or any special courts of the King. In 1534, the Parliament suspended the use of oaths, repealing a law in force since 1401 that had given bishops the power to use the method of inquisition. Opponents of the use of oaths also argue that the inquisitorial method of the Crown Court violates Article 28 of the Magna Carta, which requires proper presentation of a jury before the oath is taken. Some argue that Article 28 of the Magna Carta prohibits the use of oaths, whether or not there is a jury (proper presentation). Many of the arguments against the inquisitorial method of the Crown Court rest on the assumption that both the Magna Carta and common law limit the power of the Crown Court, and that Parliament, as the origin of common law, limits the power of the Crown Court. It is not surprising that the Crown Court disagrees with this assumption and continues to use the traditional inquisitorial method using oaths. In the 17th century, the battle over oath-taking and the right to silence began to be fought between Parliament and the common law courts on one side and the Crown court on the other.[17] The conflict reached its peak during the English Civil War in 1640 onwards, which was a conflict of political, religious and legal nature. In political terms, the conflict was between the royalists who insisted on the divine power of the monarchy and the parliamentarians who supported the democratic approach. In religious terms, the royalists supported the established English Christianity, while the parliamentarians were both Catholics who supported the Church in Rome, considered the right wing, and the Puritans who supported the left wing. In legal terms, the royalists supported the High Commission and the Court of Star Chamber, which

[17] Ibid, p. 41-415.

used an inquisitorial system and introduced the *ex officio* trial process. The parliamentarians, led by Lord Coke, supported the common law courts in the accusatory system.[18] For example, in the early 17th century, Parliament made four attempts to reaffirm Chapter 29 of the Magna Carta, hoping to force the Crown Court to use common law procedures in times of conflict between the two courts. The common law courts played a proactive role, and Lord Coke was arguably the most important figure in establishing the common law court's authority over the Crown Court. That is, when Lord Coke was President of the Court of Common Pleas, Lord Coke asserted the supremacy of the common law courts and limited the powers of the Crown Court. The opportunity arose in the Fuller's case, where a judge on the King's Bench sought advice from Lord Coke on how to punish Fuller, a barrister and member of the House of Commons. Fuller had attacked the High Commission when he applied to the King's Bench to acquit his client who had been tried at the High Commission. Lord Coke, writing in the Fuller case, argued that the Crown Court had jurisdiction only in matters within its jurisdiction, namely religious offences, and that the Crown Court had jurisdiction only under legislation passed by Parliament. The Common Law Court could set rules on the limitations of the Crown Court's jurisdiction. Applying this principle, the High Commission could only punish Mr.Fuller for religious offenses, such as heresy, and had no jurisdiction at common law. Lord Coke confirmed this principle by issuing a writ of prohibition or stay of proceedings that contradicted the Magna Carta and common law. Lord Coke's principle asserted Parliament's power to legislate, affirmed the right of individuals to benefit from common law and demonstrated his opposition to oaths and inquisitorial proceedings.[19] Lord Coke's comments thus confirm the principle of the supremacy of the law of England. According to this principle, in deciding cases, the common law courts have

[18] Moylan, Charles E./Sonsteng, John O., (Footnote 5), p. 256.
[19] Gregory W. O'Reilly, (Footnote 2), p. 415.

the ultimate power to decide whether what comes out of Parliament and what is the custom of the country is law or not. The extent of the religious courts' jurisdiction is determined by the common law courts. The High Commission is given only the powers specified in the Act. That is, the Act of Supremacy and the limits of their powers as defined by that Act are interpreted by the common law courts. Warrants can be issued to review the legality of the jurisdiction or the form of proceedings of religious courts.[20] Whether it is the High Commission or any other court, the privileges of the King must be limited. The King himself is subject to the law of the land. Lord Coke also held that Acts passed by Parliament can be examined by the judiciary and if the court finds that the Act is contrary to the law of the land, it can be declared void.[21]

Lord Coke's imposition of such a rule was seen as a threat to the inquisitorial process used by the Crown Court and as a weakening of King James's power. In response to this, King James dismissed Lord Coke from office in 1616. Even after Lord Coke was removed from office, laws began to limit the use of oath-taking procedures and to limit the interrogating of inquisitorial questions, and the right to silence began to be developed. The Court of Star Chamber will require suspects to take an oath and use the inquisitorial interrogation procedure only in minor offences where there is no death or bodily injury, and only after the suspect has been informed of the charges. As a result, the High Commission Court can only use the oath procedure in criminal cases on a limited basis. The

[20] A defendant in a religious court can apply to the common law court for a writ of prohibition. The common law judge will send the writ to the religious court and prohibit the religious judge from acting in the proceedings of the case involving a civil matter. In determining whether the case involves a civil matter that is outside the jurisdiction of the religious court, the common law judge will hold an examination of witnesses. If it is found that the case involves a civil matter, the prohibition in the writ is upheld and the religious court cannot proceed with the proceedings. If it is found that the case does not involve a civil matter, a writ of consultation is issued to lift the writ of prohibition. (Randall, Charles H. Jr, Footnote 6, p. 437-438).

[21] Randall, Charles H. Jr, (Footnote 6), p. 436.

oath procedure can also be used by clerics, while ordinary citizens can only use the oath procedure in cases involving wills and marriages.[22] As can be seen from the case of *Collier vs. Collier,* where a wife sued her husband for incontinency, the Common Pleas Court held that in such cases, religious courts could not compel the defendant to take an oath. In the following case, *Burrowes and others vs. the High Commission* in 1616, Lord Coke cited three other cases in which the Common Law Courts had acquitted three defendants who had been sentenced by the High Commission for refusing to take an oath, citing the principle of the right to silence. Thus, it can be seen that prior to 1600, religious court proceedings could not be subject to oaths in private courts unless the above-mentioned exceptions were met.[23] Lord Coke's principle has gradually been extended. Moreover, the objection to the use of oaths is no longer based on the grounds of proper presentment, as it used to be, but rather on the grounds that it is wrong to force people to testify against themselves because such a trial violates human dignity and the common sense of self-preservation. The prosecution of John Lilburne may be regarded as a turning point in the conflict between the Crown Court and the proponents of common law. The outcome of the case was a victory for the proponents of the right to silence and to cease proceedings in the English inquisitorial system. The facts of the case were that John Lilburne, a prominent leader in Parliament, was indicted in the Star Chamber on charges of importing seditious literature into England. John Lilburne denied the charge of importing the literature and demanded to be confronted by his accusers and refused to take oath or answer any questions unrelated to the charges before the inquisitors for fear that his answers would incriminate him. In 1639, the Star Chamber found John Lilburne guilty of refusing to take an oath and sentenced him to be scourged until he had recanted. As a result, John Lilburne told

[22] Gregory W. O'Reilly, (Footnote 2), p. 416-417.
[23] Randall, Charles H. Jr, (Footnote 6), p. 427-428.

the crowd about the unfairness of the inquisitorial system. In 1639, the Star Chamber found John Lilburne guilty of refusing to take an oath and sentenced him to imprisonment until he took the oath and was then flogged. As a result, John Lilburne told the crowd about the injustices of the inquisition system. As a result, the Crown Court was opposed and soon Parliament and the Puritans gained political power. During the two years that John Lilburne was sentenced, his argument against taking an oath was accepted by the political establishment. In 1641, Parliament outlawed the judgment in the John Lilburne case and abolished the Star Chamber and the High Commission, limiting the use of oaths in criminal cases. In 1688 the right to silence was firmly established when King James II sued seven bishops for refusing to comply with King James II's order to repeal all laws contrary to the existing Inquisition. Archbishop Sancroft asserted his right by refusing to say anything that would expose him to criminal punishment.[24] When the inquisitorial courts of the Crown, namely the Star Chamber, were abolished in 1641 and the High Commission in 1660.[25] Common law courts eventually became the mainstay of the English criminal justice system. The tradition of common law has been built around an accusatorial model. This development took place slowly and over hundreds of years; for example, it was not until 1696 that defendants were given the right to a copy of their indictment and to consult a lawyer.[26] The development of the right to silence in English law, as mentioned above, shows a close relationship with the accusatory system, as it is a judicial system that promotes the right to silence, as opposed to the inquisitorial system mentioned above.[27]

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[24] Gregory W. O'Reilly, (Footnote 2), p. 416-418.

[25] Sargsyan, Razik. (2016). The right to silence as a safeguard against state abuse of the right to a fair trial. Master Thesis, Faculty of Law, Lund University, p. 46.

[26] Gregory W. O'Reilly, (Footnote 2), p. 418.

[27] However, on this point, Prof. Langbein has stated that the right to silence is an artifact of the accusatory system of the late 18th century, and not of the abolition of the Star Chamber and High Commission in the second half of the 17th century, and that the

In the accusatory system, the burden on the state can be said to be twofold: first, the state has the burden of proving that there is sufficient evidence to indict the defendant; and second, the state has the burden of proving to an impartial judge that the defendant has committed the crime as charged. The state is able to bear such burden of proof more than the defendant because the state is in a superior position to collect and preserve evidence. The imposition of such burden of proof on the state is based on the rationale that the state is in a superior position than the individual. For the reason that the accusatory system presumes that the defendant is innocent and has no burden to prove his innocence, the defendant can silence. If the plaintiff cannot prove the defendant's guilt, the case must be dismissed and the plaintiff releases the defendant without having to present any evidence to prove his innocence. The right of the accused to silence is therefore an affirmation that the state alone has the burden of proving the guilt by presenting independent evidence and not compelling the alleged offender to assist the state in proving his guilt. The accusatory system is not a system that shifts the burden of proving the guilt to the suspect who must answer questions from public authorities and may make them give information that is harmful to themselves. The accusatory system and the right to silence limit the power of the state over individuals. On the contrary, the inquisitorial system creates a risk of using improper methods against the suspect because the method of interrogating the suspect uses questions to get answers and confessions. The state itself often uses improper methods to get confessions. For example, at one point, the English common law used torture to get confessions. The most important aspect of the accusatory system, as Justice Goldberg put it, is that without the right to silence, the state can shift the burden of proof of guilt to the defendant by requiring him to present evidence to prove his innocence,

right to silence is the work of defense counsel. See Langbein, John H, 'The Historical Origins of the Privilege Against Self-Incrimination at Common Law' (1994) Michigan Law Review 92, p. 1047.

both during the investigation when he is being interrogated and during the arraignment of the witnesses when he oneself testifies in court. If the state can limit the right to silence and can infer to the detriment of the defendant, then the principle of the presumption of innocence of the defendant will be gone because just the accusation is a presumption of guilt. If the defendant cannot contest this during the investigation and trial, then the judge or jury can claim that the defendant is guilty. The system is not one in which the state must prove the defendant's guilt with evidence, but rather one in which the defendant must seek evidence to prove his innocence.[28]

2.2 The Scope of the Right to Silence in American Law

While in England, the interesting thing is the development of the idea of the right to silence that arose from the common law courts as mentioned above, in the United States, which has adopted the idea of the right to silence from England, the interesting thing is the scope of the right to silence, where the courts in the United States have gradually expanded the scope of the right to silence to protect the rights of the alleged offender and the defendant, as detailed below. That is, in the United States until the end of the 16th century, although the inquisitorial process, which was adopted from England and used by religious courts, was used, the defendant had a duty to give a true statement, and if necessary, under oath, to give a true statement, even if it meant incriminating oneself. Such testimony was often coerced, and it was not until the 17th century that a movement against the inquisitorial process, including against the British government, began to develop. An unwritten principle that began to be accepted by the courts was the principle *nemo tenetur se ipsum prodere*, which means that no one can be compelled to testify before a court or under oath.[29]

[28] Gregory W. O'Reilly, (Footnote 2), p. 419-423.

[29] Bonnen, Andreas, 'Der Schutz des BeschuldigtenvorSelbstbelastung in den USA-eineuropaeischesVorbild?' (2004) NK Neue Kriminalpolitik, 4, p. 154.

The principle of immunity from incrimination or the right to silence in American law was initially intended solely to provide a guarantee to an alleged offender that one would not have to give any facts about the alleged crime before an indictment could be presented to a grand jury. However, the principle has been expanded upon by court precedent and state constitutions and was eventually codified in the Bill of Rights of the Fifth Amendment to the Constitution, with the 14th Amendment's *due process of law* provision applicable to all states. This principle of non-self-incrimination has been established by the courts as a principle that must be applied to criminal proceedings in all states. The criminal procedure law of the United States can be said to be influenced by the Bill of Rights, by the interpretations of liberal Supreme Court legislation, and especially during the era of Chief Justice Earl Warren. During the period from 1953 to 1969, the United States Supreme Court interpreted widely the guarantees guaranteed by the Constitution and created a set of criminal procedure rules based on a number of Supreme Court ruling. In the post-Chief Justice Earl Warren era, the composition of the Supreme Court has changed, with the proportion of newly appointed judges being less liberal, thus preventing continuation of the previous era. In addition, under the influence of conservative judges and under the leadership of Justice Warren Earl Burger from 1969 to 1986, and later under Justice William H. Rehnquist, liberalism has been limited.[30]

Since 1936, American criminal procedure law has had the principle of non-self-incrimination as well as the voluntariness test. This principle is enshrined in the Due Process Clause of the 14th Amendment to the Constitution and applies to all states. This principle means that a confession, even if self-incriminating, is admissible if it is voluntary. This principle is related to the credibility of a confession. In cases where the methods of examining the confession by the police officer, prosecutor

[30] Ibid, p. 154.

or judge tend to induce the alleged offender to make an incorrect confession, such confession may not be admissible in the trial. Over time, many judgments that established the principle of protecting the right to self-incrimination that conflicts with the principle of the voluntariness test have been continuously extended. The 1936 *Brown vs. Mississippi* case established that several black defendants had been sentenced to death for murder. The defendants' confessions, which were based on torture by police officers, were later upheld by the Supreme Court under the 14th Amendment, which held that such confessions violated the voluntariness test. A confession is then deemed inadmissible if it is due to intimidation, sleep deprivation or constant interrogation. Other factors to consider include the age of the alleged offender, his mental state and level of education. If one or more of these conditions are present, the court will consider the confession to be involuntary and this will lead to the legal consequences that make the confession inadmissible.[31]

Later in 1964, the Supreme Court of the United States established legal principles in *Escobedo vs. Illinois*, which dealt with the fact that Danny Escobedo, who was accused of murder, was arrested and interrogated. At the beginning of the interrogation, Escobedo requested to speak with a lawyer, but was refused, even though the police station that interrogated Escobedo was able to provide one. After being investigated for several hours, during which Escobedo was on his feet the entire time, he was told he could return home if he identified his accomplice and that he would be punished. However, Mr.Escobedo refused to testify, citing that he had spoken to his lawyer the day before and that his lawyer had told him not to testify until he had spoken to his lawyer. However, Mr.Escobedo eventually confessed. The Supreme Court ruled that his confession was inadmissible, citing the Sixth Amendment to the Constitution, which stated that the right to an attorney had been

[31] Ibid, p. 154.

violated, and that his confession was not voluntary. In addition, Escobedo's testimony, which was given after his re-arrest without the presence of a lawyer, was considered to be a statement made under pressure and therefore involuntary, which violated the principle of non-self-incrimination. The Supreme Court went on to say that in many cases, a confession made under deception was considered to be a statement that is prohibited from being admitted. The decision to extend the right to counsel was closely related to the principle of non-self-incrimination and thus extends the scope of protection for the alleged offender's rights. As a result of the ruling, the examination of the alleged offender must be accompanied by a lawyer. Public authorities must inform the alleged offender of this right.[32]

Two years later, in 1966, the case of *Miranda vs. Arizona* was brought, in which Ernesto Miranda was convicted of robbery and kidnapping. Mr. Miranda confessed after hours of interrogating by police officers, who did not inform him of his legal rights. At the end of his interrogation, Mr.Miranda signed a confession stating that he had been informed of his legal rights and that he had voluntarily confessed. The Supreme Court of the United States reversed the lower court's ruling, arguing that confessing without first being informed of the alleged offender's rights guaranteed by the Constitution violated the Fifth Amendment's principle of non-self-incrimination for the first time, as well as the due process principle guaranteed by the Fourteenth Amendment. The Supreme Court established for the first time the principle of how to inform an alleged offender of his rights in order for a confession to be admissible, known as the *Miranda Warnings*, which the alleged offender must be informed of before the initial interrogation. In practice, these rights are read out immediately upon arrest so that if the alleged offender makes any statements while under arrest, those statements can be heard. These rights include the right to silence about the alleged

[32] Ibid, p. 155.

crime, the right to consult with a lawyer during or before questioning, the right to receive assistance from the state in the cost of lawyers, and any statements given can be used to support oneself in the trial. The principle of *Miranda Warnings* has become a condition for the acceptance of a confession in court. However, *Miranda Warnings* can only be used if the alleged offender is arrested or safety measures are taken against the alleged offender. If the examination of testimony is in other cases apart from this, it is necessary to return to the principle of testing the voluntariness of the testimony, that is, a confession, even if there is no notification of the alleged offender's rights, can still be accepted if it is voluntary.[33]

Although the Supreme Court's rulings under Chief Justice Earl Warren further expanded the Miranda doctrine, when Chief Justice Earl Warren was not reappointed in 1969 and was replaced by Chief Justice Warren E. Burger, subsequent interpretations of the law by the Supreme Court were not interpreted in a way that protected the rights of the alleged offender and the principle of *Miranda Warnings* was also weakened. In this era, there was a tendency to control crime instead. And when the law 18 U.S.C. section 3501 was passed in 1968, which was a serious invasion of the rights of the alleged offender, the law contained the principle of testing the voluntariness of the testimony, that was, the confession at any stage of the trial can be admitted if it is voluntary. In addition, there are examples of cases where the confessions were considered involuntary. The right to inform the alleged offender under the principle of *Miranda Warning* is no longer considered to be required if the state officers during the investigation can prove that the confession was voluntary within the meaning of section 3501. The meaning and purpose of the law is to make the provisions of the principle of non-self-incrimination, the principle of the voluntariness test, and the Supreme Court's judgments consistent and help officers in the investigation

[33] Ibid, p. 155.

process of justice to be able to arrest the perpetrators more easily. That is, without any strict formal rules. Later, a ruling of the Court of Appeals for the Fourth Circuit demonstrated the overturning of the principle of *Miranda Warning*. In this case, the facts were that the alleged offender was not informed and did not know his rights under the law, but confessed. According to the Court of Appeals for the Fourth Circuit, the confession was voluntary within the meaning of section 3501 and was not considered a forced confession. The alleged offender appealed by citing the Miranda case and invoking the principle of non-self-incrimination. In the case, *Dickerson vs. United States*, the Supreme Court had to decide whether 18 U.S.C. section 3501 was constitutional.[34]

In the case, *Dickerson vs. United States*, the defendant, Charles Thomas Dickerson, was arrested for armed robbery and interrogated by the FBI. The defendant confessed without being informed of his rights prior to being interrogated by FBI agents. In this case, it can be seen that the FBI's interrogation clearly violated the principle of *Miranda Warning* and the confession could not be considered a voluntary confession within the meaning of the voluntariness test because Dickerson confessed within the scope of the formal interrogation. However, Dickerson was convicted and sentenced to life imprisonment. The district court reasoned that the confession was voluntary within the meaning of section 3501. Later, the Fourth Circuit Court of Appeals upheld the case, but in 2000, the Supreme Court reversed both of the lower court's rulings, citing the Fifth and Fourteenth Amendments to the Constitution and the Miranda ruling on the rights of the alleged offender. It further ruled that the *Miranda Warnings* were constitutional and could not be altered or weakened by law, in this case, section 3501. According to the judgment, section 3501 was therefore unlawful and unconstitutional.[35]

[34] Ibid, p. 155.
[35] Ibid, p. 156.

In the event that the alleged offender was not informed of his rights before the arraignment and confessed, such confession will be admissible only when the latter arraignment has informed him of his right not to give a statement the previous time and the alleged offender has confirmed his intention to continue to confess. However, during the period of such notification of rights, the alleged offender must be informed that the first confession cannot be admissible and it is the alleged offender's right to continue to confess or not. If the alleged offender exercises his right to silence after being informed of his rights, the previous confession cannot be admissible. On the contrary, if the alleged offender, after being informed of the right to act later, still insists on his confession, such confession can be admitted in the trial to the detriment of the alleged offender. In examining whether the alleged offender has waived his rights or not, it is considered whether the waiver was voluntary or not and whether the alleged offender was aware of the legal consequences of such waiver. In addition, in many cases, a confession can be admissible even without being informed of the alleged offender's rights, provided that the breach of duty did not result in damages and the failure to inform of such rights did not affect the alleged offender's conviction.[36]

Before the Miranda case, the Supreme Court had already confirmed in a number of previous judgments that the scope of the protection of the right to self-incrimination was limited to cases where the alleged offender was required to act with the authorities *(actives Tun)* in proving his guilt, but did not include cases where the alleged offender was required to accept coercive measures (ein passives Dulden von Untersuchungsmassnahmen) that the public authorities would take against him in the absence of any coercive action. The reason is that in a criminal case, it is the duty of the prosecution to prove the guilt of the

[36] Ibid, p. 156.

defendant, but the defendant is not obliged to assist the government officials in proving his guilt. As such, the alleged offender is obliged to submit to photographs and fingerprints, blood tests and physical examination, including the clothing found at the scene. The alleged offender cannot refuse to comply with this relatively limited investigative procedure by citing the principle of the right to silence. Moreover, in some cases, the alleged offender is also required to participate in voice or handwriting tests, which are considered active actions. However, such testing must be to confirm the mental characteristics of the alleged offender and not to confirm the content of the testimony. There are special cases where evidence can be admitted even if the alleged offender has not been informed of the right in the first place, namely in cases where there is a situation that poses a danger to the police officers and the officers responsible for the investigation. In addition, the suspect can be searched or questioned if there is a situation that necessitates the officers responsible for the investigation, such as in cases where the suspect's weapon must be seized. In this case, the benefit of protecting the state officers outweighs the benefit of protecting the alleged offender in terms of the right not to incriminate oneself.[37]

In the event of a violation of the principle of non-self-incrimination or the *Miranda Warnings*, such testimony is inadmissible under the principle of the preclusion of evidence. However, in the cases of *New York vs. Quarles and Oregon vs. Elstad,* only evidence discovered from the testimony of the alleged offender who was not informed of his legal rights cannot be admitted as evidence in the case. The poisonous fruit principle is, therefore, used in a limited manner. Evidence that would normally have been discovered is still admissible so that the criminal trial can proceed without any obstacles because of a minor deficiency in the notification of rights. From this principle, it follows that in each case,

[37] Ibid, p. 156.

it must be established whether such evidence could still have been discovered without the testimony of the alleged offender who was not informed of his rights, and the severity of the violation of the *Miranda Warnings* or the failure to inform the alleged offender of one's rights. Only then can it be said whether such evidence can be admitted as evidence. Therefore, the prosecutor must prove that such evidence is not evidence from the poisonous tree.[38]

Now that we have learned the content of the right to silence under English and American law, then next, we will discuss the right to silence under German law.

2.3 Historical Development and Scope of the Concept of the Right to Silence in German Law

In German law, if considering the evolution of the concept of the right to silence, it can be seen that after Germany reformed its criminal procedure law before the creation of the 1877 Code of Criminal Procedure of the Reich,[39] there was no provision in the criminal procedure code that the alleged offender was not required to incriminate oneself. For example, the Hamburg Code of Criminal Procedure in 1869 stipulated that both the alleged offender and the witnesses had a duty to give the facts about everything they knew. In contrast, In the draft of the Reich Code of Criminal Procedure, the original draft, which adopted the concept from English law,[40] clearly stated that if the alleged offender did not consent, the person could not be compelled to give a statement and that the alleged offender had to be informed of one's right to silence. Although this suggestion was immediately rejected for fear

[38] Ibid, p. 156.

[39] For details of the reform of German criminal procedure law, see Surasit Sangviroatjanapat, 'Looking Back and Looking Forward: Principles and Problems of Criminal Proceedings in the Federal Republic of Germany' (2019), Bot Bundit 75 (1), pp. 212-241.

[40] Eser, Albin, 'Der Schutz vor SeblstbezichtigungimdeutschenStrafprozessrecht, Deutschetrafrecht lichelandesreferatInternationalenKongressfuerRechtsvergleichung' (1974), p. 136-171, 141-143.

that it would void the alleged offender's moral duty to tell the truth, the reason was that under German criminal procedure law before the reform, there was a principle that the alleged offender had a duty to give a true statement.[41] The guarantee of the right to silence was first enforced in court. Later, it was extended to the investigation level, and as a result, police officers and prosecutors were required to inform the alleged offender of the right to silence. However, the alleged offender's right to silence would not be of much help if that person did not know what crime one was being alleged offender of. Therefore, it was later stipulated that the alleged offender be informed of the charge one was an alleged offender of when one was first questioned by a judge. Initially, this provision was only for the facts, not the law. Later, this notification was expanded to include the law, and the duty to inform was eventually extended to prosecutors.

The recognition of the right to silence in German law, compared to common law countries, may be said to have taken a long time to be recognized. Professor Eser said that one reason why the right to silence has been recognized in German law is probably that, based on the experience of the Third Reich, the German Constitution guarantees human dignity in Article 1 (1), which is the first and highest guarantee of human dignity. It is also widely accepted that all human beings, including potential offenders, must be guaranteed and protected by a humane and legal process, which includes the right to silence for the alleged offender, regardless of whether they are ultimately proven guilty or innocent.[42]

Although the right to silence under German law is not enshrined in the constitution, some scholars argue that it has the characteristics of a fundamental constitutional right under the German Constitution (Grundrechtscharakter des Schweigerechts),[43] including in the German

[41] Surasit Sangviroatjanapat, 'Some Basic Principles of Evidence Law under German Criminal Procedure Code' (2013) Dunlaphaha 60 (2), p. 121.

[42] Eser, Albin (Footnote 39), p. 144-145.

[43] Ibid, p.156, 166.

courts, be it the Constitutional Court[44] and the Federal Supreme Court[45] (i.e. the Supreme Court according to the understanding of Thai lawyers) have all agreed that the right to silence has constitutional status because it is considered part of human dignity, the right to privacy and the rule of law under Articles 1 (1), 2 (1) and 20 (3) of the German Constitution.

The essence of the privilege against self-incrimination is the freedom to give evidence, whether negatively, that is, by not giving evidence or by silence, or positively, that is, by giving evidence in defense. This evidence, which must be considered a positive exercise of the right to defense, is protected by the right to be heard, guaranteed by Article 103 (1) of the German Constitution. The recognition of such a right does not only mean in the fact that the right to silence is recognized under procedural law, but also that when such right is exercised, it is recognized and no legal doubt can be raised as to the exercise of such right to silence.[46] In order to realize this right, Article 136a of the German Code of Criminal Procedure provides for the methods of interrogation that are prohibited. In addition, the alleged offender must be informed of the right to silence from the person who is interrogating one statement, because if the person is not aware of this right, one cannot exercise it. The alleged offender must also be informed of the offenses one is accused of, whether in fact or in law. Finally, the right to have a lawyer, including informing the right to have a lawyer, because when deciding when or how to exercise the right to silence, it is more beneficial for the alleged offender to have a lawyer to assist one, especially if one wishes to give all or only part of one's statement.

Under German law, the right to silence applies not only to the alleged offender but also to witnesses. That is, a witness is not obliged

[44] BVerfGE 56, 37, 43, 49f.; BVerfGStV 1995, 505; NJW 2002, 1411.
[45] BGHSt 43, 324, 326; 38, 314, 220; 45, 363, 364; 45, 367, 368.
[46] Eser, Albin (Footnote 39), p. 147-149.

to give a true statement if it would make him/her a suspect in a criminal case. In other words, in such cases, the witness can exercise the right to silence, that is, the witness has the right not to give any statement, and not only for his/her own protection, but also for the protection of his/her family members (Article 55 of the German Code of Criminal Procedure). Similarly, in the case of the alleged offender, the right to silence must be informed to witnesses. Although originally this was limited to the courts, it has since been extended to include police and prosecutors.[47]

In terms of the scope of the right to silence in cases where public authorities take invasive measures towards the alleged offender, such as testing the alleged offender's blood under Article 81a of the German Criminal Procedure Code,[48] or examining the alleged offender's fingerprints under Article 81b of the German Criminal Procedure Code, etc. Although the alleged offender is not required to cooperate with the authorities in proving one wrongdoing, the person has a duty to admit to such actions (Duldungspflicht).[49] If it is a case where there is a specific law that requires the alleged offender to admit to such an act, such as the German Criminal Procedure Code, Articles 81, 81a, etc., in such a case, the alleged offender is considered to be "real evidence". For this reason, if there is no law that provides for it, testing can be carried out.[50] For example, questioning patients after they are given sedation (Narkoanalyse) (BGHSt 11, 211ff) or using a polygraph (Luegendetektor) (BGHSt 5, 332), including illegally recording the alleged offender's opinions, if the tapes are used as evidence, it will also violate the principle of self-incrimination (BGHSt 14, 364, 365) because it must be

47 Ibid, p. 163.

48 For details, see Surasit Sangviroatjanapat, 'Physical Examination and Blood Test According to Article 81a of the German Criminal Procedure Code' (2003), Bot Bundit 59 (4), pp. 1-8.

49 Eser, Albin (Footnote 39), p. 146.

50 Ibid, p. 153.

considered an active act of self-incrimination. The distinction between the concept of cooperation with public authorities in proving one's wrongdoing, which is prohibited by the right to silence, and the obligation to tolerate the actions of public authorities in seeking evidence of wrongdoing, is generally accepted among German jurists.[51] However, the duty to accept the actions of public authorities only arises in cases where there is an express provision in law, such as in Articles 81a and 81b. The aforementioned German Code of Criminal Procedure expressly provides that public authorities can act in accordance with the law even if the alleged offender does not consent. However, where no coercive measures have been taken, but personal data have only been asked, the alleged offender is obliged to provide such information. The requirement to provide information about the identity of the alleged offender does not fall under the protection of the right to silence.[52]

If we consider the principle of the right to silence under the foreign laws mentioned above, it can be seen that the principle of the right to silence prohibits only cases where the alleged offender is required to assist public authorities in proving his/her guilt. In other words, it is a case where the alleged offender must take active actions. However, it is not considered to be in violation of the principle of the right to silence if it is a case where the alleged offender must accept certain actions from state officials in order to seek evidence of the alleged offender's guilt. This principle is a principle that German[53] and Austrian[54] criminal procedure laws have clearly laid out. Although Professor Kanit Nanakorn, Ph.D., gave

[51] Roxin/Schuenemann, 2017, Strafverfahrensrecht. 29. Auflage. Chapter 33, Topic 6.

[52] Roesinger, Luna, (2019), Die Freiheit des BeschuldigtenvomZwangzurSelbstbelastung: Studien und BeitraegezumStrafrecht Band 23. Tuebingen, p. 5.

[53] Roxin/Schuenemann (Footnote 50), Chapter 33, Topic 6; Eser, Albin (Footnote 39), p. 146; Mitsch, Wolfgang, 'Das GesichtsverhuellungsverbotimStrafverfahren' (2020) KriPoZ 2, p. 99.

[54] Schrank, Christopher, 'Sicherstellung von Smartphones mitFingerabdruckoder Face-ID' (2000) iwp Journal 3, p. 46.

reasons regarding the alleged offender's presiding over the case, he did not explain in a way that the alleged offender had a duty to accept the actions of public authorities as the German and Austrian jurists explained above. According to American law, even though it does not clearly distinguish between the concept of helping public authorities to prove their guilt and having to accept the search for evidence of public authorities' guilt as in Germany and Austria, it must be considered that if it is not a case of helping public authorities to prove their guilt, it is not considered a prohibition according to the principle of the right to silence. In *United States vs. Wade* (1967), there was no violation of the right to silence under the Fifth Amendment when it came to requesting a handwriting sample.[55] In Black's Law Dictionary, the right to silence does not include the requirement to submit to fingerprinting.[56] In the UK law, police are given the power to compel the taking of fingerprints and non-intimate samples.[57] However, recent English law has provided for exceptions to the principle of the right to silence in certain cases, which means that the alleged offender's assistance in proving his guilt in certain cases does not in itself violate the right to silence. That is, a law during the time of former Prime Minister John Major (The Criminal Justice and Public Order Act, 1994 Part III, sections 27–31) introduced the idea of limiting the right to silence, namely, if the alleged offender refuses to give a statement to the police during the investigation or if the defendant refuses to give a statement to the court during the trial, both the judge and the jury can consider such silence as detrimental to the alleged offender or defendant.[58] The Act amended the restrictions on the right to silence that were imposed by Congress in 1988.

[55] Charan Phakdeethanakun, 'Evidence Law and the Exercise of the Right to Silence and The Privilege Against Self-Incrimination (2003) Bot Bandit 59 (2), p. 13.

[56] Black, Henry Campbell. (1990) Black's Law Dictionary. Sixth Edition, p. 1382

[57] Charan Phakdeethanakun (Footnote 57), p. 12.

[58] Gregory W. O'Reilly (Footnote 2), p. 402.

In Northern Ireland, the Act has four provisions: (1) The judge and jury can infer against the alleged offender if one fails to give evidence against the police during interrogation about facts about which one will be able to defend oneself in court, if one is able to do so; (2) If the alleged offender refuses to give evidence, the judge and the prosecutor can instruct the jury to infer that the evidence is admissible against the alleged offender; (3) The judge and jury can infer against the alleged offender if one fails to answer questions from the police about any suspicious objects, substances or symbols found on one's body or clothing or in the place where one was arrested; (4) The judge and jury can infer against the alleged offender if one fails to explain to the police why one was at the place or at the time of the offense and was arrested.[59]

3. Analysis

This article will analyze whether the Announcement of the Council for Democratic Reform No.25 was contrary to or inconsistent with Article 29 paragraph four of the Constitution or not.

The order of the Announcement of the Council for Democratic Reform No.25 on the Proceedings of Criminal Justice, which requires those alleged offender of committing a criminal offense to provide fingerprints or footprints in the part designated as criminal offenses and penalties, dated 29 September 2006, paragraph two, which states that "a person alleged to have committed a criminal wrongdoing is under a duty to provide a fingerprint, handprint or footprint pursuant to the order of a state attorney, prosecutor or an inquiry officer; any violator shall be held to have committed the offence of wrongdoing relating to justice and liable to a term of imprisonment not exceeding six months or a fine not exceeding one thousand baht, or both." Does this conflict with or contradict section 29 paragraph four of the Constitution? Before entering into the content of the analysis, the author believes that it is

[59] Ibid, p. 404.

appropriate to analyze the opinions of Thai lawyers regarding section 132 of the Code of Criminal Procedure because the content is related to the Announcement of the Council for Democratic Reform No.25. After that, we will analyze the content of the announcement.

The Criminal Procedure Code section 132, which provides the inquisitor with the power to seek evidence of the crime, including taking the fingerprints of the alleged offender, the question that must be asked is, when there is the Criminal Procedure Code, section 132, why is there a need for the Announcement of the Council for Democratic Reform No.25? Why is the Criminal Procedure Code section 132, which is already in place, unable to solve the problem of the alleged offender refusing to provide fingerprints? A possible reason for this may be that if the alleged offender refuses to give his fingerprints, Article 132 of the Code of Criminal Procedure does not clearly provide that the investigating officer can compel the alleged offender as provided in Article 81b of the German Code of Criminal Procedure. And if the alleged offender is forced to give his fingerprints by taking his hand to give them, will that not be a compulsion for the alleged offender to give a self-incriminating statement? Similarly, the Criminal Procedure Code section 131/1, which was a later enacted provision, stipulates that the alleged offender must consent to the examination or for such reasons, it is necessary to issue the Announcement of the Council for Democratic Reform No.25. Having an understanding of the Criminal Procedure Code section 132 in the sense that investigators have no authority to force the alleged offender to provide fingerprints is a reason in itself that requires the issuance of the Announcement of the Council for Democratic Reform No.25. In addition to the interpretation of the Criminal Procedure Code section 132 as mentioned above, when the Constitutional Court issued this note, it was a reason for the alleged offender to take it as an opportunity to refuse to provide fingerprints as the inquisitor informed by citing this note of the Constitutional Court's ruling. In this regard, there is a judgment of

the Nonthaburi Provincial Court on the issue, which can be summarized as follows:

The Nonthaburi Kwaeng Court has sentenced the defendant for the offense of disobeying an official order under section 368 paragraph one of the Criminal Code (according to Criminal Red Case No.2738/2563) because while the defendant was a suspect, he refused to allow the inquisitor to take his fingerprints. Even though the defendant fought the case that taking his fingerprints violated the right not to incriminate himself and was a right guaranteed by the Constitution, citing the Constitutional Court's ruling in this note. However, the Nonthaburi Kwaeng Court gave reasons for sentencing the defendant that citing the Constitutional Court's ruling did not correspond to the case of the Nonthaburi Kwaeng Court because the issue in the Constitutional Court's ruling was the legality of the Announcement of the Council for Democratic Reform No.25 on Criminal Justice Procedures, which requires those alleged offender of committing a criminal offense to take fingerprints or footprints. In the part that is specified as an offense and criminal punishment that is contrary to or in conflict with the Constitution without any issue regarding the legality of the Criminal Code, section 368 paragraph one, in any way, in addition, the Criminal Procedure Code sections 131 and 132 also give the inquisitor the power to take the fingerprints of the alleged offender. When the alleged offender knew and refused to comply without reasonable cause, it is an offense under the Criminal Code section 368 paragraph one.

Whether one comprehends section 132 of the Criminal Procedure Code or forms an opinion based on the Nonthaburi Kwaeng Court's judgment, the consistent aspect is the absence of any mention of an inquiry official's power to compel an alleged offender to provide fingerprints, or to enforce compliance if the alleged offender refuses. Although the judgment of the Nonthaburi Kwaeng Court states that the inquiry official has the authority to provide fingerprints as provided by

law, it does not provide a reason why, if the alleged offender refuses, the inquiry official can be forced to comply with the law. Upon examination, we found no opinions in the textbooks that addressed this issue at all.[60] It was found and commented that the inquisitors can force the fingerprints to be taken, but they must not do so to the extent that it affects the presiding of the alleged offender in the case.[61] From all that has been said, the author believes, Thai lawyers (except for the opinion of Professor Kanit Nanakorn) should have the opinion that since there is no provision for inquisitors to force the alleged offender to give their fingerprints, inquisitors do not have the authority to force the alleged offender to give their fingerprints, and therefore, it is necessary to stipulate the text as appears in the Announcement of the Council for Democratic Reform No.25. If considering the text in the announcement that states "a person alleged to have committed a criminal wrongdoing is under a duty to provide a fingerprint, handprint or footprint pursuant to the order of a state attorney, prosecutor or an inquiry officer; any violator shall be held to have committed the offence of wrongdoing relating to justice and liable to a term of imprisonment not exceeding six months or a fine not exceeding one thousand baht, or both." It can be seen that this is a duty imposed on the alleged offender and may or may not result in a conflict with the right to silence according to the foreign laws mentioned above, because it means that the alleged offender must cooperate with public authorities in proving their guilt, because otherwise, they must be held liable for committing an offense related to justice for which a criminal penalty has been imposed.

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[60] Surasak Likhitwatthanakun, (2019), Code of Criminal Procedure, Reference Edition. 19th edition, Section 132, p. 24-248; Thanisa Ketsawapitak, (2018), Explanation of the Code of Criminal Procedure, Part 1-2 (Section 1-156), 14th edition, p. 328; Sanya Thammasak/Praphas Uaychai, (1986), Explanation of the Code of Criminal Procedure, Part 1 to Part 3, Section 1-171, p. 306.

[61] Kanit Nanakhon, (2006), Criminal Procedure Law. 7th edition, Chapter 8 Topic 2, Chapter 14 Topic 2, Chapter 30 Topic 6.

If the aforementioned principles of foreign law are used to answer the question, according to my opinion, if there is the concept of having a duty to accept the actions of public authorities (Duldungspflicht), it should help to interpret the law in this matter more clearly and there is no need to stipulate the words as appearing in the Announcement of the Council for Democratic Reform No.25. It is because even though section 132 of the Criminal Procedure Code does not clearly state that actions can be taken against the consent of the alleged offender as stipulated in German law, if it is not interpreted in the way that the inquisitor has the authority to do so, the provisions in this matter are ineffective. The inquisitor having the authority to take the fingerprints of the alleged offender is to confirm the identity of the person, which does not mean that it will not only have a negative effect on the alleged offender, but may also have a positive effect on the alleged offender. In addition, although section 132 of the Criminal Procedure Code does not clearly state it, the fact that there is a statement that if an act is committed against the victim, consent must be obtained, but the alleged offender does not state such a statement, further shows that the alleged offender does not need to have consent at all because if the alleged offender's consent is required, a statement similar to section 131/1 of the Criminal Procedure Code can be stipulated (whether the Criminal Procedure Code section 131/1 states that the alleged offender must give consent is a legally correct provision or not is another issue). Although violating section 132 of the Criminal Procedure Code will be subject to criminal punishment according to section 368 paragraph one of the Criminal Code, criminal punishment for refusing to take the alleged offender's fingerprints is not the intention of section 132 of the Criminal Procedure Code to help inquisitors find evidence of the offense. Fingerprinting is used to confirm the identity of the alleged offender, which will help in the investigation to find the offender. Therefore, the interpretation that the inquisitor has the authority to take the alleged

offender's hand and take his fingerprints even if it violates the alleged offender's consent, not only makes section 132 of the Criminal Procedure Code applicable in reality, but also eliminates the need for the Announcement of the Council for Democratic Reform No.25. Hence, the right to silence does not include cases where the alleged offender must accept the actions of public authorities who have laws supporting their ability to do so. In such cases, Professor Dr. Kanit Nanakorn said that the alleged offender is a piece of evidence[62] or, as Professor Eser said, the alleged offender is "real evidence".[63] On the contrary, the enactment of the message in the Announcement of the Council for Democratic Reform No.25, which is the assignment of duties to the alleged offender, does not only mean that the alleged offender has a duty to accept the actions of public authorities, but also makes the alleged offender have a duty to help public authorities in seeking evidence of their wrongdoing, which in turn violates the principle of the right to silence. In summary, the enactment of the Announcement of the Council for Democratic Reform No.25, which is the assignment of duties to the alleged offender, violates the principle of the right to silence, because forcing the alleged offender to do so would be tantamount to changing the truth-seeking system from an accusation system, which is proving the truth with evidence, to an investigation system, which is examining the alleged offender's testimony in order to obtain evidence that will prove the guilt of that person.[64] On the contrary, if the concept of having a duty to accept the actions of public authorities as mentioned above is understood, which in such cases is not considered a case of the right to silence, state officials will be able to take action in accordance with section 132 of the Criminal Procedure Code without the need for the Announcement of the Council for Democratic Reform under the Constitutional Monarchy No.25.

[62] Kanit Nanakorn (Footnote 54), p. 212-213.
[63] Eser, Albin (Footnote 39), p. 153.
[64] Gregory W. O'Reilly, 1994-1995, p. 405.

4. Summary

Although the Constitutional Court's ruling in this case did not rule on the principle of the right to silence, from the concepts of foreign law that I has researched, it can be seen that if Thai lawyers have a concept of the alleged offender or defendant having a duty to accept the actions of public authorities (Duldungspflicht) according to the approach of German and Austrian lawyers, it should help to interpret the law in this matter more clearly and there would be no need to stipulate the words as appearing in the Announcement of the Council for Democratic Reform No.25.

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Bibliography

Thai Books

Kanit Nanakhon (2006). Criminal Procedure Law. 7th ed. Bangkok: Winyuchon Publishing House.

Charan Phakdithanakul. Evidence Law and the Exercise of the Right to Silence and the Privilege Against Self-Incrimination, Bot Bandit, Volume 59, Part 2, June 2003: 1-15.

Thanit Kesavapitak. (2018). Explanation of the Criminal Procedure Code, Part 1-2 (Section 1-156), 14th printing. Bangkok: Krung Siam Publishing Co., Ltd.

Sanya Thammasak/Praphas Uaychai. (1986) Explanation of the Criminal Procedure Code, Part 1 to Part 3, Sections 1-171. Bangkok: Krung Siam Printing.

Surasit Sangviroatjanapat. Physical Examination and Blood Test According to Article 81a of the German Criminal Procedure Code (2003), Bot Bundit 59 (4), pp. 1-8.

Surasit Sangviroatjanapat. Some Basic Principles of Evidence Law under German Criminal Procedure Code. Dulaphaha, Volume 2, Year 60, May-August 2013: 83-128

Surasit Sangviroatjanapat. Looking Back and Looking Forward: Principles and Problems of Criminal Proceedings in the Federal Republic of Germany (2019), Bot Bundit 75 (1), pp. 212-241.

Surasak Likasitwatanakul (2019). Code of Criminal Procedure, Reference Edition. 19th ed. Bangkok: Winyuchon Publishing House.

Foreign Books

Black, Henry Campbell. (1990) Black's Law Dictionary. Sixth Edition. St.Paul, MN: West Publishing Co.

Bonnen, Andreas. Der Schutz des BeschuldigtenvorSelbstbelastung in den USA–eineuropaeischesVorbild?, NK Neue Kriminalpolitik, 4/2004: 154-157

Eser, Albin. Der Schutz vorSeblstbezichtigungimdeutschenStrafprozessrecht, Deutsche strafrechtlichelandesreferatInternationalenKongressfuer Rechtsvergleichung, 9 (1974): 136-171

Helmholz, Richard H. Origins of the Privilege against Self-Incrimination: The Role of the European Ius Commune. 65 New York University Law Review 962 (1990): p. 962-990

Gregory W. O'Reilly. England Limits the Right to Silence and Moves towards an Inquisitorial System of Justice. 85 J. Crim. L. & Criminology 402 (1994-1995): 402-452

Langbein, John H. The Historical Origins of The Privilege Against Self-Incrimination at Common Law, 92 Michigan Law Review (March 1994): 1047-1085

Mitsch, Wolfgang. Das GesichtsverhuellungsverbotimStrafverfahren.KriPoZ 2, 2020: 99-103 Moylan, Charles E. Jr. and Sonsteng, John O. (1990) "The Privilege against Compelled Self-incrimination," William Mitchell Law Review: Vol. 16: Iss. 1, Article 6: 249-307

Randall, Charles H. Jr (1956) "Sir Edward Coke and the Privilege Against Self-Incrimination," 8 S.C.L.R. 417: 417-453

Roesinger, Luna. (2019). Die Freiheit des BeschuldigtenvomZwangzur Selbstbelastung. Studien und BeitraegezumStrafrecht Band 23. Tuebingen: Mohr Siebeck Verlag Roxin, Claus/Schuenemann, Bernd. (2017). Strafverfahrensrecht. 29. Auflage. Muenchen: C.H. Beck Verlag.

Sargsyan, Razik. (2016). The right to silence as a safeguard against state abuse of the right to a fair trial. Master Thesis, Faculty of Law, Lund University.

Schrank, Christopher. Sicherstellung von Smartphones mitFingerabdruckoder Face- ID.iwp Journal 3, 2000: 46

Walker, Jeffrey K. (1993). "A Comparative Discussion of The Privilege Against Self- Incrimination" NYLS Journal of International and Comparative Law. Vol. 14: No.1, Article 2 pp. 1-37

Precedents on the Exercise of State Power for the Expropriation of Immovable Properties under the Constitution in the case of the Supreme Administrative Court's Judgment No. For.16/B.E. 2545 (2002)

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1. Exercise of State Power for the Expropriation of Immovable Property under the Constitution

In the Thai legal system, the concept of expropriation has existed since ancient times, where the land is considered to belong to the King. When citizens occupy the land, it is considered that the King has given permission to reside there. Should the state seek to reclaim the land at any point, it reserves the right to initiate eviction proceedings against the current occupant and may provide compensation, assuming that it is because the King has graciously granted it, and it is not a legal right that must be received. Later, rules and regulations regarding eviction began to be set to create more justice, in which the eviction must be for the purpose of government or public interest.[1]

Later, when there was a change of government in 1932, Thailand guaranteed the property rights of individuals in the constitution, starting from the Constitution of the Kingdom of Siam 1932 onwards, and it is still guaranteed in every constitution, with improvements and additional details on the protection of such rights being made clearer respectively in order.[2] As an example, in the Constitution of the Kingdom of Thailand,

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1 Chaiwat Wongwattanasan (1983). Law and land reform for agriculture. 4th ed. (Bangkok: Ramkhamhaeng University Press). p. 117.

2 Jirawat Suriyachotichayangkul and Isakun Unhaket (2014). A project to analyze the laws currently in force: The Expropriation of Immovable Property Act B.E. 2530 (1987). (Parliamentary Academic Promotion Office: King Prajadhipok's Institute). pp. 6-9.

B.E. 2492 (1949), which added criteria on the scope and conditions for limiting the property rights of individuals to be able to do so under the provisions of the law, along with the principles for the exercise of state power in expropriating for the first time as follows: "The expropriation of immovable property shall be done only by relying on the power under the provisions of the law specifically for the purpose of public utilities or necessary for direct national defense or the acquisition of natural resources, and fair compensation shall be paid to the owner and the right holders as specified in the law on expropriation of immovable property who have been damaged by such expropriation."

The principles for the exercise of state power in expropriating are an important legal principle that has been stipulated in every constitution continuously up until the current constitution.[3] Because even though the Constitution recognizes and protects the property of individuals, the interests of the state are more important than personal interests.

[3] Section 37. Individuals shall have the right to property and inheritance.

The scope of such rights and any restrictions thereon shall be as provided by law.

Expropriation of real property shall not be undertaken except by virtue of laws enacted for public utilities, national defense, acquisition of natural resources, or other public benefits, and shall require fair compensation to be paid to the owner and other parties entitled to compensation for damages incurred due to the expropriation, taking into account the public benefit and the impact on those expropriated, as well as any benefits the expropriated party may derive from the expropriation.

The expropriation of real property shall be carried out only to the extent necessary for the purposes specified in the third paragraph, unless it is for the purpose of compensating the owner of the expropriated property to ensure fairness as provided by law.

Laws on expropriation of immovable property must specify the purpose of the expropriation and define the period of utilization of the property clearly. If the property is not used for its intended purpose within the specified period or if there remains any unused property, and if the original owner or their heirs wish to reclaim it, it shall be returned to the original owner or their heirs.

The period for requesting the return of expropriated property that is not used or remains after use, and for reclaiming compensation paid, shall be as provided by law.

The enactment of laws specifying particular real property or property owners for expropriation as necessary shall not be deemed to contravene section 26, paragraph two.

The Constitution allows the state to limit the property rights of individuals by relying on legal authority and allows the state to have the power to expropriate immovable property, but must comply with the conditions stipulated in the Constitution.[4] First, the Constitution provides that the state has the power to expropriate immovable property for purposes prescribed by the Constitution, in accordance with the powers of the law enacted by the legislature. Second, the state must provide fair compensation to those whose land has been expropriated and must return the land if it is not used for the purposes for which it was expropriated.

The Supreme Administrative Court's judgment, Red Case No. For.16/2545 (2002), is a case in which the Supreme Administrative Court considered a case of disputes regarding the exercise of State power to expropriate immovable property as an illegal act. It is considered as the first judgment to set a precedent regarding the exercise of state power to comply with the terms and conditions stipulated by the Constitution. In addition to the exercise of such power having to be carried out in accordance with the forms and procedures stipulated by law, which is a general principle for examining the legality of administrative rules or orders, the Court also applied the principle of proportionality, which is a general principle under the Constitution, to examine state actions.

2. Supreme Administrative Court's Ruling, Red Case No. For.16/2445 (2002) and Analysis

2.1 Verdict

The facts in this case are that the Department of Highways has a project to construct Highway No. 417, Surat Thani Airport - connecting with Highway No. 401 to increase the efficiency of transportation on the route connecting Surat Thani Airport and Surat Thani city. Since the original route

[4] Constitutional Court's Ruling No. 21-28/2020

was winding and the road area was narrow and could not be expanded, a Royal Decree was issued to determine the land area in the area to be expropriated to build Highway No. 417, Surat Thani Airport-Highway No. 401, B.E. 2540 (1997), which caused damage and distress to the 6 plaintiffs who were the owners of the land in the area to be expropriated according to the map attached to the Royal Decree. The plaintiffs believe that the Royal Decree and the map attached to the Royal Decree are unlawful because the road alignment in the area to be expropriated, in the part entering Surat Thani city, does not adhere to the road alignment in the Surat Thani city planning area as resolved by the Tripartite Committee (Department of Highways, Department of Public Works and Town & Country Planning, and Surat Thani Province Authority). Therefore, they request the Court to issue a judgment or order to amend the map attached to the Royal Decree so that the construction of the highway by the Department of Highways complies with the resolution of the Tripartite (three-party joint) Committee.

The Supreme Administrative Court considered the content of the case and found that there was a case to be made as to whether the said royal decree was enacted in accordance with the law or not. The Court held that the Royal Decree was issued under the authority of section 68, paragraph one of the Highways Act, B.E. 2535 (1992), which stipulates that when it is necessary to acquire immovable property for highway construction or expansion, if it is not otherwise agreed on the transfer, expropriation shall be effected in accordance with the law on immovable property expropriation, which section 5, paragraph three and section 6 of the Immovable Property Expropriation Act, B.E. 2530 (1987) stipulates that for the purpose of the expropriation, the Royal Decree on demarcation of the area to be expropriated may be enacted prior to the expropriation. In this regard, a map or plan that demarcates the area to be expropriated and all land plots within the demarcated area shall be made and annexed with the Royal Decree and shall be deemed

as an integral part of the Royal Decree. Therefore, the enactment of this disputed Royal Decree was enacted based on the authority duly certified by law.

As for the issue that the plaintiff disputes that the Department of Highways' selection of the road that appears on the map attached to the Royal Decree was a correct action because it is not a road in the Surat Thani City Planning Area according to the Ministerial Regulation No.105 (B.E. 2534 (1991)) issued under the Town Planning Act, the Supreme Administrative Court held that the determination of road directions in the transportation and communication project plan attached to the Ministerial Regulation enforcing the Town Planning Area would be done by initially determining the routes based on architectural and town planning principles only. It did not survey or study the details in terms of engineering, impacts on local people, impacts on the environment, or changes in the population structure to the point where roads could be immediately built. Therefore, when the responsible agency will construct a road, it will survey and design the engineering details and survey the details of the land and immovable property to be expropriated, as well as the budget to be used for construction again. The appropriate approach for actual construction may have to change from what is specified in the road and transportation route map at the end of the Ministerial Regulation enforcing the city plan. Therefore, when it appears that the disputed highway construction project occurred because the first defendant (Department of Highways) had a need to increase the efficiency of transportation, the purpose of this project was to enhance the road network, facilitate, speed up and ensure safety of traffic in the area, especially travel between Surat Thani and Surat Thani Airport and to Bangkok. When the first defendant surveyed the alignment in that area, he presented the results of the study on the economic and engineering unsuitability of the city plan road alignment. Since the road in the city plan has a right of way of 30 meters, while the first defendant

wants a right of way of way of 80 meters, the expropriation along the road in the city plan will have approximately 170 buildings expropriated, which will have to pay an expropriation fee of approximately 150 million baht. As for the expropriation according to the guidelines set by the first defendant, there will be approximately 49 buildings, which will have to pay an expropriation fee of approximately 76 million baht. **The defendant therefore adjusted the road alignment as appropriate, considering the principle of proportionality, so that the restriction of freedom and rights affecting the private interests of each individual is only as necessary to maintain the public interest. This is to ensure that the resolution of various problems is as efficient and effective as possible.** Therefore, the fact that the first defendant determined the boundary of the land in the area to be expropriated to build Highway No.417 in the Surat Thani city section, which will intersect with Highway No.401, was different from the boundary of the road of the transportation and communications project, which the Public Works and Town & Country Planning had surveyed and determined originally, was not contrary to or inconsistent with the law in any way. The disputed Royal Decree was therefore in accordance with the law. The court dismissed the case.

2.2 Analysis

(1) Development of the System for Examining the Exercise of State Power's Expropriation

In the past, before the 1949 Constitution clearly recognized the exercise of state power to expropriate immovable property, the state's exercise of power to expropriate private property had to be for purposes specified by law only. The Immovable Property Expropriation Act, B.E. 2477 (1934) was enacted to be used as a central law when land is to be expropriated from private individuals and the conditions were set that the state would be able to use the expropriation power only when

it is for use in public utilities or mining.[5] In general, the expropriating organization, whether it is a government agency or a state enterprise, must submit reasons and necessity along with submitting a specific expropriation bill for each time to the House of Representatives to consider whether the expropriation is for public utilities or other purposes as prescribed by law or not. This has been the practice continuously even after the exercise of state power to expropriate immoveable property was specifically recognized in the Constitution of the Kingdom of Thailand, B.E. 2492 (1949).

The fact that the Thai legal system requires that the exercise of expropriation power must be in the form of a specific Act, raises questions about the power to review the content of such expropriation Act. In particular, in cases where the House of Representatives has passed a bill enacted to expropriate immoveable property, but it later appears or there is a dispute that the expropriation was not intended for public utilities as claimed. The issue that arises is whether the owner or related person will be able to bring an objection regarding the exercise of the state's expropriation power to the court to revoke the expropriation as enacted in the Act for that purpose. On this issue, there are three Supreme Court Judgment, namely Supreme Court Judgment No.1081/2494 (1951), Supreme Court Judgment No.558/2496 (1953) and Supreme Court Judgment No.2214/2517 (1974), which set guidelines for examining the exercise of state power to expropriate immoveable property in cases where it appears that the state has used the expropriated land in a manner not consistent with the purposes specified by law.[6] The three judgments dealt with issues concerning land expropriation in the Bangkok Port construction project.

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[5] Section 5: Immovable property which the Government needs for any public utility activity or for mining, unless there is an agreement on transfer otherwise, shall be expropriated in accordance with the provisions of this Act.

[6] Please see Supachet Kusuwan (1997). The legal legitimacy of real estate expropriation in the Thai legal system. Thammasat University. pp. 286-300.

In the area where the project was to be constructed, which was expropriated in 1937, permission was granted to use the area for the construction of a slaughterhouse by the Quartermaster Department Royal Thai Army, as it was in accordance with the intention of having an industrial factory as part of the port business under the Bangkok Port construction project. Later, when the Ministry of Industry received the transfer of the slaughterhouse construction project from the Quartermaster Department Royal Thai Army, there was an idea to expand the factory area further because it supported the area for raising animals, animal shelters, and factories for producing by-products from slaughtered animals. Therefore, the Royal Decree on the Land Area Determination in the Area to Expropriate Immoveable Property to Expand the Bangkok Port Area, B.E. 2485 (1942) was issued and the Immoveable Property Expropriation Act to Expand the Bangkok Port Area B.E. 2486 (1943) (the Specific Expropriation Act, B.E. 2486 (1943)) was issued to expropriate additional land to expand from the expropriated area, with the boundary adjacent to the land where the meat factory was being built. After the expropriation was completed, the government used some of this expropriated land by raising animals, building animal shelters, and building worker's areas, which caused the owner of the expropriated land to file a lawsuit in court to reclaim his own land that was expropriated under the Specific Expropriation Act, B.E. 2486 (1943).

In the Supreme Court's Judgment No.1081/2494 (1951), the Supreme Court considered the issue of whether the defendant's use of the disputed land was in accordance with the purpose of the expropriation under the Immovable Property Expropriation Act to expand the Bangkok Port Area, B.E. 2486 (1943) or not. The facts showed that the construction of the slaughterhouse was not part of the port business from the beginning. The Quartermaster Department Royal Thai Army only asked to share the land and when it turned out that the land was insufficient, the Specific Expropriation Act, B.E. 2486 (1943) was

enacted, claiming that it was to expand the Bangkok Port Area, but the real purpose was to expand the meat factory. Therefore, even though the defendant used the disputed land for raising animals, building animal shelters, and building worker houses, it is not considered as using the land for the port business, which is the purpose of the expropriation. Therefore, when the plaintiff's land that was expropriated has not been used for more than 5 years, the plaintiff is entitled to reclaim the land.[7]

As for the case of Supreme Court Judgment No.558/2496 (1953), it is a request for the court to revoke the expropriation of the plaintiff's land that was expropriated by the defendant in accordance with the Expropriation Act for the Expansion of the Bangkok Port Area, B.E. 2486 (1943). In the facts of this case, the Court of Appeal has concluded that the meat factory business is a business, not a public utility, and the meat factory is not part of the port business. Therefore, it is considered that the defendant's expropriation was intended to expand the slaughterhouse business, which is not a public utility business, and is not in accordance with the Immovable Property Expropriation Act, B.E. 2477 (1934). Therefore, even though the Specific Expropriation Act, B.E. 2486 (1943) specified that the land was expropriated to expand the port area, which is a public utility, when the facts showed that the intent was to expand the meat factory business, which is not a public utility, the plaintiff's land expropriation under the Specific Expropriation Act, B.E. 2486 (1943) had no effect under the Immovable Property Expropriation Act, B.E. 2477 (1934). The ownership of the land, therefore, did not pass to the defendant.

[7] The Court further considered that even if the defendant insisted that the true intention of enacting the Specific Expropriation Act, B.E. 2486 (1943) was to use the land to expand the meat factory, expropriation in this manner would be illegal because it violated the Immovable Property Expropriation Act, B.E. 2477 (1934) because it was not an expropriation for public utility activities and could not be done (Supreme Court's Judgment No.1081/2494 (1951)).

In the Supreme Court's Judgment No.2214/2517 (1974), the dispute arose after the Supreme Court had issued the Supreme Court's Judgment No.558/2496 (1953), where the Immovable Property Expropriation Act, B.E. 2477 (1934) (No.3), B.E. 2495 (1952) was enacted to amend and expand the purpose of expropriation as specified in section 5 to include other state benefits as well. Later, the Immovable Property Expropriation Act in Khlong Tan Subdistrict and Phra Khanong Subdistrict, Phra Khanong District, Phra Nakhon Province, B.E. 2496 (1953) (Specific Expropriation Act, B.E. 2496 (1953)) was enacted to expropriate the land of the previous landowner once again to the Port Authority, claiming that the government needed to use it for the benefit of the state (other than) to set up a slaughterhouse. The landowner therefore became the plaintiff suing the Port Authority of Thailand, asking the court to rule that the Specific Expropriation Act, B.E. 2496 (1953), which expropriated all 6 plots of land, was void and unenforceable because operating a slaughterhouse is an activity that private individuals should normally do. Therefore, the expropriation was not for public utilities or other state benefits.

On the issue of whether the land expropriation for use in operating a meat factory is a public utility, the Supreme Court upheld the former ruling in Supreme Court Judgments No.1081/2494 (1951) and No.558/2496 (1953), which had already ruled that the business of slaughtering animals for sale is a commercial business and not a public utility. As for the issue of whether the operation of a meat factory is of other state benefits, the facts show that the expropriation was not for the benefit of the Port Authority of Thailand. Instead, it was heard that it was for the benefit of a private company, namely, Saha Samakkee Animal Trading Co., Ltd. The expropriation was therefore not for the benefit of the state and did not comply with the purpose of the expropriation. Therefore, it had no effect on the plaintiff's land.

From the three Supreme Court's Judgment above, it can be considered that the Court of Justice has set the precedents and guidelines for examining the exercise of state power in expropriation to guarantee that the rights of the people will not be violated without reasonable cause. The Court will consider and examine the facts that occurred in the case to find out the true intention of the expropriation, whether it is in accordance with the objectives stated in the Specific Expropriation Act that was enacted or not or if it is not in accordance with the objectives as stated in the Specific Expropriation Act, then the true purpose of the expropriation is for public utilities or other purposes as stipulated by central law or not.

It is noted that according to the Supreme Court's Judgments above (Supreme Court's Judgment No.558/2496 (1953) and Supreme Court's Judgment No.2214/2517 (1974)), it is a request for the Court to rule that the Specific Expropriation Act is not applicable because the government does not have the power to expropriate according to section 5 of the Immovable Property Expropriation Act, B.E. 2477 (1934), even though at the time that the Specific Expropriation Act was enacted, Thailand already had a constitution[8] that specified the framework and conditions for the use of the expropriation power. The claim that the enactment of the Specific Expropriation Act was contrary to or in conflict with the purpose of expropriation as specified by law would also result in the enactment of such law being an unconstitutional act. This is a case that should be more concerned with the examination of the constitutionality of the Specific Expropriation Act. However, the Supreme Court's Judgment that the Act was not applicable because it was enacted in conflict with the central law on real estate expropriation, which is also a law at the level of an Act, has led

[8] Section 34 of the Constitution of the Kingdom of Thailand, B.E. 2492 (1949) and section 29 of the Constitution of the Kingdom of Thailand, B.E. 2495 (1952), amended B.E. 2496 (1953)

to criticisms as to whether the court of justice should have the power to examine such a matter. Since there is no principle or theory to support the Court of Justice having the power to examine and make the Act which conflicts with or contradicts the Act which was previously enacted void or unenforceable before, especially in the Supreme Court's Judgment No.2214/2517 (1974), which was a decision after the Constitution had already set the criteria for the protection of the people's property rights and the establishment of a mechanism for an organization responsible for examining the constitutionality.[9]

Later, when the law on expropriation of immovable property was revised by the enactment of the Immovable Property Expropriation Act, B.E. 2530 (1991), some important criteria were added in the process after the Royal Decree was issued to determine the area of land to be expropriated, which normally, when the state needs to acquire land for necessary purposes as prescribed by law and needs to survey to know the land to be acquired with certainty. The expropriation officer may propose to the executive branch to issue a royal decree defining the area of land to be expropriated to give the officer the authority to enter the land and immovable property within the specified area until the facts are known clearly before proposing to enact the expropriation act. However, the act has given the expropriation officer the authority during the period when the royal decree is in force to have the authority to agree to buy and sell and determine the amount of compensation for the real estate to be expropriated from the owner or legal possessor in order to proceed with the purchase and payment of compensation for the said immovable property[10] without having to enact the Specific Expropriation Act in every case as was the practice in the past.

The amendments to the expropriation process in this regard have resulted in a change in the role of the royal decree to determine

[9] Suphachet Kusuwan, cited in footnote 5, p. 345-361.

[10] Real Estate Expropriation Act, B.E. 2530 (1991) section 10

the area of land to be expropriated. Although the constitution has laid down the principle that expropriation shall not be carried out except by virtue of legal authority, in reality, the state's expropriation does not necessarily require the issuance of specific laws for each expropriation. Meanwhile, in cases where specific laws are required to give the state power to expropriate, it is not that the administrative sector can immediately propose the enactment of the Expropriation Act. Instead, the administrative sector must proceed in accordance with the procedures specified in the Expropriation Act, which was enacted as the central law on this matter. Later, when the Administrative Court was established in accordance with Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999), with the intention of being an organization with the power to examine the exercise of power by the administrative sector in various forms, the Administrative Court therefore has the power to examine the legality of the issuance of a Royal Decree defining the area of land to be expropriated, which is an important process that the administrative sector must proceed with before proposing the enactment of the Specific Expropriation Act. Therefore, if the owner of the expropriated land or the people affected by such expropriation believe that the exercise of the power of the administrative sector by issuing the Royal Decree was illegal, they may file a lawsuit with the Administrative Court requesting the court to order the revocation of the Royal Decree.

(2) Application of the Principle of Proportionality to Control the Legality of the Royal Decree specifying the boundaries of land expropriated of the Administrative Court

In considering the case of a dispute concerning the unlawful issuance of a Royal Decree by the administrative sector, the Administrative Court shall examine whether or not the Royal Decree issued, which falls within the definition of "rule" as defined in Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542

(1999), is a rule issued in violation of the conditions of legality. The examination shall be conducted based on the grounds set out in section 9, paragraph one (1) of Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999), to determine whether the issuance of such rule was an act without authority or beyond the power and duties or was not in accordance with the law or was an act that was not in accordance with the essential forms, procedures or methods prescribed for such act or was an act that was dishonest or was in the nature of unfair discrimination or was in the nature of creating unnecessary procedures or creating an undue burden on the public or was an improper exercise of discretion.

For the Supreme Administrative Court's Judgment No. For.16/2545, it was a case where the landowner who was affected by the highway construction project to connect Surat Thani Airport to the Province Authority brought a lawsuit to the Administrative Court to rule that the issuance of the Royal Decree defining the land area to be expropriated in such case was unlawful. The plaintiff believed that the road line in the area to be expropriated, entering Surat Thani city, did not adhere to the road line in the Surat Thani city plan area, which was as the tripartite committee from relevant government agencies, namely the Department of Highways, the Public Works and Town & Country Planning, and Surat Thani Province, had already met and discussed and reached a joint resolution. In ruling on the content of the case, the Supreme Administrative Court, which is the court with jurisdiction under section 11 (2) of the Administrative Court Establishment Act, considered and saw that there was a case to decide whether the Royal Decree was legally issued or not. The issues for consideration were determined in order, starting with an examination of the conditions regarding the process of issuing the Royal Decree to see whether it was issued under the powers already provided for by law. And then there was the consideration of the contents of the Royal Decree, whether it was lawfully enacted or not.

In considering the legality of the content of the Royal Decree in the above disputed case, since in this case the plaintiff argued that the use of discretion by the Department of Highways in selecting the road to be constructed differently from the road in the Surat Thani city planning area was an improper action, the Supreme Administrative Court, therefore, ruled on the above disputed issues to examine whether the Department of Highways had exercised its discretion to adjust the road area in the area to be expropriated according to the map attached to the Royal Decree properly.

If we consider the steps in the process of expropriation according to the law, whether it is the central law on expropriation[11] or the specific law that giving the authority to expropriate, which in this case is section 68, paragraph one[12] of the Highways Act, B.E. 2535 (1992), it can be seen that the law has specified that it is the executive's discretion to decide when it is necessary for the state to expropriate immovable property for the purposes prescribed by the Constitution, including the appropriate area for such expropriation, the size and location of the area to be expropriated. When the executive branch considers that it is appropriate to expropriate land and needs to conduct a survey to determine the land to be acquired with certainty, it is necessary to propose that a Royal Decree be issued to determine the area of land to be expropriated, along with specifying the details of the expropriation in the Royal Decree. Therefore, when a Royal Decree is issued to

[11] Immovable Property Expropriation Act, B.E. 2530 section 5, when the state has a necessity to acquire property for any activity necessary for public utilities or necessary for national defense or the acquisition of natural resources or for urban planning or for agricultural or industrial development or for land reform or for other public benefits, if there is no agreement on the transfer otherwise, the expropriation shall be carried out in accordance with the provisions of this Act.

[12] Section 68; When it is necessary to acquire immovable property to build or expand a highway, if there is no agreement on the transfer otherwise, expropriation shall be carried out in accordance with the law on immovable property expropriation.

determine the area of land to be expropriated, it is considered that the executive branch has exercised its discretionary power to decide that it is appropriate to expropriate immovable property.

In the case of the judgment, the Administrative Court considered the facts, the purpose of the project and the process of the Department of Highways' discretion that led to the adjustment of the road boundary to be different from the road boundary according to the Surat Thani City Planning Area, which when it appeared that in the process of surveying the alignment in the field, the first defendant (the Department of Highways) presented the results of the study on the economic and engineering unsuitability of the road boundary according to the city planning area. Since road lines of the comprehensive plan have a road boundary of 30 meters, while the first respondent wants a road boundary of 80 meters. The court compared the impact that will occur during the expropriation along the road in the city plan, which will have approximately 170 buildings and structures expropriated, which will have to pay an expropriation fee of approximately 150 million baht, with the impact that will occur from the expropriation according to the guidelines set by the first defendant, which will have approximately 49 buildings and structures, paying an expropriation fee of approximately 76 million baht. Therefore, **the defendant adjusted the road alignment as appropriate, considering the principle of proportionality so that the restriction of freedom affecting the private interests of each individual is only necessary to maintain the public interest. This is to ensure that the resolution of various problems is as efficient and effective as possible.** Therefore, the determination of the land area by the Department of Highways is not in any way contrary to or inconsistent with the law. The issuance of the disputed Royal Decree is, therefore, in accordance with the law.

From the above rulings, the Supreme Administrative Court has applied the "proportionality principle" to examine and control whether

the administrative sector has exercised its discretion to determine the area of land to be expropriated, taking into account the principle or not. Although the principle is not specified as a condition of legality that the Administrative Court must consider and examine according to section 9 (1) of the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999), in reality, the principle is a constitutional legal principle and is considered an important sub-principle of the rule of law that requires the exercise of power by state officials that encroaches on the sphere of private rights and freedoms to be done only as necessary for the public interest.[13] The principle of proportionality (or the principle of reasonableness) is a basic principle that limits the power that the government has under an organic law, an act, or a royal decree. It is considered a general principle of law that must be applied to the exercise of state power to act that has the effect of limiting the rights or affecting the rights and freedoms of individuals in all cases, regardless of whether there is a law that expressly supports this principle or not.

In textbooks[14], the principle of proportionality (or the principle of reasonableness) is essentially made up of three demands or sub-principles:

Principle of Appropriateness[15] which requires that those exercising state power must use discretion to select measures that can be implemented to achieve the objectives or intentions of the constitution or law, which is to protect the common interests or public interests.

Principle of Necessity means that among the many measures that can be taken to achieve an objective or intent or law, the person exercising state power must choose the measure that is the least severe.

[13] Worachet Phakhiratana (2011). Administrative Law, General Section. Bangkok: Nitirat, p. 58.

[14] Worapot Wisarutphich (2022). Some Basic Ideas and Legal Principles of Administrative Law. Bangkok: Winyuchon. p. 49-50.

[15] Some texts use it as the "Principle of Appropriateness", see Banjerd Singkaneti. (2019). Basic Principles of Human Rights, Freedom and Dignity. Bangkok: Winyuchon. p. 293-294.

Principle of Proportionality in the Narrow Sense is a principle that calls for a balance between the damage that will occur to individuals and/or society as a whole and the benefits that the public will receive from implementing any measure that the state authority has enacted.

When considering the essence of the proportionality principle and its three sub-principles, it can be seen that in order for the administrative authorities to act in accordance with the aforementioned constitutional principles, it is necessary to consider the relationship between the legal instrument (regulation or administrative order) chosen by the administrative authorities and the purpose of that action in the context of the facts that occurred, with the consideration process taking place in 4 steps[16] as follows: (1) Finding the purpose of the administrative action and checking whether the purpose of the action is a legitimate purpose; (2) Considering whether the selected measure is a measure that can achieve the desired purpose, which is in accordance with the "Principle of Appropriateness"; (3) Considering whether the measure that may achieve the purpose desired by the administrative organization is a necessary measure, which is a consideration in accordance with the "Principle of Necessity"; and (4) Considering whether the measure that may achieve the purpose desired by the administrative organization and is a necessary measure is a reasonable measure, which is a final consideration in accordance with the "Principle of Proportionality in the Narrow Sense", which requires the administrative organization to weigh the public interests that will be gained from the measure against the benefits that individuals will lose or bear, whether they are acceptable or not.

Despite the aforementioned ruling, it can be seen that this is a case where the court has investigated the consideration process of the Department of Highways' discretion complies with the principle of

[16] Worachet Phakhiratana, cited in footnote 12, p. 59-62.

proportionality in each sub-principle in order of steps, it has provided sufficient details on the points that should be considered to decide whether the administrative organization complied with the principle of proportionality or not, such as comparing the impacts that will occur between the expropriation along the original road and the newly improved road, considering the number of buildings that were expropriated and the budget that the state had to use for the operation, which is a consideration based on the principle of necessity that requires the person exercising state power to decide to choose the measure that is the least severe.

(3) French Legal Judgments

In the French legal system, the courts are an important body that plays a key role in protecting the rights and freedoms of citizens against the abuse of state power in expropriating immovable property, particularly in examining whether an administrative expropriation is necessary for the public interest, and in determining which cases are considered expropriations for the public interest. The Council of State (Conseil d'Etat), as France's highest administrative court, set the precedent in 1971 in the case of *Ville Nouvelle Est*[17], which established important legal principles that remain in force today.

The facts of this case arose from a government project to develop the eastern part of Lille into a new city, which would be a university city where students and the general public would live together. The city area would include university buildings and facilities to accommodate approximately 30,000 students, as well as residential areas for approximately 25,000 people. And in the construction of the said project, the government had to expropriate the land and buildings which were houses of the people, approximately 250 households. And even though the construction plan was later adjusted, resulting in a reduction

[17] CEAss. 28 mai 1971, Ministre de l'équipement et du logement c/ Fédération de défense des personnesconcernées par le projetactuellementdénommé « Ville nouvelle Est »

in the number of affected houses, those affected by the construction of the new city who had formed an association were still not satisfied and filed a petition with the court to revoke the announcement of the Minister certifying the public benefits of the said project because it was an announcement issued illegally because it was not necessary for the public interest (utilité publique).

On the issue of whether a project that requires land expropriation for implementation is for public interest or not. The Council of State has established a principle of adjudication that an announcement of a project as a project of public interest necessity can be made only when the damages resulting from the project, whether it be private property affected, the budget used for the operation, or other social damages, do not exceed the interests received.[18] When considering the documentary evidence presented in the case, the court found that the administrative party had to expropriate the residential buildings in the area because of the necessity to have the school building construction not to be separated or distinguished from the residential area. When considering the overall interest of the project, it was found that it did not have the effect of making the project that was not carried out for public interest in any way and the court ruled to dismiss the case.

From the above rulings, the French Administrative Court has applied the principle of proportionality in considering whether an expropriation is necessary for the public interest. It will consider the details of the impacts or damages caused by the project in various aspects to weigh them against the interests of the public to be at a suitable level.

[18] « Une opération ne peutêtrelégalementdéclaréed'utilitépublique que si les atteintes à la propriétéprivée, le coût financier, les inconvénientsd'ordre social, la mise en cause de la protection et de la valorisation de l'environnement, et l'atteinteéventuelle à d'autresintérêts publics qu'ellecomporte, ne sont pas excessifseuégard à l'intérêtqu' elleprésente ».

In the French legal system, the examination of the exercise of administrative powers in expropriation can be carried out by filing a lawsuit in the Administrative Court, requesting the court to review the legality of an administrative act (Recours pour excès de pouvoir) in which the interested party believes that the administration has acted improperly and to request that the court revoke the act. Most cases are cases of requesting the court to revoke a type of announcement called a public interest announcement[19] (Déclarationd'utilitépublique: DUP), which is an announcement issued by the administration after a preliminary examination that the reason for the administration's desire to expropriate the property is for the public interest.[20]

The fact that the French Expropriation Code provides for a procedure for the issuance of a DUP to certify the public interest necessity of a project prior to each expropriation is to comply with the provisions on the restriction of the right to property (la propriété) of individuals, a right guaranteed by the Constitution. Article 17[21] of the 1789 Declaration of the Rights of Man and of the Citizen, which has the status of a constitutional law, stipulates that the expropriation of a person's property can only be done in cases of public necessity (nécessité publique) as recognized by law (légalement constatée). However, there is no provision in the Constitution that clearly defines "public necessity". The French Expropriation Code itself, which stipulates that expropriation of

[19] Code de l'expropriation pour cause d'utilitépublique, Art. L121-1

[20] In administrative law, the DUP is often cited as an example of an administrative act which is not a "Regulations" (acteréglementaire) but has a special character, unlike an "Administrative Act" (acteindividuel) directed against a specific person. In the textbooks, such special administrative acts (actesui generis) are called "General Administrative Act" (actes non réglementaire) or "Special Administrative Act" (décisiond' espèce). On this point, see R. Chapus, Droit administratifgénéral, tome 2, 15e éd., p. 724.

[21] Déclaration des droits de l'homme et du citoyen de 1789, art. 17 ; « La propriétéétant un droit inviolable et sacré, nul ne peutenêtreprivé, sicen'estlorsque la nécessitépublique, légalementconstatée, l'exigeévidemment, et sous la condition d'unejuste et préalableindemnité »

immovable property can only be carried out in the case of public interest[22] (utilité publique), does not provide a general definition of "public interest" or provide examples of what cases would constitute a "public interest" in a manner similar to the provisions of the Thai Expropriation Act. On the surface, it seems that the constitutional principle intends for the legislature to be the one to examine and certify which cases are appropriate grounds for the state to exercise its power to expropriate land. However, in reality, the role of the legislature is rather limited because, apart from some specific laws that have been enacted with clearly specified grounds allowing the administration to exercise its power to expropriate, expropriation in general must be carried out in accordance with the procedures prescribed by the Expropriation Code. According to the provision, the expropriating agency, and the agency responsible for the project must use their discretion to consider whether the activity or project that caused the expropriation of the property for use in such operation is a case for "public interest" or not.[23]

Historically, when there was a dispute over the administrative discretion of an expropriation project to determine the "public interest" of the expropriation, French administrative courts would consider whether the purpose of the expropriation was general interest[24] (intérêt général). If it appears that the purpose that the administration relies on as a reason for expropriation is for the general interest, the court will consider

[22] Code de l'expropriation pour cause d'utilitépublique, Art. L1; «L'expropriation, en tout oupartie, d'immeublesou de droits réelsimmobiliers ne peutêtreprononcéequ'à la condition qu'elleréponde à uneutilitépubliquepréalablement et formellementconstatée à la suite d'uneenquête et qu'ilaitétéprocédé, contradictoirement, à la détermination des parcelles à exproprierainsiqu'à la recherche des propriétaires, des titulaires de droits réels et des autrespersonnesintéressées ».

[23] R. Hostiou, « Propriétéprivée et action publique. Le droit de l'expropriationenFrance : entre permanence et changement », RDI 2016, para. 7.

[24] For a sample judgment, please see Y. Gaudemet, Traité de droit administratif–Droit administratif des biens, Tome 2, LGDJ, 13e éd., 2008, p. 371.

that such expropriation is for the public interest, without considering the context or details of the facts of the project to analyze the impact or interest that the public will receive from the expropriation. The French Administrative Court's initial approach to interpreting the abstract term "public interest"[25] (appréciation abstraite de l'utilité publique) was consistent with the general administrative law principle that the court has no power to interfere or examine the appropriateness of the exercise of discretion in expropriation, which is a matter within the executive's power. However, this judgment resulted in a wide expansion of the scope of expropriation for public interest. This is because if the juridical sector can prove to the court that the purpose of the expropriation is for the interest of the public or society, it is considered an expropriation for the "public interest" as stipulated by the Constitution.

The limitation of the French Administrative Court's power to review the public interest has drawn much criticism from scholars. In addition, as the economic and social environment has changed, the government has had to invest in large-scale infrastructure projects involving many people. If expropriations are allowed to proceed without scrutiny, they could have a property rights impact that is difficult to remedy, as stated in the statement of the judge who made the ruling.[26] In the *Ville Nouvelle Est* case, it was considered that since the situation had changed from before, expropriation was not just the state exercise public power to take action by citing public interest as a reason to expropriate property rights from private parties, but it was the state and private parties having to take into account the interests of many parties simultaneously, which sometimes may be possible that in the decision-making process, the state will give more weight to the interests of the private sector without sufficiently considering the possible

[25] R. Chapus, Droit administratifgénéral, tome 2, 15e éd., p. 743.

[26] Conclusions du G. Braibant, CE Ass. 28 mai 1971, Ville Nouvelle Est, GAJA, Dalloz, 2021, 23e éd., n° 77, p. 561.

impacts on the public interest. Therefore, the court's examination cannot consider whether the project is for public interest or not based on its nature. Instead, it must weigh the advantages and disadvantages, the costs of implementation, and the interests to be gained to consider whether the expropriation claimed by the state is in fact for public interest or not.

For these reasons, the *Ville Nouvelle Est* case is an important one because it is the first judgment in which the French Administrative Court has strengthened the scrutiny of the legality of an administrative DUP declaration by allowing the court to consider the concrete facts and possible impacts (contrôle in concreto), not just the expropriation as stated or reported in the documents, so that the court can analyze or weigh the interests or disadvantages of the expropriation. If the project is carried out and will cause widespread impacts on the public or society or is a project that requires a large amount of investment that is disproportionate to the expected interests, such a project cannot be considered as expropriation for public interests that can be carried out legally.

Theory of Weighing of Evidence[27] (théorie du bilancoût-avantages) as espoused in the judgment in the *Ville Nouvelle Est* case has since become an important norm for the public interest review of administrative courts, being one of the elements of the question that the Council of State will always consider when examining whether an expropriation is in the public interest[28], which includes:

(1) Is the expropriation intended for the benefit of the public?

(2) Is expropriation necessary? That is, can the government use other methods to achieve the project's objectives without expropriation? For example, can the government

[27] R.Hostiou, « Propriétéprivée et action publique. Le droit de l'expropriationenFrance : entre permanence et changement », RDI 2016, para. 7

[28] CE, 19 oct. 2012, Commune de Levallois-Perret.

use the property it already owns to implement the project?

(3) Is the expropriation proportionate? It is a matter of weighing to see whether the impacts from the expropriation, in terms of the property expropriated, the amount of money required to implement the project, and the impacts on society in various dimensions, are not excessive when compared to the benefits that the government expects to receive from the expropriation.

From the above criteria, it can be said that the French legal system has provided a mechanism for the administrative court to set the rules and determine the criteria for considering the important conditions for the use of expropriation power, namely whether the expropriation is for the public interest or not. The Court has devised a specific process for examining the administrative actions in this matter, which is unique and different from the process of examining the legality of other administrative acts that the Court has previously practiced. If we consider it from the perspective of protecting the rights of the people, it is acceptable that the establishment of such a standard is necessary to ensure that the property rights of the people will not be violated by the state expropriation for inappropriate reasons. However, from another perspective, the aforementioned judgment also causes the Court to examine the appropriateness (l'opportunité) of the exercise of discretion by the administrative party in expropriation,[29] which raises concerns that it will be an expansion of the Court's power to the point of interfering with the mission of the administrative party, especially in cases where the Court finds that the expropriation proposed by the administrative party is not reasonable and is for the public benefit, and thus the proposed project cannot proceed.

[29] R.Hostiou, « Propriétéprivée et action publique. Le droit de l'expropriationenFrance : entre permanence et changement », RDI 2016, para. 12.

However, when considering the results of the judgments in the cases with disputes regarding the public interest conditions of expropriation that have occurred since the *Ville Nouvelle Est* case until now, it is found that most of the judgments are cases where the courts have ruled to dismiss the case. As for the verdicts to revoke the DUP announcement, which are few in number, when analyzed according to the nature of the projects in the said verdicts, it is found that they are usually medium or small-sized projects, not large-scale investment projects of national importance or projects that are carried out in accordance with the government's main policies,[30] such as projects related to the military, the construction of nuclear power plants, the construction of expressways or high-speed trains.[31]

On the one hand, it can be seen that the French Administrative Court has tried to exercise its power of review under the theory of weights with caution and the fact that the Court has set the criteria for review is partly to give the administration a clear framework for its work and to try to control its exercise of discretion according to the criteria set by the Court in order to avoid having its proposals rejected or facing problems that would cause complications. However, from the perspective of academics who strongly support the concept of public interest scrutiny, the enforcement of the Administrative Court's weighting theory is still disappointing[32] because it has not been able to elevate the scrutiny of public interest conditions to a tool for truly protecting the rights of the people.

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30 R. Chapus, Droit administratifgénéral, tome 2, 15e éd., p. 750.

31 Large projects that have had their DUP announcements revoked include the highway project between Annemasse and Thonon-les-Bains (Projetd'autoroutetranschablaisienne), with the Court citing the necessity and the enormous construction costs, CE, Ass., 28 March 1997, Association contre le projet de l'autoroutetranschablaisienne.

32 P. Wachsman, « Un bilan du bilanen matière d'expropriation : la jurisprudence Ville Nouvelle Est », in Mélanges J. Waline, Dalloz, 2002, p. 733.

The above criticisms have led to some scholars' demands[33] to raise the standard of scrutiny of public interest conditions, especially in considering whether an expropriation is necessary. They believe that the court should not only consider whether the proposed alternative is appropriate (l'adéquation du choix) for the intended project objectives, but should also examine the discretion in deciding on the project's principles to see if it is the most appropriate alternative or if there are other more appropriate alternatives that would achieve the objectives of the administration. This examination of the appropriateness of the administrative discretion, or what is known as the external legality examination (contrôle de la légalitéextrinsèque), is still only an academic proposal and has not yet been accepted by the French Administrative Court.[34] However, some scholars[35] predict that the court's current approach to adjudication is likely to develop into a stricter level of scrutiny in line with such approach. Although the court has tried to limit the scope of its power to not encroach or direct the administration on how it should proceed, in order to consider how necessary the expropriation activities or projects proposed by the administration are, the court must consider the facts about the various options that the administration has in order to achieve its desired objectives, such as examining whether the administration has other land plots that it already has and can use[36], or whether there are other options to operate that do not require expropriation, or in cases where the petitioner may object to the boundary or the layout of the project and propose the

[33] B. Seiller, « Pour un contrôle de la légalitéextrinsèque des déclarationsd'utilitépublique », AJDA 2003, p. 1472 ;D.Labetoulle, « La jurisprudence Ville Nouvelle Est cinquanteans après », RFDA 2021, p. 299.

[34] CE 17 oct. 2013, Collectif des élus qui doutent de la pertinence de l'aéroport de Notre-Dame- des-Landes, AJDA 2013. 2550, note R. Hostiou.

[35] H. Hoepffner « Chronique de droit public », Les Nouveaux Cahiers du Conseil constitutionnel, vol. 43, no. 2, 2014, p. 182.

[36] CE, 30 nov. 1974, Époux Thony et Hartmann- Six, Rec. T. 1009, concl. D. Labetoulle

consideration of what the appropriate boundary should be. The court must compare such arguments with the route or boundary proposed by the administration[37] to examine whether the route or boundary that is being expropriated in the option that causes the least impact. If we consider only the content, these questions are all things that the court has already used as considerations in weighing public interests.

3. Summary of the Precedents of the Exercise of State Power for Expropriation under Constitution

The Constitution of the Kingdom of Thailand provides that the state has the power to expropriate private property, subject to the power of the law enacted by the legislature for purposes prescribed by the Constitution or for other public interests, while the Declaration of the Human Rights and Citizens of 1789, which is a constitutional law of the French Republic, provides that expropriation of private property is only permitted for public necessity (nécessité publique) as provided by law. The French Expropriation Code, which is the central law on this matter, provides that expropriation of private property must be for public interest (utilité publique). It can be seen that the constitutions of both countries have similar provisions protecting private property rights, with the exception that the state can limit private property rights by means of expropriation only in cases where the state has a reason or necessity for the public interest.

However, in considering whether a case is an exercise of state power to expropriate "for public interest" or not, there is no clear definition or scope of meaning, which is probably because the principle laid down by the constitution states that expropriation can only be carried out by relying on legal power. Therefore, the legislative branch has the power to directly control and inspect whether the draft law enacted for expropriation is for public interest or not. However, if we consider the

[37] CE, 5 avr. 2002, ADEG.

laws and practices related to the expropriation of immovable property, we will see that the roles of the Thai and French legislatures in this matter are rather limited. There is a central law to determine the process and procedures for expropriation, which allows the agencies that expropriate and are responsible for the project to exercise discretion in considering whether the expropriation of immovable property that the administration will proceed with is necessary for the public interest or not. The judicial organizations, namely the Thai Administrative Court and the French Council of State, are the organizations that play an important role in controlling and examining the exercise of state power in expropriating immovable property.

In the Thai legal system, the Supreme Administrative Court's Judgment, Red Case No. For.16/2545, is considered the first judgment that has set a precedent on expropriation for public interest. It has applied the "Principle of Proportionality", which is a general legal principle in the Constitution, to control and examine the exercise of state power to ensure that it is only necessary to maintain public interests without causing damage or affecting the property rights of individuals, which the Constitution provides for unreasonably. This principle is one of the conditions set by the Supreme Administrative Court to decide whether the Royal Decree defining the area of land to be expropriated, which is a dispute, was enacted lawfully or not. This can be seen from the following Supreme Administrative Court judgments:

Supreme Administrative Court's Judgment No. Aor.109/2551 (2008) In a case where a plaintiff argued that the issuance of the Royal Decree defining the land area to be expropriated to expand the intersection area and for visibility for the safety of road users by the Saraburi Highways District, Department of Highways, was an unlawful determination of the road area on the plaintiff's land, which created an undue burden on the plaintiff. The court considered that it was necessary to expropriate some of the plaintiff's land to expand the area for improving the intersection

to be in line with the expansion of the main highway. When the facts showed that the defendant (Department of Highways) had adjusted and reduced the visibility distance by taking into account engineering principles for the safety of road users and it appeared that only the plaintiff's garden area had been expropriated, it showed that the public interest had been considered together with the plaintiff's interest, **taking into account the damages that the plaintiff should suffer, together with the necessity to expand the road area.** The determination of the land area to be expropriated by the Department of Highways was, therefore, not an unnecessary procedure and did not create an excessive burden for the plaintiff, and was in accordance with the law. The court dismissed the case.

Supreme Administrative Court Judgment No. For.36/2560 (2017) The Court ruled on the case where the plaintiff stated that the exercise of the power of the Minister of Agriculture and Cooperatives to propose the issuance of a Royal Decree to determine the area of land to be expropriated for the benefit of irrigation under the Tapi - Phum Duang River Basin Development Project, Surat Thani Province, was unlawful. In the issue of determining the area of land to be expropriated, **when considering the benefits under this Royal Decree compared to the damages affecting all 110 plaintiffs,** it can be seen that if action must be taken to protect the benefits of all 110 plaintiffs, it would damage the public interest. In addition, the plaintiffs had the right to receive compensation for damages from the expropriation of such immovable property according to the conditions of the law. The issuance of such Royal Decree was, therefore, not an abuse of discretion and was contrary to the intention of the Royal Irrigation Act. The court dismissed the case.

Supreme Administrative Court Judgment No. For.11/2561 (2018) The plaintiffs argued that the enactment of the Royal Decree defining the area of land to be expropriated for the Bangkok Metropolitan

Administration's project to construct a shortcut from Phetchaburi New Road through Soi Sun Wichai connecting to Rama IX Road was unlawful because the project could not solve traffic problems and specifically provided benefits to private individuals. In addition, the construction area was set wider than necessary and there was no need for expropriation. The court considered the facts of the disputed expropriation and found that the road area to be constructed would have less impact when compared to the alternative road area, which would be directly adjacent to the people's houses, requiring the entire house to be demolished. This would cause a significant impact. When considering the benefits to be gained from the implementation of the project, in addition to the general public benefiting from the connection as a shortcut between Phetchaburi New Road and Rama 9 Road, it would also provide convenience to the people using the services of Bangkok Hospital. The Bangkok Metropolitan Administration designed the road to be approximately 8 meters wide, which was considered to be in line with the economic and social necessity for living together in the urban community. Therefore, it was ruled that the exercise of discretion in selecting the area for road construction and expropriating the land in dispute in this case was in accordance with **the purpose of expropriation based on the necessity for public interests.** The enactment of the disputed Royal Decree was, therefore, lawful. The court dismissed the case.

In summary, the Thai Administrative Court has accepted and applied the principle of proportionality to control the exercise of administrative discretion in expropriating immovable property, which must be based on the necessity for public interest. In considering whether the expropriation of land that the state needs to acquire for necessity or for public interest; the Court does not only examine whether the expropriation is for the purpose of carrying out activities for public interest as stipulated in the Constitution or law. The Court will also

consider the facts in the implementation of each expropriation project, such as whether the determination of the area or zone of land to be expropriated as stated in the Royal Decree Determining the Zone of Land to be expropriated has been carried out by the administrative party taking into account the principle of proportionality. The court will make a decision based on the "Principle of Proportionality in the Narrow Sense", i.e., the court will weigh the public interests to be gained from land expropriation under the Royal Decree against the potential damage or impact to the private owners of the expropriated land. If the court considers that there is evidence to support or indicate that the expropriation of the disputed land will lead to interest for the public or society holistically, without causing excessive damage to the private owners of the expropriated land, the exercise of the power to determine the area of land to be expropriated under the Royal Decree is lawful.

In terms of comparative law, the Thai Administrative Court's judgments are considered to have universal standards of property rights protection, with principles and concepts that are consistent with the judgments of the French Council of State. In the *Ville Nouvelle Est* case, it is the first case in which the Council of State applied the principle of proportionality to control the exercise of administrative power in expropriating immovable property for the implementation of any public project, which must be within the rationale and necessity for the public interest (utilité publique). The application of this principle in expropriation cases, also known as the "Theory of Weighing of Evidence" (théorie du bilancoût-avantages), calls for the courts to strengthen their examination of the legality of the administrative issuance of the DUP, taking into account the context or factual details of the project in various dimensions to weigh the advantages, disadvantages, damages or costs of implementing the project against the interests to the public or society as a whole to ensure that the expropriation is truly in the public interest.

Any project that the court considers that the impact or damage that will occur, whether it is the private property affected, the budget used for the operation, or other social damages, combined, is in a proportion that exceeds the benefits that the public will receive; such expropriation shall not be an expropriation for public interests.

However, even though the Thai Administrative Court has a clear precedent for the exercise of expropriation powers that must be in accordance with the principle of proportionality, it is not easy for the court to apply such principle to the facts in a way that is acceptable and fair to all stakeholders. As can be seen from the example in the case of France, although the Council of State has established the principle of public interest judgment based on the theory of weighing since 1971, which is more than 50 years ago, this issue is still a hot topic of debate in the legal academic circle. Some believe that the Council of State's judgment has not achieved its objective of being a tool to truly protect the rights of the people, and some propose that the court should increase the "degree" of scrutiny. However, at the same time, there is concern that if the court scrutinizes the discretion of the administrative branch too strictly based on the theory of weighing, it may be seen that the court has interpreted and expanded its power to the point of interfering or exercising administrative power instead of the government.

In the current economic and social environment, the government still has an important mission to drive the economy and improve the quality of life of the people by providing public services in various aspects comprehensively and efficiently. The expropriation of immovable property for the construction or development of infrastructure is a necessary legal measure and plays an important role in the economic and social development of the country. However, the examination of the state's expropriation power results in the restriction of the property rights of individuals and may inevitably affect the people and society in various dimensions. Therefore, the Constitution stipulates the conditions

for the examine of the state's expropriation power to be done "only as necessary" for the implementation of activities that interest the public as specified and in proportion to the limitation of the rights or freedoms of individuals protected by the Constitution.[38] The Thai Administrative Court, as an organization with the power to examine the exercise of the state's expropriation power, has a challenging mission to seek and develop guidelines for applying the "principle of proportionality", considering the country's economic and social context, in order to achieve the intention of creating a balance between the benefits or impacts that may occur both for the public and for all stakeholders appropriately. This will be an important guarantee that the state will not examine its power to expropriate private property in a way that violates or restricts the rights or freedoms of individuals protected by the Constitution without reasonable cause.

[38] The Constitutional Court explained the important principle in its rulings No.21-28/2020, summarizing in part that "The Constitution recognizes and protects the property rights of individuals. However, the interests of the state are more important than personal interests. The Constitution allows the state to limit the property rights of individuals by exercising its legal powers and allows the state to have the power to expropriate immovable property, but only under the conditions stipulated in the Constitution. If the state needs to use the property for purposes stipulated in the Constitution, it must do so by exercising its legal powers and must provide fair compensation. **Expropriation must be done only as necessary and proportionate to** the limitation of the rights or freedoms of individuals protected by the Constitution.

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Bibliography

Thai Books

Jiravat Suriyachotichayangkun and Isarakun Unhaket (2014). A project to analyze the laws currently in force: the Immovable Property Expropriation Act, B.E. 2530 (1987). (Parliamentary Academic Promotion Office: King Prajadhipok's Institute).

Chaiwat Wongwattanasan (1983). Law and land reform for agriculture. 4th ed. (Bangkok: Ramkhamhaeng University Press).

Banjerd Singkaneti. (2019). Basic Principles of Human Rights, Freedom, and Dignity. Bangkok: Winyuchon.

Worachet Phakhirattana (2011). Administrative Law, General Section. Bangkok: Nitirat.

Worapot Wisarutphich (2022). Some Basic Ideas and Legal Principles of Administrative Law. Bangkok: Winyuchon.

Dissertation

Supachet Kusuwan (1997). The legal legitimacy of immovable property expropriation in the Thai legal system. Thammasat University.

Foreign Books

R.Chapus, Droit administratifgénéral, tome 2, 15 éd., 2001.

Y. Gaudemet, Traité de droit administratif – Droit administratif des biens, Tome 2, LGDJ, 13 éd., 2008.

Foreign Language Articles

B. Seiller, « Pour un contrôle de la légalité extrinsèque des déclarationsd' utilité publique»,AJDA 2003.

D. Labetoulle, « La jurisprudence Ville Nouvelle Est cinquanteans après », RFDA 2021.

H. Hoepffner « Chronique de droit public », Les Nouveaux Cahiers du Conseil constitutionnel, vol. 43, no. 2, 2014.

P. Wachsman, « Un bilan du bilanen matière d'expropriation : la jurisprudence Ville Nouvelle Est », in Mélanges J. Waline, Dalloz, 2002.

R.Hostiou, « Propriétéprivée et action publique. Le droit de l'expropriationenFrance : entre permanence et changement », RDI 2016.

Rights and Freedoms to Engage in an Occupation

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A. Theoretical principles

1. Foreword

Earning a living has been an integral part of human existence since ancient times. It has evolved from foraging and hunting to agriculture, leading to the development of division of labor and field specialization, and eventually the concept of "occupation."Occupation is not merely about individuals earning a living; it is also a crucial aspect of coexistence in a society where the division of labor is based on skills and expertise. Consequently, it is considered a cornerstone of the economic system valued by every society, as evidenced by the various mechanisms established to enable and protect it.

The Legal mechanism can be regarded as one such mechanism. Public law and international human rights law reveals how "occupation" is guaranteed across several contexts: This includes the guarantee of the right to work[1], which has the characteristic of maintaining social justice;[2]

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[1] Article 6 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), see Nicolas Bueno, From the Right to Work to Freedom from Work, Introduction to the Human Economy, International Journal of Comparative Labour Law 2017, pp. 463–487

[2] Right to work, It is a type of social and economic right that occurs to guarantee that the underprivileged in society have a standard of living that is not lower than it should be in order to ensure rights and freedom (or the right to freedom) according to the constitution. It is beneficial to all parts of the public, not only those having higher opportunities. At present, rights of society and economy are not established as a "right" that citizens can demand from the state. It is often specified in the Chapter regarding "Directive Principles of State Policies" instead. See Worapot Wisarutpit, "Human Rights and Constitutional Rights and Freedoms," in: Constitution 60: 60 Years Somkid Lertpaitoon, collection of academic articles on the occasion of the 60th year of Professor Dr. Somkid Lertpaitoon, October Printing House, 2019, page 86

or the protection of professionals from discrimination[3], which has the characteristic of protecting individual rights and freedom regarding the choice of occupation[4], a concept basing on individualism and efficiency of market mechanisms.

The Constitutions of the Kingdom of Thailand have included "the freedom of occupation" as one of the fundamental rights and freedoms since B.E. 2475 (1932), to thus protect individuals' right and freedom regarding occupation from unreasonable restrictions by the state. In order to determine the constitutionally covered scope of "the freedom of occupation", as well as to determine the types of act which would qualify as restrictions to such freedom, one needs to explore the literal contents of the constitution, it's ratio, it's legal interpretation, as well as precedents laid down by constitutional court or other judiciary organizations in relevant cases. Since the Constitutional Court of the Kingdom of Thailand has published several rulings in the-freedom-of-occupation cases, several of which can serve as guidelines for interpreting the scope of protection under the constitution, it is prudent to take a closer look into these cases. But first, in order to lay a foundation for studying these cases, the author would like to give a brief theoretical overview of the freedom of occupation in the Thai Constitution as seen from a comparative lens of the German Constitution (Basic law of the Federal Republic of Germany, or Grundgesetz für die Bundesrepublik Deutschland[5]). Not only has the latter been a model for drafting constitutions in many countries, but it also has perpetual influence in the development of principles of constitutional law in those countries and beyond.

[3] Article 2 of the ICESCR, see Nicolas Bueno, Cited in footnote 1, p. 467

[4] Article 6 of the ICESCR

[5] Subsequently, the "German Constitution (GG)".

2. Scope of protection on freedom of occupation

The scope of protection for each matter under the fundamental rights and freedoms provided in the Constitution are different. The said differences are not only reflected in the foreseen mission of each type of rights and freedoms[6] but also in the conditions of restrictions[7] according to the nature and background of rights and freedoms in each matter. In comparison with the rulings of the Constitutional Court of the Federal Republic of Germany, or das deutsche Bundesverfassungsgericht[8] it can be seen that the German Constitutional Court (BVerfG) not only gives importance to specifying the type of fundamental rights and freedoms but also the scope of protection.[9] The said scope is used as criteria to consider the type of rights and freedoms applicable to the acts or exemptions to acts of the person affected by the state measures in each case, as well as whether they are under such a scope of protection. If the case is not the use of freedom within the scope of matters protected by the Constitution, the state can take measures to restrict such freedom regardless of the conditions under the constitution of such

6 Different types of basic rights and freedoms have different missions and characteristics of protection. Some types of rights have a characteristic, such as a right that individuals can exercise through the courts (subjektives Recht), which can also be divided into rights that protect individuals from harassment by the state (Abwehrrecht) and the right of individuals to demand that the state take certain action, such as the right to demand the state to protect individuals from the actions of other individuals. (Schutzgewähr), as well as the right to demand welfare from the state (Teilhaberecht), while some types of rights aim to protect only in principle (objektives Recht, e.g., institutionelleGarantie) (Banjerd, 2018, pp. 57–62, Pieroth/Schlink, pp. 16–28).

7 The Constitution stipulates different conditions for restricting rights in each matter according to its nature and origin. The rights may be divided into rights that can be restricted by laws enacted by the state, and rights that can be restricted by laws with specific purposes or rights that cannot be restricted by law (Banjerd 2018, pp. 56-57).

8 Subsequently, the "German Constitutional Court (BVerfG)".

9 The "scope of protection" corresponds to the words "Shutzbereich," "Grundrecht-statbestand," or "Gewährleistungsgehalt" in German constitutional law, which in Thai academics, use of different words such as "land of rights", "Land of rights and freedoms", "Sphere of protection of rights" may be found.

restriction. However, the conditions provided in regard to other freedoms under which the individual's act is protected in the scope of protection still needed to be considered.

In studying the Thai Constitutional Court rulings, it may be found that the Constitutional Court does not focus on the diagnosis of the scope of protection on rights and freedoms in each matter under the constitution. This may be because the concept of "scope of protection" is not yet widespread in the Thai constitutional law. However, in several cases, the reasons given by the Constitutional Court in ruling whether the government measures restricted such rights might contain some hints on the court's interpretation of the scope of protection. To elaborate on this, and for the sake of comparing with the rulings of the German Constitutional Court (BVerfG), the author will proceed with the question of "scope of protection "in two distinct areas;" personal scope of protection" (persönlicherSchutzbereich) and "material scope of protection" (sachlicherSchutzbereich).

2.1 Personal scope of protection

Natural persons with Thai nationality are the holders of rights to the freedom of occupation under the Constitution of the Kingdom of Thailand. However, there is an issue to consider whether or not this protection of freedom covers juristic persons, groups of persons, and aliens.

2.1.1 Protection of juridical persons or groups of persons

When considering only the Constitution of the Kingdom of Thailand, it will be found that there has never been a Thai constitution that contains provisions specifically recognizing the rights of juridical persons or groups of persons. However, the overall Thai legal system, especially the legal principles regarding "persons" can be found in Title II of the Civil and Commercial Code, which is divided into Chapter I "Natural Persons" and Chapter II "Juridical Persons." Legally, the word "persons" may include "juridical persons." In addition, Section 67 of

the Civil and Commercial Code states that a juridical person shall have the same rights and duties as a natural person, except for rights and duties that, by reason of their nature, may only be enjoyed or incurred by a natural person. Therefore, the word "persons" whose rights and freedoms are protected by the constitution would cover "juridical persons" without conflicting with general principles of law in the Thai legal system, however, only to the extent that the rights and freedoms in such matters, by reason of their nature, are not reserved to only be enjoyed or incurred by natural persons, such as the right and freedom of life and person, rights of family or privacy, or freedom to profess a religion.[10]

In comparison, German constitutional law has provisions for the rights of domestic juridical persons (legal persons) in article 19, paragraph three, of the German Constitution (GG): "The basic rights shall also apply to domestic legal persons to the extent that the nature of such rights permit". It can be seen that juridical persons are guaranteed by the Constitution to enjoy some fundamental rights and freedoms. The German Constitutional Court (BVerfG) has established precedents that the freedom of occupation aims to protect not only the freedom of individuals but also basic economic freedom. Therefore, freedom of occupation does not have to always be based on conditions that are linked to the characteristics of natural persons. In this sense, the word "occupation" is not reserved only for natural persons. Therefore, juristic persons will be protected under the freedom of occupation in accordance with Article 19, paragraph three, of the German Constitution (GG) as well.[11]

[10] Banjerd Singkaneti, Basic Principles of Rights, Freedom and Human Dignity, pp. 71-76; Phadorn Suchiwa, Restriction on freedom to engage in occupation of a juristic person executive according to United Nations Convention Against Transnational Organized Crime 2000, Page 51

[11] BVerfG NJW 1979, 699

However, even though the German Constitutional Court (BVerfG) accepts that the freedom of occupation protects the acts of juridical persons who have no connection with natural persons, fundamentally the constitution mainly aims to protect the freedom of expression of individuals. Therefore, in the case where restrictions on the freedom affect only the rights holder who is not a natural person, for example, in the case where the law specifies the organization relationships of large companies, the German Constitutional Court may give special attention to the public interest to explain the necessity of restricting such rights.[12] In other words, in the case where the law has an effect in restricting rights of the juridical person and there are reasons for the necessity to enact the laws to preserve the public interest, it is likely that the German Constitutional Court (BVerfG) would rule that such law is not contrary to or inconsistent with the constitution.

2.1.2 Protection of alien

The provisions on protection of rights and freedoms of persons in the Constitution of the Kingdom of Thailand are contained in the Chapter II "Rights and Freedoms of the Thais" or "Rights and Freedoms of the Thai People," which exhibits that the drafters of the constitution intended to restrict the scope of protection for Thai nationals only.[13]

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[12] BVerfG NJW 1979, 699, 708

[13] Although academically there was a debate about whether or not and to what extent the Constitution of the Kingdom of Thailand protects the rights and freedoms of alien persons. However, if we consider the history of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), the Constitution of the Kingdom of Thailand, B.E. 2550 (2007), and the Constitution of the Kingdom of Thailand, B.E. 2560 (2017), it can be seen that in the past, the organization responsible for drafting the constitution was well aware of the debate on this issue. There was a proposal to also guarantee certain rights and freedoms of alien persons. However, the organization responsible for drafting the constitution has voted against guaranteeing the rights and freedoms of alien persons in the constitution. In this case, it can be seen that the Constitution of the Kingdom of Thailand cannot be interpreted to provide the protection of rights and freedoms of alien persons considering the provision or the intention of the drafter. (See Pinthanet Kaewrungfa, "Protection of the rights and freedoms of alien persons according to the Constitution of The Kingdom of

This is consistent with the opinion in Thai constitutional law academic circles that the words "Thais" or "all Thai people" imply that alien are not entitled to the rights and freedoms outlined in the Thai constitution.[14]

In this regard, to consider whether or not and to what extent the constitution protects the rights and freedoms of aliens, the principles for consideration differ in each country. Many countries have accepted the concept of a separation between human rights and civil rights and freedoms.[15] That is, some rights and freedoms, such as human dignity or rights and freedoms in life and person, are "human rights," which are inherent to all human beings and must therefore be protected regardless of the persons' nationality. Other types of rights and freedoms, such as the freedom of occupation, freedom of movement which are limited to persons who have the privilege of being citizens of the state only, are known as "civil rights".

Thai constitutional law does not distinguish between the civil rights and human rights, which is different from the constitutional law of many other countries including the German Constitution (GG). Although rights and freedoms are not explicitly classified into civil rights and human rights, it has specified certain rights and freedoms of which only German people are holders. Freedom of occupation, according to

Thailand, B.E. 2550 (2007): Study on the Case of Human Rights and Civil Rights," Master of Laws Thesis, Field of study: Law, Chulalongkorn University, 2556 (2013), Kanokwan Laophon, "Constitutional Rights of Foreign Juristic Persons According to the Constitution of the Kingdom of Thailand", Master of Laws Thesis Department of Public Law Thammasat University, 2018, p. 49-51)

[14] One of the legal academics who has been most frequently cited on this issue is Special Professor Dr. Yut Saeng-uthai, See Yut Saeng-uthai, "Explanation of the Constitution of the Kingdom of Thailand, (B.E. 2511 (1968)) by sections, Bangkok, Bamrungsan, 1968, pages 130-131

[15] Classification of rights and freedoms into human rights and civil rights and freedoms is based on the origin of rights and freedoms, which affects the determination of "right holder" of each of the rights and freedoms as well; see Worapoj Wisarutpit, "Human rights and constitutional rights and freedoms," quoted in footnote no. 2, pp. 97, 104.

article 12 of the German Constitution (GG), is one of the freedoms specified to belong only to the Germans. Therefore, it can be concluded that Thai constitutional law and German constitutional law protect freedom of occupation only for their citizens.

2.2 Material scope of protection

Since the Constitution of the Kingdom of Siam, B.E. 2475 (1932), the Thai constitutions have always provided a guarantee for freedom of occupation. Different wording may be used, such as section 14 of the Constitution of the Kingdom of Siam, B.E. 2475 (1932), which uses the word "absolute freedom in... occupation," and section 41 of the Constitution of the Kingdom of Thailand, B.E. 2492 (1949), which uses the word "absolute freedom... in engaging in occupation," section 48 of the Constitution of the Kingdom of Thailand, B.E. 2534 (1991), which uses the word "rights of persons to engage in business or occupation," and section 40 of the Constitution of the Kingdom of Thailand, B.E. 2560 (2017), which uses the term "freedom to engage in an occupation". However, regardless of the wording, the one thing that the provisions of the Constitution aim to protect is "occupation."

2.2.1 The meaning of "occupation"

In the past, the word "occupation" had never been defined in the constitution, and the Constitutional Court of the Kingdom of Thailand has not previously defined or determined the scope of "occupation" or "engage in occupation." However, the Constitutional Court has used the word "occupations" in various contexts that may convey the understanding of the Constitutional Court on the scope of protection of the freedom of occupations. There are also words used in the same way in many Thai laws. Therefore, to consider in what sense the Thai legal system uses the word "occupations" can be considered based on the context of use.

Firstly, it may be considered by the specification of qualifications and prohibited characteristics of position holders intended

by the law to perform such duties as "full-timework", such as position of a judge of the Supreme Administrative Court according to the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999) or a committee member of the Trade Competition Commission according to the law on trade competition. The laws often specify that the position holder must not be "a civil servant who has a position or receives a regular salary" or "be otherwise engaged in any other occupation or profession"[16]. This exhibits that in general, "occupation" in the context of Thai law has the nature of a full-time work, which implies that if a person has already engaged in an occupation, the person may be unable to perform the duties in the position as required by law to be done on a regular basis.

Additionally, Thai law also considers that "occupation" is a source of income or property. For example, section 69 of Narcotics Code specifies that the Secretary General of the NCB shall have to comment to the Property Examination Committee if it appears that property possessed or acquired by him or her is "beyond his status or his capability of engaging in his or her career or other activities in good faith, or property that ordinary people shall be afforded as his or her status or necessity in subsistence"[17]. If we consider the use of words in many laws, such as

[16] Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999)

Section 14: A judge of the Supreme Administrative Court shall not have the following prohibitions during incumbency of the office:

(1) being any other government official holding a permanent position or receiving salary

Etc. etc.

(7) being a lawyer, or **being engaged in any other occupation** or profession, or holding any position or carrying out any activity which is inconsistent with the performance of duties as specified in the regulation prescribed by the J.C.A.C.

[17] Narcotics Code

Section 69: For the sake of ordering of a property examination under Section 68, when the Secretary General of the NCB shall have reported relating to property which shall have reasonable suspicion relating to property connected with the commission

Military Service Act, B.E. 2497 (1954) or the Immigration Act, B.E. 2522 (1979), the phrases "to earn a living"[18] or "earn a living" are used in the same way as "engage in occupation". It can be thus seen that the Thai legal system "occupation" not only as a source of income but also as a necessary source or earning a living.

In addition to the characteristics related to "occupation" as mentioned above, Thai law does not limit the form of occupation or work strictly. As an example, the Foreigners' Working Management Emergency Decree, B.E. 2560 (2017) defines "work" to mean any occupation with or without an employer, etc.[19] The word "work" implied by the said law does not mean only employee occupation but also

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of serious offence relating to narcotics, the Secretary General of the NCB shall have to comment to the Property Examination Committee for further consideration.

If it appears that property possessed or acquired by him or her beyond his status or his capability of engaging in his or her career or other activities in good faith, or property that ordinary people shall be afforded as his or her status or necessity in subsistence, the Secretary General of the NCB shall be reported to the Property Examination Committee for information.

[18] Military Service Act, B.E. 2497 (1954)

Section 32: If it appears that the reserved personnel who is age more than 21 years of age but less than 30 years of age on the year to join an active duty, is making a living on other district, the chief district officer of the military origin district shall sent the warrant to the chief district officer to deliver the warrant instead, when the warrant is received but it is impossible to attend the selection according to the warrant due to the lack of financial status for transportation or cannot make it on time, the individual must explain the reason to the chief district officer where he is currently residence, after the investigation has been done by the chief district officer and see that it is true, the chief district officer must sent the individual to the selection in the district if not then the individual should be sent to the nearby district as it is suitable.

The chief district officer of the selecting district must inform the chief district officer of the district the warrant issued.

[19] Foreigners' Working Management Emergency Decree, B.E. 2560 (2017)

Section 5 in this Emergency Decree

Etc. etc.

"work" means engaging in any occupation with or without an employer, but not including the business operations of the recipient of license according to the law on foreign business operations.

Etc. etc.

freelance occupation. Or, the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999) addresses "engage in other occupations or professions," which indicates that occupations are not limited only to work that has characteristics of a profession.

In summary, the Thai legal system lacks a precise definition of "occupation". However, the definition of "occupation", "earning a living,", "work," etc., in Thai laws demonstrates some common elements of the word "occupation" as any work activity in which an individual routinely engages to earn income to support themselves. The Royal Society's Dictionary defines "occupation" as "making a living, earning a living, performing work on a regular basis to support oneself." As may be observed, Thai laws interpret "occupation" in alignment with the word's broad definition. As a result, it is certain that in the case where the Constitutional Court have to eventually define the term "occupation" to set the scope of protection for freedom of occupation, it will do so based on general definition of the word as used in the Thai legal system.

However, consideration of the scope of constitutional protection cannot be restricted to only the "understanding" as exhibited in the law that has a status lower than the constitution. The constitution may therefore be interpreted to have a broader scope of protection of freedom of occupation, or a narrower scope than its general meaning. In this sense, it seems that the Constitutional Court of the Kingdom of Thailand intends to restrict constitutional protections only to "righteous occupation", as appears in the Constitutional Court Ruling No.9/2562 (2019).[20] Nevertheless, the Constitutional Court did not elaborate on the

[20] See Constitutional Court Ruling No.9/2562 (2019), page 8. The Constitutional Court has established a principle that the constitutional provisions that guarantee freedom of occupation are "provisions that guarantee freedom of occupation according to the readiness, aptitude, potential, abilities, and needs of each person. The state has a duty to ensure that people do not engage in occupations that violate the law as well as supporting individuals in their righteous occupations to compete freely and fairly."

definition of "righteous occupation," which may be interpreted that the Court has no intention to use "righteous occupation" in the moral sense or in terms of personal beliefs. This is because such an interpretation would significantly restrict the scope of protection for freedom of occupation and necessarily require deliberated reasons. Consequently, the word "righteous occupation" used by the Court probably means "righteous occupation" in a general sense, according to which "righteous occupation" shall means occupations that do not pose a serious threat to society or the public at large.

In summary, **"occupation" as protected by Thai constitutions under the "freedom of occupation" means the work that a person does regularly to earn income for making a living, regardless of its nature. However, it must not pose a serious threat to society or the public at large.** In comparison, the decisions of the German Constitutional Court (BVerfG) established precedents that **"occupation" means any act or work done to earn income. It is done regularly to obtain or maintain the means for earning a living, except acts that are prohibited due to their characteristics that explicitly pose danger to society or the public at large**.[21] It can be seen that the meaning of "occupation" in the Thai legal system above is consistent with the meaning of "occupation" (Beruf) according to German constitutional law.

2.2.2 Freedom to "engage in" an occupation

(a) Freedom of "choice" of occupation.

"Occupation" is not inherent. When a person engages in any occupation it is a result of that person's "choice" to engage in that occupation. Freedom of occupation, therefore, includes the freedom of "choice" of occupation.

The Thai courts decided in support of this idea in many cases such as Constitutional Court Ruling No.7/2549 (2006). The Court explained that "the Constitution of the Kingdom of Thailand,

[21] BVerfG NJW 1958, 1035; BVerfG NJW 2006, 1261, 1262; BVerwGE 22, 286

B.E. 2540 (1997), section 50, paragraph one, provides for the guarantee of freedom of business or occupation and free and fair competition. This is a guarantee that the people have freedom **of choice to operate a business or engage in an occupation** freely, without being forced nor deprived of the opportunity to operate a business or engage in an occupation to compete with other business operators". Another example is the Supreme Administrative Court Judgment No.15/2545 (2002) pertaining to Ministerial Regulation No. 10 issued by virtue ofsection 42 of the Tourism Business and Guide Act.The Court decided that the provisions that specify the conditions for renewing the license (which affect the **"choice" to continue working** in tour guide profession) restricted freedom of occupation. However, such restriction on freedom is under the conditions specified by the Constitution. Therefore, it was not contrary to or inconsistent with the Constitution.

(b) Freedom of "form and method" of occupation.

After a decision is made to engage in an occupation, a person has the freedom to conduct business in that occupation in the form and method that he deems appropriate. This can be seen in the decisions of the Supreme Administrative Court in many cases, such as the case of the legality of Ministerial Regulations regarding regulations on the issuance of liquor licenses and liquor sales for those who have received a license to sell liquor, categories 3 to 7, B.E. 2548 (2005). The Supreme Administrative Court considered the stipulation of "restrictions on whom to sell to and where to sell" and found that "although the content of this Ministerial Regulation has the effect of restricting the rights and freedoms of the nine plaintiffs who have the occupation of selling alcohol, ... it reduced social problems. ... As a result, one can observe that this Ministerial Regulation has content that aimed to protect the public interest, which will be more beneficial than the that of groups of persons, etc."[22] It can be seen that the Supreme Administrative Court

[22] Judgment of the Supreme Administrative Court, Red Case No. F.36/2551 (2008), pages 22-24

interpreted the scope of protection of rights and freedoms under the constitution not only freedom of "choice" to engage in an occupation but also "forms and methods"of occupation. In the example, the Supreme Administrative Court found that the rules issued had the effect of restriction on freedom. However, the rules' purpose is to safeguard the public interest, and it aligns with the conditions specified in the constitution and law. They are, therefore, lawful rules.

In comparison, we consider Article 12, paragraph one of the German Constitution (GG) which states that "All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law."[23] It can be seen that the drafters of the Constitution has always intended to address both the choice of occupation and the form and methods used in that occupation (the practice of an occupation). Later, the German Constitutional Court (BVerfG) established precedents on adjudication that the choice of occupation and the form and methods used in that occupation are so related that they can be considered a component of the same thing. This is because a person, having chosen to start an occupation, will at the same time choose the form and method of that occupation. Any form and method of occupation is considered a reiteration of the intention in choosing such occupations.[24] Therefore, the choice of occupation and the form and method of occupation (the practice of an occupation) are freedoms guaranteed by the constitution, which may be regulated by or regulated pursuant to a law.

[23] Translated by the author

[24] BVerfGE 7, 377 = NJW 1958, 1035, 1037: „... die Aufnahme der Berufstätigkeit [stellt] sowohl den Angang der Berufsausübung dar wie die gerade hierin ... sich äußernde Betätigung der Berufswahl; ebenso sind der in der laufenden Berufsausübung sich ausdrückende Wille zur Beibehaltung des Berufs ..."

3. "Restriction" on freedom of occupation

The main mission of the guarantee of rights and freedoms in the constitution is to protect individual's rights and freedoms from acts of state that may result in restriction (or interference) on such rights and freedoms. However, since the state is involved in every aspect of society, it is challenging for the state to accurately foresee what matters and how a measure of the state will have an "indirect" impact on individual's rights and freedoms. Consequently, the constitution cannot protect the rights and freedoms of individuals that may be indirectly affected by certain acts of state that are unforeseeable. For example, the constitution cannot protect individuals from the impact of mismanagement of economic matters by the state.

When we consider the decisions of the Constitutional Court of the Kingdom of Thailand, it may be seen that the Constitutional Court did not explicitly set criteria on action of state deemed to be restriction on or interference with the rights and freedoms of persons. This may be partly because the court did not make separate decisions on "restriction on rights and freedoms" and "condition for the legality of restriction on rights and freedoms". Both issues were decided in combination in many cases. As an example, the Constitutional Court Ruling No.17/2555 (2012) stated "When considering the specific provisions of the Revenue Code, section 40, etc., there is no statement that has the nature of affecting or restricting freedom in the operation of a business or occupation, nor an impact on the essence of individual's rights and freedoms recognized by the constitution". This indicates that the Court did not distinguish between the two issues. If the Court had addressed each part separately, it would have been sufficient to conclude that there was no restriction on rights and freedoms. Further elaboration on the essence of individual rights and freedoms, as seen in Ruling No.17/2555 (2012), would have been unnecessary.

In the case of German constitutional law, criteria for determining whether the act is a restriction on or interference with rights and freedoms have been developed. Constitutional law scholars in Germany tend to set rigid criteria to define restriction and interference (der klassischeEingriffsbegriff), according to which the act of state will be considered a restriction on or interference with rights and freedoms only when such an act has the characteristic of an order that has direct legal consequences. An act that does not have the characteristic of an order or does not intend to have legal consequences, or an act that has an indirect impact, will not be considered as "restricting or interfering with rights and freedoms" in this sense. Nevertheless, there is a significant flaw in such rigid criteria: The state could easily avoid infringing the constitution by deliberately designing measures that do not meet the said criteria. Because of this, a concept has been developed to broaden the definition of restriction on or interference with rights and freedoms to include other acts of state that, in whole or in part, prohibit individuals from exercising their constitutionally guaranteed rights and freedoms, regardless of whether the acts are in the form of an order with direct legal consequences or not (der moderne Eingriffsbegriff). However, the latter also has its own issues, particularly in relation to the endless expansion of the state's responsibilities.

Regarding freedom of occupation, the German Constitutional Court (BVerfG) ruled that act of state considered to be restriction on freedom of occupation must have the characteristics of **criteria which has the tendency to regulate practices or choices of occupation (berufsregelnde Tendenz)**.[25] Later, the German Constitutional Court (BVerfG) broadened the scope of this principle to include acts of state that, even though do not aim to regulate occupation, but maybe **objectively occupation-regulating** (objektivberufsregelnde Tendenz)[26]

[25] BVerfG NJW 1961, 2299

[26] BVerfG NJW 1997, 1975, 1976

or may have an **impact on** the occupation of the target group.[27] The said criteria established by the Court show however, that the Court intended to only moderately broaden the scope of what would constitute a restriction of freedom of occupation. So, in the case where the state issues an act which is intended to have a "general" effect and, judging from its literal content, does not seem to affect the occupation of any group, if, in practice, such an act unintentionally affects the practice of any occupation, it shall not be concluded that the act has any legally significant relevance to that occupation and thus cannot be considered to have an effect of restricting freedom of occupation.[28]

4. "Conditions" for restriction on freedom of occupation

The constitution does not unconditionally protect individual rights and freedoms. The constitution authorizes the state to restrict the rights and freedoms of individuals in some cases, provided it meets the conditions specified by the constitution.

Important conditions provided in the constitution include the restriction on rights and freedoms by virtue of the law. The constitution classifies conditions of restriction on rights and freedoms into three types,[29] namely (1) rights and freedoms that cannot be restricted by enactment of law, such as freedom to profess a religion according to section 31 of the Constitution of the Kingdom of Thailand, B.E. 2560 (2017); (2) rights and freedoms that may be generally restricted by enactment of law, such as freedom of communication according to section 36 of the Constitution of the Kingdom of Thailand, B.E. 2560 (2017); and (3) rights and freedoms that may be restricted by enactment of law with specific purposes as provided in the constitution, for example, freedom of occupation according to section 40 of the Constitution of the Kingdom of Thailand, B.E. 2560 (2017).

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[27] BVerfG NJW 1974, 30

[28] BVerfG NJW 1978, 877, 878

[29] See Banjerd Singkaneti, Basic Principles of Rights, Freedom and Human Dignity, page 56.

In addition to the conditions of enactment of the law, restrictions on rights and freedoms must not conflict with general principles. In particular, it must not affect the essence of rights and freedoms, as well as be in accordance with the proportionality principle.

4.1 Enactment of laws with specific purposes

Thai constitution put the freedom of occupation in the category of rights and freedoms that may be restricted only by laws that have specific purposes as provided in the constitution. As an example, the Constitution of the Kingdom of Thailand, B.E.2560 (2017), states in section 40, paragraph two, that "The restriction on freedom under paragraph one shall not be imposed except by virtue of a provision of law enacted for the purpose of maintaining the security or economy of the country, protecting fair competition, preventing or eliminating barriers or monopolies, protecting consumers, regulating the practice of occupation only where it deems to be necessary, or for other public interests."

The constitution does not, however, outline every single kind of particular purpose in detail, nor has the Constitutional Court of the Kingdom of Thailand explicitly interpreted these requirements. This might be, on the one hand, because the Constitutional Court considers the required specific purposes to be self-evident, so that legal interpretation of these requirements becomes superfluous. On the other hand, this could be regarded as court's recognition of the authority of legislative branch in exercising discretion in considering which case meets the conditions of law having specific purposes as stipulated in the constitution.

However, when we consider the decisions of the Supreme Administrative Court, which is responsible for diagnosing the constitutionality of secondary laws, there are evidences that the court put an effort to define specific purposes as stipulated in the constitution. This was achieved both explicitly and implicitly. For example, in the case where the specific purpose of "preserving

natural resources or the environments"[30] was interpreted, the court explicitly defines it as "preserving natural resources and the environments to be abundant and can be used forever"[31]. Another example where the court implicitly interpret a specific purpose is in the decision that a Royal Decree aimed at protecting consumers from inferior quality and low safety products[32] is a law that has a purpose relating to "consumer protection"[33] and "welfare of the people."[34]

When we consider theruling of the German Constitutional Court (BVerfG), in comparison, it can be seen that in the case where the German Constitution (GG) has provisions protecting fundamental rights and freedoms with special legal conditions for the restriction on such rights or freedoms, the German Constitutional Court (BVerfG) will interpret the special legal conditions to decide whether the restriction on rights and freedoms by act of state meet the said conditions.[35] In this way, the

[30] Section 50, paragraph two, of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997)

[31] Supreme Administrative Court Judgment No. F. 33/2553 (2010)

[32] Supreme Administrative Court Judgment No. F. 34/2550 (2007)

[33] Section 50, paragraph two, of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997)

[34] Section 50, paragraph two, of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997)

[35] An example is the case of citizens' freedom of travel and choice of residence in the Federation territory in accordance with article 11, section one of the German Constitution (GG). Article 11, section two of the German Constitution (GG) provides one specific condition: the restriction on freedom is possible in the absence of adequate means of living and permission to travel, and free choice of living will create a burden on the public in particular. The decision of the German Constitutional Court (BVerfG) whether the provisions for German nationality who settled later (Spätaussiedler) must lose the right to living expenses from the state if such person moves away from the place of residence specified by the state meet the conditions of section 11, paragraph two. The German Constitutional Court (BVerfG) has interpreted the provisions of the said article as: The lack of factors sufficient for living means a person is unable to find a means of living on his own. And the conditions regarding the burden on the public include cases where the state has to invest in living quarters, infrastructure, child care, education,

BverfG is able to construe the special legal conditions in accordance with the spirit of the constitutionally protected rights and freedoms in each matter.

4.2 The law must not affect the essence of freedom.

The Constitution of the Kingdom of Thailand provides one general condition for restricting rights and freedoms. That is, the laws enacted to restrict rights and freedoms must not affect the essence of such rights and freedoms.

When we consider the decision guidelines of the Constitutional Court, such as Ruling No.59/2545 (2002), the Constitutional Court established guidelines to consider the essence of rights as follows: to consider what rights are guaranteed by the constitution and whether the act of state that resulted in the restriction on such rights has the characteristic of "cancelling" that right.[36] Later, the Constitutional Court adopted this approach in deciding cases related to freedom of occupation. For example, in Ruling No.52-53/2547 (2004), the Constitutional Court ruled that even though the provisions restrict the freedom to engage in occupation in making liquor, "it is not strictly prohibited". Therefore, it did not affect the essence of freedom of occupation. Another case is Ruling No.33/2555 (2012), the Constitutional Court ruled that the provisions "do not have content affecting the essence of freedom of occupation of a person because it does not absolutely prohibit those with occupation in the fertilizer trade". Additionally, the Supreme Administrative Court also adopted the aforementioned guidelines in deciding administrative cases related to the legality of secondary laws. The Supreme Administrative Court established guidelines that if the secondary law is not a

or various public services. When the Court considered the purposes of the law, it therefore ruled that the said law complies with the conditions stipulated in Article 11, paragraph two, of the German Constitution. (GG), (BVerfGNVwZ 2005, 797).

[36] Constitutional Court Ruling No.59/2454 (2002), page 12

complete and perpetual prohibition of the occupation,[37] it cannot be regarded as an effect on the essence of the rights and freedom to engage in occupation. As an example, Supreme Administrative Court Judgment No. A. 51/2547 (2004), in which an explanation was given that "the said announcement prohibits the general public from using certain types of fishing gear only, etc. It did not prohibit the plaintiff from fishing completely and perpetually. Therefore, it did not affect the essence of engaging in the fishery occupation of the 23 plaintiffs according to section 50 of the Constitution of the Kingdom of Thailand, etc."

However, in comparison, we consider the decision of the German Constitutional Court (BVerfG) regarding the guarantee of the essence of rights (Wesensgehaltsgarantie) as provided in Article 19, paragraph two of the German Constitution (GG). It can be seen that "the essence of rights," as understood by the German Constitutional Court (BVerfG), means the minimum essence of rights and freedoms in each matter, which must be provided for the right holder to use without being affected by state measures that result in restriction on rights and freedoms in such matter.[38] The German Constitutional Court (BVerfG) viewed that each type of fundamental rights and freedoms has its own essence which must be absolutely protected.[39] In this sense, to consider

[37] See Supreme Administrative Court Judgment No. 51/2547 (2004), Supreme Administrative Court Judgment No.33/2553 (2010), Supreme Administrative Court Judgment No.7/2555 (2012)

[38] Pieroth/Schlinke, Grundrechte, Staatsrecht II, marginal no.301

[39] There are still different opinions in the academic field of constitutional law in Germany on whether or not the consideration of restriction on rights in each case affect the essence of the rights. It should be considered by taking into account the impact in each case (protection of the essence of relative rights and freedoms theory) or by considering the content of each type of rights and freedoms as the constitution provides only (The theory of absolute protection of the essence of rights and freedoms). (Pieroth/Schlink 2002, marginal no. 298-306; Banjerd 2019, pp. 270-273). The Supreme Administrative Court of the Federation had previously ruled on this issue saying, "If considering from the case and found that the protection of rights and freedoms in such case has less weight [the public interest that the measure aims to protect] the restriction on freedom in such cases does not

whether the restriction on rights and freedoms in each case affects the essence of the rights, one must look into the substance of those rights to abstractly, i.e. not case-specifically, determine what might be regarded as "essential."[40] Concrete, i.e. case-specific, severity of the impacts should not play a role in determining the essence of the respective right or freedom. Rather, consideration of the severity of impact bears more resemblance to proportionally weighing the severity of impacts according to the proportionality principle (Verhältnismäßigkeitimengeren Sinne) than to determining the essence of rights.[41]

4.3 Restrictions on individual rights and freedoms shall not impose burden unreasonably

In addition to the principle of absolute protection of the essence of rights and freedoms, the constitutions of the Kingdom of Thailand also contain provisions for a general condition that the restrictions on the rights and freedoms of individuals guaranteed by the constitution

affect the essence of the rights." (BVerwGE 47, 330, 358). This is the same reasoning as in theory of protecting the essence of rights. Relatively, however, considering the impact on each in each case is already part of the consideration according to the proportionality principle. According to the proportionality principle a method of consideration is different from consideration of the essence of rights as provided in section 19, paragraph two, of the German Constitution (GG). Article 19, paragraph two, absolutely prohibits the restriction on rights in a manner that affects the essence of rights, whereas considering based on the proportionality principle, the weight proportion between protected rights and the public interest that the measure aims to protect in each case must be considered. In this respect, the German Constitutional Court (BVerfG) had given reasons in the ruling that, in considering the substance of the rights under section 19, paragraph two, one cannot use the method of considering the weight proportion of the impact from restriction on rights due to the fact that the use of such methods equals to admitting that "essence of rights" do not have absolute status as provided for in article 19, paragraph two, of the Constitution (BVerfG NJW 1958, 1035, 1039), which are reasons similar to the theory of absolute protection of the essence of rights. (Give reasons in such guidelines; see Worachet 2000, pp. 190-191).

40 BVerfG NJW 1967, 1795, 1800

41 Pieroth/Schlinke, Grundrechte, Staatsrecht II, marginal no. 298-306; Kloepfe, Michael, Verfassungsrecht II – Grundrechte -, marginal no. 80-84

can be done only "as necessary," which is in alignment with a general legal principle known as the "proportionality principle".

The proportionality principle is a general legal principle developed from the concept of fairness in the German legal system.[42] The proportionality principle is recognized by the German Constitutional Court (BVerfG) as constitutional law.[43] It is a sub-principle of the german rule of law (Rechtsstaatsprinzip) and has three elements: (1) appropriateness (Geeignetheit); (2) necessity (Erforderlichkeit), and (3) proportionality in the narrow sense (Verhältnismäßitkeitimengeren Sinne).

4.3.1 The proportionality principlein the Constitutional Court of the Kingdom of Thailand Rulings

It was found in the rulings of the Constitutional Court and the judgments of the Supreme Administrative Court of Thailand pertaining to freedom of occupation that both courts applied the proportionality principle in their decisions. The principles of appropriateness[44], necessity, and proportionality in a narrow sense were mentioned. For example, in Supreme Administrative Court Judgment No. F. 15/2545 (2002), the Court decided the facts and concluded that the requirement of tour guides to undergo additional training is a necessary measure to achieve such purposes, etc., because it is the most appropriate method for the tour guides to gain knowledge and understanding and put it into practice. Another case is in Supreme Administrative Court Judgment No. A. 51/2547 (2004) and No. F. 34/2550 (2007), the Court compared the measures to be decided with the original or other measures whether the measures to be decided are measures that will better achieve the purposes of the law or rule. And if so, the Court will decide that such measures are "necessary".

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[42] Banjerd Singkaneti, Basic Principles of Rights, Freedom and Human Dignity, page 279

[43] BVerfGNJW 1966, 243

[44] In Thai academics there are some different terms for such principles, such as "principles of achievement" or "principles of success", see Worapoj Wisarutpit, "Human rights and constitutional rights and freedoms", quoted in footnote no. 2, page 112

Furthermore, the Supreme Administrative Court also applied the proportionality principle in a narrow sense in many cases. The Court discussed this issue using different wordings, such as "the equilibrium principle of damage to tour guides or society as a whole and public interest"[45] or "the comparison of the total public interest that will be received from the imposition of various measures, etc., with the damage that the plaintiff, etc. received or expect to receive"[46]

When it comes to the Constitutional Court of the Kingdom of Thailand, the Court typically renders decisions on matters relating to the proportionality principle by ruling that "the case is a restriction on freedom only to the extent where it is deemed necessary" without setting any guidance or criteria to further elaborate on the principle of proportionality. However, there are some rulings where the Constitutional Court addressed each element of the proportionality principle. Forinstance, Constitutional Court Ruling No.7/2549 (2006) in which the Court mentioned the proportionality in a narrow sense and ruled that "[the measures in the lawsuit] also bring benefits to the public more than cause the damage to the private sector. Furthermore, the said ruling also established the precedent for deciding on the constitutionality of the law to "consider the circumstances of the country as well as the people's way of life while the law is effective". Although the Court did not refer to such consideration as a part proportionality principle, such consideration indeed has the characteristic of proportionality in a narrow sense as well (as will be discussed in D.)

4.3.2 Proportionality principle in German constitutional law

When we consider the evolution of proportionality principle that appears in the rulings of the German Constitutional Court (BVerfG),

[45] Supreme Administrative Court Judgment No. F. 15/2545 (2002)
[46] Supreme Administrative Court Judgment No. F. 33/2553 (2010)

it was found that the Court's ruling related to freedom of occupation plays a very prominent role in the development of the proportionality principle. In the early days, where the Constitutional Court of Germany (BVerfG) has not yet explicitly laid down the criteria for proportionality principle, the Court (BVerfG) has ruled in many cases regarding the constitutionality of restrictions on fundamental rights and freedoms using criteria which bear strong resemblance to the proportionality principle. Especially in cases involving restrictions on freedom of occupation, the German Constitutional Court (BVerfG) has created specific diagnostic criteria. The criteria not only become important precedents for deciding cases regarding the restriction on freedom of occupation but also help develop the concept of the weighing of the severity of impact on the rights and freedoms versus the importance of public interest that the measures aim to achieve. Such criteria also help develop proportionality principle in a narrow sense which is one of the three elements of the proportionality principle.

(a) *Three-step theory* in the ruling of Apotheken-Urteil case

The ruling of the German Constitutional Court (BVerfG) that established significant precedent for making decision in cases involving restrictions on freedom of occupation is the ruling on the law concerning the German Pharmacies Act.[48] The said ruling diagnosed the constitutionality of section 3 of the Pharmacies Act in Bavaria, which prohibits the setting up of a pharmacy until a permit is granted. The provision also stipulates one condition for issuing a permit: *a pharmacy must ensure a proper supply of medicinal products to the population as required by public interest. In addition, a permit can be issued only if it is foreseeable that the applicant has adequate capital to operate a pharmacy. In addition, the establishment of such a pharmacy shall*

[47] Mann/Worthmann, JuS 2013, 385, 390

[48] Apotheken-Urteil BVerfGE 7, 377 = NJW 1958, 1035

not affect the business of other pharmacy operators in the vicinity to the extent that other operators may be unable to continue the business as usual.

The German Constitutional Court (BVerfG) ruled that the pharmacy business is a profession according to article 12, paragraph one, of the German Constitution (GG), which does not protect only freedom to practice traditional forms of occupation but also freedom of occupation and choice of occupation in all forms. Therefore, section 3 of the State Pharmacy Act of Bavaria, which restricts the freedom to set up pharmacies that entrepreneurs use to earn a living, restricts the freedom to engage in occupation as protected by the constitution.

However, article 12, paragraph one of the German Constitution (GG) authorizes the state to restrict freedom of occupation by enacting laws (Regelungs-vorbehalt) to regulate the practice of occupation (Berufsausübung). This would include the issuing of rules regarding the choice of occupation (Berufswahl) as well. However, the state can issue rules that have the effect of restricting freedom of occupation only to the extent necessary for the protection of the public welfare. The provisions in article 12, paragraph one of the German Constitution (GG) convey the importance specially given to the freedom of choice of occupation. Consequently, it is appropriate to segregate the conditions into different levels in accordance with the characteristics of rules. In the case of **rules regarding the practice of occupation** (Berufsausübungsregelungen), the said rules do not prohibit persons from engaging in occupations as they wish. The rules only specify the practices which is not prohibited for each occupation. Therefore, **rules regarding the practice of occupation** will have less impact on freedom than in the rules restricting freedom of choice of occupation, and the state may in such cases choose measures **for the public benefit that are appropriate and do not create a burden that exceeds what is necessary to achieve the said purposes.** Meanwhile, **the rules regarding the choice of occupation** would inherently have

a more notable effect of restriction on the freedom. The state may therefore issue such rules only in the case necessary to **protect the important public interests that outweigh the freedom of individuals.** The rules regarding the choice of occupation may be divided into **rules specifying the conditions or qualifications of persons** or the so-called **"subjective qualification"** (subjektiveZulassungsvoraussetzungen) and **rules that determine the conditions for the choice of occupation beyond persons' control** or the so-called **"objective qualification"** (objektiveZulassungsvoraussetzungen). Subjective-qualifications rules are necessary to enable and ensure a person to properly practice in the said occupation. Those who will engage in the said occupation must therefore be already aware of the necessity of such rules; so these rules would have less severe effects of restriction on freedom than objective-qualification rules which impose conditions beyond persons'control. Objective-qualification rules have thus greater impact on the lives of persons because it is unpredictable whether a permit to engage in an occupation will be granted regardless of all the qualifications one's able to show or how well prepared a person is. **The issuance of such rules must, therefore, be restricted to cases where it is necessary to prevent danger to the extremely important public interest that has already occurred or has a high probability of happening. So, to honor this classification, the state must consider choosing the rules that is least restrictive first.** Only if the state can demonstrate with high probability that rules with less restrictive effect would not be sufficient to effectively prevent danger, then the state may choose to issue rules with more restrictive effects.

The German Constitutional Court (BVerfG) held that section 3 of the Pharmacy Act has the characteristics of objective-qualification rules that set conditions for choice of an occupation beyond a person's control. But since the purpose of section 3 of the Pharmacy Act is to maintain that the quantity, the quality, and the allocation of medicines and medical supplies would be sufficient for the population's

needs, it could be demonstrated that the first criterion of the objective-qualification rules were met. However, the state of Bavaria still had to demonstrate that there was a high probability that rules with a less severe restriction on freedom could not be used in place of a measure according to section 3 to effectively prevent harm. The Court found that there were a number of similarly effective, but less restrictive measures that the State of Bavaria could use, such as quality control measures on the pharmacy or quality control measures of medical supplies. Since the state of Bavaria **did not** sufficiently demonstrate that there was a high probability that other less restrictive measures would be less effective than the measures specified in section 3 of the Pharmacy Act, the German Constitutional Court (BVerfG) ruled that section3 of the Pharmacy Act of Bavaria is contrary to or inconsistent with the Constitution.

(B) Implication of the "Three-Step Theory"

Even though the "Three-Step Theory" has evolved to become more flexible to such a degree that the German Constitutional Court (BVerfG) has apparently shifted away from the Three-Step Theory and rather apply the proportionality principle in its three core elements, namely; appropriateness, necessity, and proportionality in a narrow sense[49,50], Nevertheless, the reasons given by the Court established an important precedent for the application of proportionality in a narrow sense to make decisions regarding fundamental rights and freedoms

[49] The German Constitutional Court (BVerfG) has clearly pointed out that the "three-step theory" developed by the Court is the adoption of proportionality principle. (BVerfGE 13, 97, 104 = NJW 1961, 2011) Therefore, although the German Constitutional Court (BVerfG) ruled cases regarding freedom of occupation using criteria based on the three-step theory, but the Court has shown that the Court may apply this theory to be more flexible to ensure the diagnosis is more consistent with the proportionality principle. For example, in the case where it was found that state measures, which are in nature of rules regarding occupational methods, may have severe consequences like rules regarding choice of occupation. The German Constitutional Court (BVerfG) will also apply higher conditions to the said measure.

[50] Mann/Worthmann, JuS 2013, 385, 390

cases: The German Constitutional Court (BVerfG) not only considered the priority of the importance of various values as construed from the provisions of the Constitution but the Court also **adopted the weighing of the impacts a state measure may have on individuals in concrete cases against the public interest which such measure is aimed to protect.**[51] In one sense, some may view that the precedent established by the German Constitutional Court (BVerfG) by weighing the severity of the impact of the measures that will affect the individuals against the public interest is a channel for the courts to use discretion without having to clearly specify criteria. Therefore, it may be a risk that the courts will make subjective judgments and overuse the power to intervene into legislative policy.[52] In another sense, however, the weighing of severity of the impact from the measures against the public interest will allow the courts to examine whether or not the use of state power in actual case is consistent with the principles of justice.[53] This aligns with the concept that the state has a duty not only to protect the public interest but also to consider the impacts that may result from various measures as well as to be careful not to cause severe impacts on individuals that are not proportionate to the benefits the measures.

5. Summary

Freedom of occupation has always been one of the fundamental rights guaranteed in constitutions of the Kingdom of Thailand. Its objective is to ensure individuals have the freedom to choose and practice an occupation according to their aspirations or inclinations, without undue prohibition or obstruction by authorities. An occupation, in this context, encompasses any activity—whether currently existing or yet to be developed—that individuals regularly engage in to earn a living, provided it does not pose a significant threat to society or the general public. However, the constitution does not grant unrestricted freedom of

[51] Pieroth/Schlinke, Grundrechte, Staatsrecht II, marginal no. 291
[52] Pieroth/Schlinke, Grundrechte, Staatsrecht II, marginal no. 293
[53] Daiber, JA 2020, 37, 40

occupation. It acknowledges that the state may, as an exception, impose restrictions on this freedom to protect certain public interests as specified within the constitution. However, the state must exercise such power within the constitutional framework, ensuring that restrictions are only to the extent necessary to achieve the goals of protecting public interests, without undermining the essence of that freedom.

The aforementioned freedom to engage in an occupationis not simply an abstract recognition. The Constitutional Court of the Kingdom of Thailand has applied it in many cases.[54] The author finds it pertinent to discuss Constitutional Court's rulings on the freedom of occupation, which might be regarded as landmark cases. This includes a landmark case regarding the diagnosis structure in freedom of occupation cases (Constitutional Court Ruling No.61/2545 (2002) – see section B); a landmark case regarding the meaning of freedom of occupation and restrictions on freedom of occupation (Constitutional Court Ruling No.7/2549 (2006) – see topic C); and a landmark case regarding the application of proportionality principle in the context of freedom of occupation (Constitutional Court Ruling No.12/2549 (2006) – see section D). These cases will be examined through a comparative lens with the German Constitution (GG) to highlight similarities and differences, which could serve as a foundation for further studies.

B. Constitutional Court Ruling No.61/2545 (2002) (landmark case regarding the decision structure in the freedom of occupation cases)

1. Summary of the Constitutional Court ruling

This case examined the constitutionality of the law that the Court would use in cases under section 264 paragraph one of the Constitution

[54] Constitutional Court Ruling No.48/2542 (1999), 13/2545 (2002), 24/2545 (2002), 40/2545 (2002), 47/2545 (2002), 61/2545 (2002), 6/2546 (2003), 25/2547 (2004), 28/2547 (2004), 52-53/2547 (2004), 32/2548 (2005), 36/2548 (2005), 7/2549 (2006), 2/2552 (2009), 12/2552 (2009), 50/2554 (2011), 2-4/2555 (2012), 17/2555 (2012), 31/2555 (2012), 33/2555 (2012), 9/2562 (2019), 13/2563 (2020), 14/2563 (2021)

of the Kingdom of Thailand, B.E. 2540 (1997). The dispute that caused the Civil Court to submit a request for the Constitutional Court's ruling was a case where the plaintiff, who received the assets of Thana One Finance and Securities (Public Company Limited) transferred from the Financial Sector Restructuring Authority (FRA), sued Defendant No. 1, the customer, and Defendant No. 2, the guarantor, to repay the debt. Both defendants argued that the right to claim hasn't been successfully transferred from the FRA to the plaintiff because the Emergency Decree on Financial Institutions Reform, B.E. 2540 (1997) and its amendments, which are the source of authority of FRA's operations, is contrary to or inconsistent with the Constitution. The defendants therefore refused the plaintiff's lawsuit and submitted a petition to the Civil Court to request the Constitutional Court to rule whether the law is constitutional.

Regarding the constitutionality of the Emergency Decree, the defendants reasoned that section 7 (1) (3), section 11, section 16 (3), section 23 (5), section 25, and section 30 of the Emergency Decree on Financial Institutions System Reform, B.E. 2540 (1997) and its amendments stipulate that FRA has the authority to rehabilitate the status and liquidate the accounts of the companies whose operations have been suspended. Such authority includes the appointment of directors, managers, employees, or an authorized person to manage or make a contract for another person to have absolute authority in the administration of the financial institutions, as well as the power to order the company to reduce, increase, allocate additional shares, etc., authority to take action on behalf of the company, which results in restricting the rights of shareholders, who are the true business owners, to dominate and manage the company through the process of directors or board of directors appointment.

The Constitutional Court accepted the petition for consideration and ruling in accordance with section 264, paragraph one of the Constitution. The Court ruled that **section 11 of the Emergency Decree on Financial Institutions System Reform** is a provision that specifies the composition

of the FRA Board. It is not a matter of restricting the rights and freedoms of persons according to section 29 of the Constitution. It does not relate to freedom or restriction on freedom to conduct business or occupation and compete freely and fairly according to section 50 of the Constitution. Nevertheless, the Court viewed that **section 30 of the said Emergency Decree** is a provision that gives the FRA board the authority to appoint a board of directors to act on behalf of the companies, whose operations have been suspended and the status and operations cannot be corrected or rehabilitated, with absolute authority to act on behalf of that company in all respects and to liquidate the company. Upon the board of directors' appointment, all directors of that company will have to step down from their positions. Furthermore, the Minister shall have the authority and responsibility to carry out any task mandated by the Public Limited Companies Law or the Civil and Commercial Code that pertains to the general meeting. According to the Constitutional Court, section 30 of the aforementioned Emergency Decree is a clause pertaining to business activities that has the effect of restricting the board of directors' and shareholders' freedom of operation. According to the Constitution, section 50, paragraph one, this is the restriction on the freedom of persons to conduct business or occupation and free and fair competition. Section 29, paragraph one, states that the guaranteed freedom to conduct business or occupation can only be restricted by virtue of the provisions of the law and only as necessary to achieve the purposes specified in the Constitution. Furthermore, the restriction shall not affect the essence of such rights and freedom. The court found that this emergency decree was enacted because it was necessary to solve problems in the financial institution system and rehabilitate the operations of financial institutions facing the problems. It was also enacted to protect depositors and creditors of the institutions and restore confidence in the financial institution system. Therefore, the said emergency decree is a law enacted based on necessity for the

benefit of maintaining the economic stability of the country. It is a provision that does not affect the essence of freedom to conduct business or engage in an occupation of persons.

In this regard, the Constitutional Court has acknowledged the reasons for the necessity of enacting the said law as follows: Financial institutions that had financial problems and their operations were suspended by ministerial order and could not be rehabilitated or continue the business operations were cases where it was already determined that the account must be liquidated. The emergency decree on financial institution system reform, therefore, entrusted the FRA board with the authority to appoint a board of directors to act on behalf of the company until the liquidation, which was to be carried out in the interest of honest depositors and creditors of financial institutions (elaborated by the author), was completed. Thus, the said provisions applied generally, i.e. appliedto all companies whose business operations were suspended and could not continue operations of the business.

Consequently, the Constitutional Court ruled by unanimous decision that Emergency Decree on System Reform Financial Institutions, B.E. 2540 (1997), section 7, section 11, section 16 (3), section 23 (5), section 25, and section 30 were not contrary to or inconsistent with the Constitution of the Kingdom of Thailand, section 29 and section 50.

2. Analysis of the ruling

Although the ruling of the Constitutional Court in this case did not involve complicated legal issues, the author considers it a landmark case. This is because the Court was able to demonstrate a systematically laid out and structured decision-making: The Constitutional Court distinguished between the decision on whether the law has the effect of restricting freedom[55] of occupation. Then the court went on to decide

[55] "Restriction on freedom" used in this meaning corresponds to the word "Grundrechtseingriff" used in German. It was found that the Constitutional Courtof the Kingdom of Thailand, as well as textbooks or various academic works, used differently wording, such as

whether the law complies with the conditions specified by the Constitution. This structure was consequently adopted by the Constitutional Court in several other cases involving freedom of occupation.[56] So, to elaborate on this point, the author will discuss the principles of German constitutional law to comparatively demonstrate why each element in the decision structure is desirable or even needed.

2.1 "Scope of protection" for freedom of occupation

In the Constitutional Court Ruling No.61/2545 (2002), which was a ruling on the constitutionality of law in the context of freedom of occupation, the Constitutional Court has established a decision structure that aimed to answer two questions. First: whether or not the law in the petition had the effect of restricting freedom of occupation according to section 50, paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). Second: if the said law had the effect of restricting freedom of occupation, whether the restriction on freedom meets the conditions provided in the Constitution. Regarding the first question, the Constitutional Court not only decided that the law in petition had the effect of restricting the rights and freedoms in general but also decided that the content of the provisions was "related to the operations of the company which results in restricting the freedom of the company's operations," thus "restricting **the freedom of persons to conduct business or engage in occupation**, etc. according to the Constitution, section 50, paragraph one"

"interference in rights and freedoms" or "affect rights and freedoms" The German constitutional law distinguishes between cases where there is a restriction on rights and freedoms (Eingriff), which may or may not be in accordance with the conditions stipulated by the Constitution, and the case of restriction on freedom is illegitimate because it does not comply with the conditions stipulated by the Constitution. The latter case, German constitutional law will use the word "Grundrechtsverletzung", which may be translated into Thai as "violation" or "violation of rights and freedoms"

[56] Such as Ruling No.28/2547 (2004), Ruling No.52-53/2547 (2004), Ruling No.7/2549 (2006), Ruling No.12/2552 (2009), Ruling No.50/2554 (2011), Ruling No.33/2555 (2012)

The fact that the Constitutional Court recognized the necessity to specify the types of freedoms it considered demonstrates that the Court accepted that the fundamental rights and freedoms provided by the Constitution in each matter **have different scopes of protection**. The differences not only reflect in the mission of each right or freedom,[57] they also reflect in the constitutionally postulated conditions of restricting that right and freedom[58] that may be different according to their characteristic and background of right and freedom in each matter. In Ruling No.61/2545 (2002), the Constitutional Court not only pointed out that the content of the law "is related tothe company's operations, etc., with regard to both the board of directors and shareholders". However, the Constitutional Court also stated at the end of its ruling that such provisions "were effective at the stage after the company's operations have been suspended and rehabilitation of status and operations was not possible." This means the Constitutional Court interpreted freedom of occupation to have scope of protection that covers the company's operations, whether the action was taken before or after the company's suspension and rehabilitation of status and business operations was not possible.

[57] Different types of basic rights and freedoms have different missions and characteristics of protection. Some types of rights have the characteristics **of rights that individuals can exercise directly through the courts (subjektives Recht)**, which can also be divided into rights that protect individuals from violation by the state (Abwehrrecht) and the right to demand the state to take certain actions, such as the right to demand the state to protect individuals from the actions of other individuals (Schutzgewähr), or the right to demand welfare from the state as well (Teilhaberecht). Some types of rights aim to **protect only in principle** (purposes Recht, e.g., institutionelleGarantie) (BanjerdSingkaneti, Basic Principles of Rights, Freedom, and Human Dignity, pp. 57-62; Pieroth/Schlinke, Grundrechte, Staatsrecht II, pp. 16-28).

[58] The Constitution stipulates the conditions for restriction on each right differently according to its nature, and origin. It may be divided into rights that can be restricted by laws enacted by the state, rights that can be restricted by laws that have specific purposes, or rights that cannot be restricted by law (Banjerd Singkaneti, Basic Principles of Rights, Freedoms, and Human Dignity, pages 56-57).

2.1.1 Personal scope of protection

In this ruling, the Constitutional Court ruled that "Section 30, etc., had the effect of restricting freedom of the company's operations, both with regards tothe board of directors and the shareholders. It was a restriction on freedom to operate a business or engage in an occupation and compete freely and fairly, etc., which this Constitution guarantees." Not only has the wording clearly recognized the effect of Section 30 of the Emergency Decree, which empowers the committee appointed by the FRA board to act on behalf of the company and thus restrict the freedom of the company's operations. But the decision also contained a less apparent legal issue that **"persons"** protected by the constitution regarding freedom of business or occupation also **includes companies, which are juridical persons, or the board as a group of persons**. This is consistent with the principles of Thai law, especially legal laws governing "persons." The term "persons" may include "juridical persons" as defined in title two of the Civil and Commercial Code. That means juridical persons have the same rights and duties as natural persons except for the rights and duties that are naturally reserved for natural persons. As a result, "persons" with constitutionally guaranteed rights and freedoms also include "juridical persons."

2.1.2 Material scope of protection

In this ruling, the Constitutional Court provided reason that section 30 of the Emergency Decree on Financial Institution System Reform "restricts the freedom of persons to engage in business or occupation and free and fair competition according to section 50 of the Constitution" because the provision "involves the businesses' operations with the effect of restricting freedom of operations of the company." In addition, the Constitutional Court also pointed out that such provisions "were in force after an order for the suspension of the company's operations and rehabilitation of status or operations was no longer

viable". Even though the Constitutional Court did not explicitly define the words "business", "occupation", or "free and fair competition" to generally determine the material scope of protection. But the fact that the Court applied section 50, paragraph one, in the ruling without distinguishing between freedom to conduct business, freedom of occupation, or free and fair competition, demonstrates that the Constitutional Court viewed business operations, occupation, and free and fair competition not as separated freedoms to be protected, but rather as elements of an undivided concept of occupation which was protected within the material scope of such freedom. The operations of the company, therefore, are protected withing the material scope of the freedom of occupation.

However, it is worth mentioning that in a situation where a company was suspended and its status can no longer be corrected or rehabilitated, whether the carrying out of tasks of that said company can still be considered as earning income or obtaining or maintaining means of living which would constitute an occupation. The German Constitutional Court (BVerfG) has established a decision on this topic, stating that freedom of occupation protects not only current revenue generating activities but also the potential to generate future income. As a result, even if a work does not yet generate income, such as a painter's unsold painting, this does not mean that the Constitution does not safeguard the right to potentially earn money from it.[59] Furthermore, due to its broad interpretation of "occupation," the German Constitutional Court (BVerfG) would only consider activities typically associated with non-profit organizations, such as charities, or those resembling hobbies, as non-income generating, and therefore not within the protection scope of the freedom of occupation.[60] Companies whose operations have been suspended

[59] Scholz, Artikel 12 Grundgesetz, in: Dürig/Herzog/Scholz (ed.), Grundgesetz Kommentar, marginal no. 32

[60] Kloepfe, § 70, marginal no. 29

and could not be rehabilitated as the ones in the Constitutional Court Ruling No.61/2545 (2002), are clearly not non-income generating in this sense. Not only were these companies founded with status and the goal of earning income, but they also maintained their registered status while section 30 of the Emergency Decree on Financial Institutional Reform was in effect. Therefore, the companies continued to be able to produce income in accordance with the aim of their existence and were thus protected by freedom of occupation.

2.2 "Restrictions" on freedom of occupation

When the Constitutional Court considered that the company's business operations are an exercise of freedom in operating business or engaging in occupations and free and fair competition as protected by section 50 of the Constitution, the Court therefore further ruled that section 30 of the Emergency Decree on Financial Institutions System Reform, which applied to financial institution companies whose operations have been suspended, contains content related to the company's operations. As a result, it restricted the freedom of persons to conduct business or engage in an occupation.

The Constitutional Court's use of the phrase "it was a provision **related to** the operations of the company" indicated that the said provisions had content intended to interfere with the operations of the company. Therefore, the fact that the company was unable to operate its business as normal was a result intended by the said provision. If we consider the German constitutional law in comparison, it can be seen that the provisions that caused the petition to appeal to the Constitutional Court according to this ruling have the characteristic of an order that aims to produce direct legal effects,[61] which the German Constitutional Court (BVerfG) would view as explicit restriction of fundamental rights and freedoms according to its rigid criteria (der klassische Eingriffsbegriff).[62]

[61] In German constitutional law, this understanding is called "restriction on rights and freedoms." "klassischer Eingriffsbegriff" (Pieroth/Schlinke, Grundrechte, Staatsrecht II, Rn. 238)

[62] BVerfG NJW 2002, 2626, 2628

2.3 "Conditions" for restriction on freedom of occupation

When the Constitutional Court ruled that section 30 of the Emergency Decree on Financial Institutions System Reform was a provision of the law that restricted persons' freedoms according to section 50, paragraph one, of the Constitution. The Constitutional Court next considered whether or not such acts of state with the effect of restricting constitutional freedoms met the conditions as provided in section 29, paragraph one, and section 50, paragraph two, of the Constitution of the Kingdom of Thailand. The said constitutional sections stipulated that restrictions on freedoms could not be done except **by virtue of the provisions of specific laws for the purpose prescribed** by this Constitution as necessary and **only if it does not affect the essence of those rights and freedoms.** As for freedom of occupation, any restriction must be done by virtue of the provisions of specific laws aimed for the benefit of maintaining the security of the state or the national economy, utility protection for the public, maintaining public peace and order or good morals of the people, regulating the practice of occupations, consumer protection, urban planning, natural resources or the environments preservation, public welfare, prevention of monopoly, or elimination of unfair competition.

The Constitutional Court ruled that the reason for enacting the Decree on Financial Institution System Reform was the need to solve problems in the financial institution system and restore the operating status of some financial institutions that were experiencing such problems, as well as to assist honest depositors and creditors of financial institutions. It was an emergency situation, with an unavoidable need to safeguard the country's economic stability. As a result, the emergency decree was a legal measure created particularly for the purpose outlined in section 50, paragraph two of the Constitution. Furthermore, section 30 of the aforementioned emergency decree went into effect after the order to suspend the companies was issued and rehabilitation of their status or operations was no longer viable. Therefore, the provision did not

affect the essence of the freedom to conduct business or engage in an occupation of persons. The Emergency Decree on Financial Institutions System Reform, section 30, therefore was not contrary to or inconsistent with the Constitution, section 29 and section 50.

2.3.1 Laws with specific purposes

The Constitutional Court stated the reasons in the notes at the end of the Emergency Decree to recognize that the provision was a law with specific purposes as provided in section 50 of the Constitution, paragraph two. The Constitutional Court has not elaborated or defined the conditions of special laws in such a section. This may be considered that the Constitutional Court viewed the conditions in section 50, paragraph two, of the Constitution as self-explanatory, or the Court accepted the legislative power to use discretion in considering which cases fall under the conditions specified in section 50, paragraph two, of the Constitution.[63]

2.3.2 The law must not affect the essence of freedom

In addition to deciding the conditions of specific law that "It was a provision of the laws with specific purposes as provided in section 50, paragraph two of the Constitution, etc.", the Constitutional Court further stated that section 30 of the Emergency Decree on Financial Institutions System Reform "was a provision that did not affect the essence of freedom to conduct business or engage in occupation of persons because the business operations of those companies have already been suspended by order of the Minister and rehabilitation of business status and operations was not conceivable. "This may be considered that the Constitutional Court was laying down the principle for reasoning about the essence of rights and freedoms in relation to freedom of occupation. In the past the Constitutional Court has established that the essence of freedom of occupation includes preventing the absolute prohibition from practicing such occupation.[64]

[63] See item A.4.1 above.
[64] See item A.4.2 above.

In this ruling, however, the reasoning of the Constitutional Court that the companies were affected from section 30 of the Emergency Decree on Financial Institutions System Reform because of the suspension order of business operations and the fact that rehabilitation of status and business operations was no longer viable. It did not explain whether section 30 of the said Decree had the effect of canceling or absolutely prohibiting the exercise of the right to freedom of occupation. It was a "weighing" consideration on the severity of the impacts that may occur from the application of the law. It may be elaborated that companies affected by section 30 were, in fact, not in a position to generate income. The imposition of section 30 on such businesses resulted in no greater loss of income-generating opportunities than they already faced. As a result, this can be regarded as an application ofthe proportionality principle rather than the essence of rights and freedoms in accordance with the criteria established by the Constitutional Court in Ruling No.59/2545 (2002).

In this regard, we consider the Constitutional Court Ruling on the essence of rights under section 29, paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), as well as the German Constitutional Court's (BVerfG) ruling on article 19, paragraph two of the German Constitution (GG).[65] It was discovered that the reason given by the Constitutional Court that companies affected by section 30 of the Emergency Decree on the financial institution system reform which have been ordered to suspend business operations, etc., did not relate to the essence of rights but to the application of proportionality principle, which will be discussed in detail in the following section.

2.3.3 Proportionality principle

The Constitutional Court has mentioned in this case that the conditions for restricting rights and freedoms can be done only "to the extent necessary." The Court did not elaborate on the meaning

[65] See item A.4.2 above.

of the principle of "restricting freedom to the extent necessary," nor has the court construed whether section 30 of the Emergency Decree on Financial Institutions System Reform was a necessary measure. However, according to the meaning of the law, the phrase "as necessary" implies "proportionality", which is a condition under the principles of German public law.,[66,67]

The Court gave reasons at the end that "Section 30 was a law that was enacted because it was necessary for the benefit of maintaining the economic stability of the country and did not affect the essence of freedom to conduct business or engage in an occupation of persons, **because the operations of the companies were already suspended by order of the Minister and the status or operations of the business cannot be rehabilitated"**. This may be elaborated that companies affected by section 30 were, in fact, no longer in a position to generate income. Application of section 30 to such companies resulted in no greater loss of income-generating opportunities than they already faced. Therefore, it shows that the Constitutional Court has considered **the severity of the impact** that such a provision would have on those who were subject to enforcement and used it as reasons for the decision. Even though the Constitutional Court claimed that it was an issue related to the essence of freedom of conducting business. A comparative study of the German Constitutional Court's (BVerfG) decision[68] would suggest

[66] Worachet Pakeerut, Journal of Law, Year 30, Issue 2, page 187; Banjerd Singkaneti, Basic Principles of Rights and Freedoms and human dignity, page 277

[67] See itemA.4.3 above

[68] In the ruling on Muhlengesetz-Urteil, the German Constitutional Court (BVerfG) has considered proportionality in a narrow sense. Even though the requirements for those who wish to operate a mill or increase production capacity to obtain a license or request permission first, but in practice, such provisions have almost no impact on those who do not yet have a mill business and wish to open a mill business. This is because opening a mill business has high costs and little opportunity to make a profit or nearly impossible. In weighing the impact on freedom of occupation and public interest such facts must be taken into account as well. (BVerfG NJW 1969, 499, 502) (See items D. 2.2.2, and D. 2.2.3 below).

that there's an even broader implication: the Court's reasoning in this case should be regarded as a recognition that the Court has an authority to review the legislator's use of discretion in evaluating whether the measures would unfairly impact individuals in concrete cases. This will serve as a precedent for future cases, regardless of whether the court would apply it within the concept of proportionality in a narrow sense or within the concept of the relative protection of the essence of rights and freedoms.

2.4 Summary

In Ruling No.61/2545 (2002), the Constitutional Court established a clear structure for decision-making in cases involving freedom of occupation by separating the decision into two parts: whether the law in the petition had the effect of restricting freedom of occupation under section 50, paragraph one of the Constitution of the Kingdom of Thailand, and whether the said law met the conditions stipulated in the Constitution, section 50, paragraphtwo, and section 29. This decision established a guideline which has been followed by the Court in several successive cases involving freedom of occupation.

In addition to establishing a structure for decision-making, the Constitutional Court addressed the impact of section 30 of the Emergency Decree on Financial Institutions System Reform, which only affected companies whose operations had been suspended and could not be rehabilitated. This was the Court's weighing the severity of potential impacts caused by measures of the state. It can be said that the Constitutional Court has set a precedent according to which the Court may consider the severity with which the state's measures may affect persons in concrete cases. The Court may later decide whether to apply it within the concept of proportionality in a narrow sense or within the concept of the relative protection of the essence of rights and freedoms.

C. Constitutional Court Ruling No.7/2549 (2006) (landmark case regarding the meaning of freedom of occupations and restriction on freedom of occupation)

1. Summary of the Constitutional Court Ruling

This case examined the constitutionality of the law that the courts have to apply in concrete cases but requested that the Constitutional Court first review it according to section 264, paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The defendant who traded used computers and equipment was sued in a criminal case for the crime of trading antiques without permission according to the Control of Sale by Auction and Trade of Antiques Act, B.E. 2474 (1931) and its amendments. The defendant stated that the provisions of the said law, which prohibited anyone from engaging in auctions or antiques trading without permission, restricted the freedom of individuals to engage in occupations which was regarded as essential as guaranteed by section 50 of the Constitution. This was because a natural person has the right to own property through trade, whether it is old or new, and to sell it to others. As a result, engaging in an occupation to buy property utilized by others and sell it to others was a normal right that every individual should be free to exercise under the constitution. Furthermore, the purposes of this Act do not match the requirement of specific purposes as provided in section 50 of the Constitution, paragraph two. As a result, the defendant asked the District Court to get a ruling from the Constitutional Court on whether the law was constitutional.

The Constitutional Court accepted the petition for consideration and ruled in accordance with section 264, paragraph one of the Constitution. The issue to consider was whether the Control of Sale by Auction and Trade of Antiques Act, B.E. 2474 (1931), section 4, paragraph one (2) and its amendments were contrary to or inconsistent with section 50 and section 29 of the Constitution. The Court has ruled that

the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), section 50, paragraph one recognizes freedom of business or occupation, as well as free and fair competition, to ensure that the public has a guarantee to freely choose to operate a business or engage in occupations without being forced to do so, or being prevented from doing so and competing with other business operators. However, section 50, paragraph two of the Constitution recognizes that state may restricts freedom of business or occupation, as well as free and fair competition, through specific legislative requirements that must be in conformity with the conditions provided in section 29 of the Constitution. The Court determined that section 4, paragraph one (2) of Control of Sale by Auction and Trade of Antiques Act, etc., **restricted the freedom of antiques trading businesses by requiring those who wish to engage in antiques trading to apply for a license and obtain permission before engaging in the occupation. Engaging in antiques trading without a license is an offense and is subject to penalty specified by law.** However, such provision aims to support the prevention and suppression of crimes related to property. It is also a law to better organize the antiques trade and safeguard customers who may suffer the consequences of purchasing property obtained by committing an offense. **According to section 50, paragraph two of the Constitution, the aforementioned Act was a specific law for the benefit of maintaining public peace and order or good morals, regulating the practice of occupation, and consumer protection.** Furthermore, the Act did not affect freedom unnecessarily, nor did it affect the essence of freedom. The Act was also generally in effect and wasn't aimed specifically at any particular case or person. Additionally, it was a measure that benefits the public more than it caused damage to the private sector.

For the above reasons the Constitutional Court therefore ruled by a unanimous decision that the Control of Sale by Auction and Trade of Antiques Act, B.E. 2474 (1931), section4, paragraph one (2) and its amendments were not contrary to or inconsistent with the Constitution, section 50 in conjunction with section 29.

2. Analysis of the ruling

The Constitutional Court's ruling in this case is one of the few cases in which the Court laid down principles to clarify the freedom of business or occupation, as well as free and fair competition. The court explained that such freedom "gives people a guarantee to freely choose to operate a business or engage in occupations without being forced to do so, or being prevented from doing so and to compete with other business operators" This explanation not only demonstrates principles related to the mission and scope of protection of freedom of occupation, but the court has also reiterated the same reasoning in later decisions.[69] Therefore, the author consider this case to also be a landmark decision for freedom of occupation cases. Like previous landmark case, the basic principles established by the German Constitutional Court (BVerfG) regarding the freedom of occupation will be used for a comparative analysis of present case.

2.1 Freedom of "choice" to engage in business or occupation.

The Constitutional Court explained that freedom of occupation is a guarantee of "choice" to engage in business or occupation "without being forced" or "being deprived". This demonstrates the Constitutional Court's recognition that the freedom of occupation is intended to safeguard the freedom of the right's holder to, in matters related to making a living, do as **he or she wishes**[70] and concretely expressing it through any action, irrespective of his or her skill level, competence, or perceived suitability.

Comparatively, it can be seen in the ruling of the German Constitutional Court (BVerfG) that the principle was set at the beginning

[69] Ruling No.33/2555 (2012) and Ruling No.9/2562 (2019)

[70] Similar opinions. Freedom of engaging in business or occupation is a protection for individuals to be able to operate businesses or engage in different occupation as desired, see Pakorn Nilpraphan, Encyclopedia ofthe Constitution of the Kingdom of Thailand, B.E. 2540 (1997), section on Rights and Freedoms, topic 4. Economic Rights and Freedoms, page 34.

that freedom to engage in occupation protected by the German Constitution (GG) encompasses more than just economic principles as previously stated in the provision on "business freedom"[71] (Gewerbefreiheit) in the Constitution of the Weimar Empire (Die Verfassung des Deutschen Reichs or Weimer Reichs-Verfassung). It is therefore a provision to protect the individual's freedom to choose any occupation he or she deems appropriate. In this respect it can be seen that freedom of occupation is very much related to the individual's "dignity and identity". This is because choosing an occupation and accepting the associated responsibilities not only reflects an individual's desire to develop their identity but also their perception of their role in society.[72] As a result, if we consider the spirit of the Constitution, which values human dignity and individual identity, freedom of occupation therefore must protect the individual from any act of state that has the effect of forcing or preventing individuals from fulfilling their wishes.

By establishing in Ruling No.7/2549 (2006) that the freedom of occupation guarantees the freedom of choice without coercion or deprivation, the Constitutional Court suggests that the right to express one's identity should be emphasized. Therefore, the primary purpose of freedom of occupation is to protect individuals from state interference that forces or prevents them from expressing their identity through their chosen occupation.

2.2 Act of state that deprives choice of occupation is a "restriction of freedom to engage in occupation"

After establishing the principle to guarantee freedom in choosing an occupation, etc., without being forced or deprived, the Constitutional

[71] Article 151, paragraph three, of the Constitution of the Weimar Empire (WRV) provides: "Freedom of trade and business protected under the principles established in the laws of the Empire," which do not have the nature of granting individual rights of claim to prevent the state from interfering in the exercise of such freedoms (subjektives Recht), but in the nature of protection in principle only. (objektives Recht) (Dürig/Herzog/Scholz, Art. 12, Rn. 10).

[72] BVerfG NJW 1958, 1035; BVerfG NJW 1979, 699, 707

Court therefore ruled that section 4, paragraph one (2) of Control of Sale by Auction and Trade of Antiques Act, etc., which prohibits any person from engaging in antiques trading without obtaining a license, and section 12, paragraph one of the said Act which stipulates that those who engage in the trade of antiques without permission will be subject to penalty. It is "a provision of the law that restricts the freedom to engage in the antiques trade because it specifies that those who wish to engage in the occupation must apply for a license and receive permission prior to engaging in the occupation. If anyone engages in the occupation without a license it will be an offense and is punishable as prescribed by law." The mentioned reason was not only consistent with the scope of protection and mission of the freedom of occupation according to the principles laid down by the Courtin the same ruling. It was also a clear indication[73] that **a law stipulating that a person must obtain permission to operate any business or occupation and that carrying out such business or occupation**

[73] Before the Constitutional Court had a ruling in this case, the Constitutional Court had not yet provided clear guidelines for making a decision whether or not the law that requires individuals to request permission to engage in occupations has the effect of restricting freedom of occupation. In Ruling No.6/2546 (2003), the Constitutional Court has ruled on the Liquor Act, which prohibits anyone from making liquor or possessing a container or distillation equipment for making liquor, unless permission is obtained from the Director-General of the Excise Department, that "it is not restricting freedom to conduct business or engage in occupation and free and fair competition in any way." The reason is that section 50, paragraph two, "provides an exception regarding freedom of occupation: Except by virtue of the provisions of the law only for the benefit of the national economy, etc., or other public interest." But later, in Ruling No.28/2547 (2004), which is a decision regarding section 21 of the Professional Nursing and Midwifery Act (No.2), B.E. 2540 (1997), and in Ruling No.52-53/2547 (2004), which is a decision regarding section 4, section 5, and section 25 of the Liquor Act, B.E. 2493 (1950), all of which are provisions that require a person to obtain permission to engage in such occupation, the Constitutional Court has ruled that the provisions are restrictions on freedom of occupation. However, the Constitutional Court did not lay down principle of reasoning or exhibited differences from the case In Ruling No.6/2546 (2003) in any way.

without permission is an offense, has the effect of restriction on freedom to engage in occupations because it deprived individuals from choosing an occupation according to his will. This was consistent with the rulings of the Constitutional Court in other cases[74] in relation to law that requires permission to operate a business or profession as well.

In comparison, the German Constitutional Court (BVerfG) has laid down the principle regarding the restriction on freedom, stating that an act of state would be regarded as a restriction on freedom of occupation only if it has regulating characteristics or regulating effects on occupation or it has an impact on the occupation of the target group of that act.[75] In the case where the act of state has the characteristic of setting rules that affect the choice of occupation (Berufswahlregelung),[76] whether the rules are regulations that set conditions for choice of occupation beyond a person's control (so-called objective qualification - objektive Zulassungsvoraussetzung) or merely rules that specify conditions or qualifications of persons (so-called subjective qualification- subjektive Zulassungs voraussetzungen), they all are considered to be rules with occupation-regulating effect by nature. Therefore, laws that require persons to obtain a permit before engaging in any occupation are rules that affect the choice of occupation and thus have restricting effect on freedom of occupation.

[74] Such as Ruling No. 2/2552 (2009), 50/2554 (2011)

[75] See itemA.3 above.

[76] In the decision on Apotheken-Urteil, the German Constitutional Court (BVerfG) has laid down prominent precedent for cases concerning freedom of occupation. The rules are divided into three levels, namely, rules about method of occupation (Berufsausübungsregelungen), rules that set conditions for choosing an occupation that is not under the control of a person (ObjektiveZulassungsvoraus-setzung), and rules that determine conditions or qualifications of persons (SubjektiveZulassungsvorauss-etzungen) (see item A.4.3.2 (a) above)

2.3 Restricting freedom only "as necessary" for the public interest

The Constitutional Court carried on with its argument, stating that although section 4, paragraph one (2), and section 12 of the Control of Sale by Auction and Trade of Antiques Act, B.E. 2474 (1931) are provisions that restrict the freedom of occupation. Section 50, paragraph two, and section 29 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) provided, however, that restriction on freedom can be done by virtue of the provisions of law with specific purposes as provided in the Constitution and only to the extent necessary and without affecting the essence of the said right and freedom. The Constitutional Court considered that the reasons for enacting Control of Sale by Auction and Trade of Antiques Act not only require that those wishing to engage in antiques trading must obtain permits but also stipulate conditions prohibiting persons who have been imprisoned for certain property crimes from engaging in such occupation. It also requires the permitted traders to prepare an account book to record all important matters of every trade and a serial number to be affixed to the product. Therefore, section 4, paragraph one (2), and section 12 "are provisions that support the prevention and suppression of an offense related to property, as well as organize a better antiques trading occupation and protect consumers who may be affected by the purchase of property obtained through wrongdoings." As such, "Control of Sale by Auction and Trade of Antiques Act is a law with the specific purpose of maintaining peace and order or good morals of the people, organizing occupations, and protecting consumers," as required by the constitution.

Although the Constitutional Court did not further elaborate on what constitutes maintaining peace, order, or good morals of the people; organizing occupations; or protecting consumers, the Court nevertheless brought up other, albeit related control mechanisms in the Act to explain why the provisions raised by the petitioner are a law

with specific purposes as provided in section 50, paragraph two of the Constitution. However, regarding the question of proportionality and the integrity of the essence of the freedom, the Constitutional Court found the law in question to be in agreement with both conditions as outlined in section 29 of the Constitution, without further justifying its decision. Considering that the Constitutional Court, in order to further justify its decision, has requested additional, case-specific information from a government agency responsible for enforcing the act, it seems that the court is indeed willing to factor in actual impacts of the law in question. Thus, it shouldn't be beyond the court's capacity to judge whether the measure requiring a permit to engage in the sale of antiques is in fact "necessary" for achieving the Act's objectives. In other words, the Court should have further clarified whether the Act would have still achieved its objective, had the permit-requirement been lifted and only other measures in the Act in question been maintained.

In comparison, the German Constitutional Court (BVerfG) consistently demonstrates how important it is, to determine whether a measure is "necessary" (erforderlich). In the Apotheken-Urteil,[77] the Court laid down the principle that **the state must give priority to the rules that are less severe in restricting freedom. The state may adopt rules with more severe restrictions on freedom only when it is highly probable that less severe restrictions on freedom cannot be adopted to effectively prevent danger.** In this sense, the rules relating to the practice of occupation (Berufsausübungs-regelungen) would have less severe restrictions on freedom than rules regarding the choice of occupation (Berufswahlregelung). In the said case, the German Constitutional Court (BVerfG) provided an example of other measures with characteristics of rules regarding occupational methods that the state can consider and use to achieve the same results, such as

[77] BVerfG NJW 1958, 1035

drugstore quality control measures or medical supplies quality control measures.[78] However, the German Constitutional Court's (BVerfG) rulings in the later period tend to accept the discretion of lawmakers in judging whether the law would be necessary in the future. The Court would only examine whether the lawmaker exercised discretion based on the complete information and whether the reasoning was justified.[79] Nevertheless, the German Constitutional Court (BVerfG) always considers whether the reasoning of lawmakers has ground and reliability to justify the constitutionality of the restrictions on freedom.[80]

2.4 Summary

In Ruling No.7/2549 (2006), the Constitutional Court set the standard for determining the scope of protection and the mission of freedom of occupation that "it provides the people a guarantee to **choose** an occupation freely **without being forced orbeing deprived** from having opportunities to engage in business or compete with other business operators." This is not only to convey that freedom of occupation is more than just an economic concept, it also aims to protect the "will" of an individual in choosing an occupation. In addition, this case serves as the foundation for the Constitutional Court to explicitly state that the law requiring a person to obtain a permit before engaging in an occupation has the characteristic of restricting freedom. Furthermore, in determining whether the aforementioned restriction on freedom complies with the conditions specified in the Constitution, the Constitutional Court factored in other measures in the said law to demonstrate how the provisions specifying the use of the permit system contribute to achieving the purposes of the law. Unfortunately, the Constitutional Court did not elaborate on the "necessity" of

[78] See item A.4.3.2 (a) above.

[79] Scholz, Artikel 12 Grundgesetz, in: Dürig/Herzog/Scholz (ed.), Grundgesetz Kommentar, marginal no. 338f.

[80] See item D.2.2 below.

prescribing the use of the permit system, as it could. When considering the German Constitutional Court's (BVerfG) ruling on freedom of occupation, it is clear that the Court (BVerfG) places a great value on determining the "necessity" of the law. The state must demonstrate that no other less severe measures than the ones chosen may generate the same results. Otherwise, the German Constitutional Court would likely rule that such measures are unnecessary and contrary to or inconsistent with the Constitution.

D. Constitutional Court Ruling No.12/2549 (2006) (landmark case regarding the application of proportionality principle)

1. Summary of the Constitutional Court ruling

This is a case, the Saraburi Provincial Court sent the defendant's claims in a criminal case to the Constitutional Court for a ruling in accordance with the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), section 264. The defendant was sued for operating a food and beverage business during the ban period without permission, which was an offense according to the Announcement of the Revolutionary Council[81] No.45 dated the January 17th, B.E. 2515 (1972), article 3, as amended by the Announcement of the Revolutionary Council No.252, dated November 16th, B.E. 2515 (1972). Article 1 forbids the owner or occupant of a place from selling food or beverages between 1:00 a.m. and 5:00 a.m. unless a permit has been obtained from the Director-General of the Police Department in metropolitan Bangkok Thonburi or from the provincial governors in other provinces, etc. The defendant explained that the Announcement of the Revolutionary Council was intended to deter criminals from accessing the location to assemble and conduct crimes. However, the defendant's restaurant has a business license

[81] **Announcement of Revolutionary Council** is an instrument used by military junta in the period between the coup d'etat and the appointment of interim government. These instruments stay valid even after the transition back to democracy and the courts recognized them to be on the same hierarchical level as a law (formal parliamentary act).

under the Commercial Registration Act, and it is not characterized as a gathering place for criminals, acts against people's good morals, or causes harm to the country. Furthermore, unlike in the past, individuals now travel both during the day and at night. Therefore, the Announcement of the Revolutionary Council should not be enforced, since it would be in contrary to or inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), section 26, section 27, section 28, section 29, section 30, section 36, and section 50.

The Constitutional Court accepted the petition for consideration and decision under section 264 paragraph one of the Constitution. However, while this request was being considered by the Constitutional Court, the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), has ended according to the announcement of the Democratic Reform Council with the King as the head of state, No. 3, dated September 19th, 2006. An interim constitution has been proclaimed, which stated that the Constitutional Tribunal would be responsible for adjudicating cases previously under the jurisdiction of the Constitutional Court, as well as having the authority to rule on all legal cases or matters that were being considered by the Constitutional Court prior to September 19th, 2006. Later, the Constitution of the Kingdom of Thailand, B.E. 2550 (2007), was enacted and took effect on August 24th, 2007. Section 300 of the 2007 Constitution established the Constitutional Tribunal under the interim constitution as the Constitutional Court, with the authority to consider and decide legal cases under its jurisdiction until an organic act governing Constitutional Court procedures was enacted. The Constitutional Court could thus continue considering the case. In addition, the provisions of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), referred to by the petitioner shared the same principles as the provisions of the Constitution of the Kingdom of Thailand, B.E. 2550 (2007), section 26, section 27, section 28, section 29, section 30, and section 43. The Constitutional Court could therefore

decide this motion in accordance with the provisions of the Constitution of the Kingdom of Thailand, B.E. 2550 (2007).

The issue in the petition that the Constitutional Court must consider and decide was whether the Announcement of the Revolutionary Council No. 45 dated January 17th, B.E. 2515 (1972), article 3, as amended by the Announcement of the Revolutionary Council No.252, dated November 16th, 1972, section 1, were contrary to or inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2550 (2007), section 26, section 27, section 28, section 29, section 30, section 34, and section 43. After careful consideration, the Court ruled that **when considering laws that restrict the rights and freedoms of persons guaranteed by the Constitution, in addition to taking into account the circumstances of the country as well as the people's way of life at the time of law enactment, the circumstances of the country as well as the people's way of life when the law is in effect must also be considered.** It can be seen that at the time when the Announcement of the Revolutionary Council was mandated, the Revolutionary Council had just taken control of the country's administration and intended to ensure that the people did not cause disorder that would jeopardize the country's stability while the Revolutionary Council was in charge of running the country. Therefore, the Revolutionary Council made an announcement to prohibit the sale of food and beverages during the specified time period in order to prevent people from being outside of their homes at night, which was difficult to control and monitor and may result in a conspiracy to cause unrest threatening the state's security and peace. **This was a case of necessity during the time of a coup d'état.** However, in normal circumstances, an individual's way of life is different from the situation in question. Furthermore, society has undergone significant changes as a result of globalization. The economic situation of the country was improving. Transportation made it possible for people to travel to many locations at any time. That has changed people's daily life

cycle to the point that working and resting time cannot be established with certainty. As a result, the government was unable to prevent people, who may have various reasons for traveling, from leaving their home during the night, nor was it able to restrict business operations or the sale of food or beverages within the prescribed time period. Therefore, the Announcement of the Revolutionary Council prohibiting the owner or occupant of a place that sells food or beverages between 1:00 a.m. to 5:00 a.m. unless a license is obtained **directly restricted the people's freedom to do business or engage in occupation, as well as free and fair competition according to section 43, paragraph one of the Constitution.** It was considered that such provisions unnecessarily restricted the opportunity for a great number of people to engage in honest trading, as well as created burden on those who work in other honest occupations and must consume food and beverages during that time period without adequate justification. Although provisions were included to allow for application of a license to sell food and beverages during such a time period, this **imposed unnecessary conditions and burdens for the exercise of such freedom** because requests for a license from high-ranking government officials **were difficult to get in practice.** It also provided an opportunity for the authorities to dominate those who engage in such occupations for unjustified reasons. Consequently, it was apparentthat such restrictions on freedom **did not serve the public interest, as stated in the Constitution, section 43, paragraph two. In addition, the necessity of sustaining national peace and order shifted and became incompatible with the people's current way of life. Therefore, this was an unnecessary restriction on persons' freedom as protected under the Constitution,** as well as an impediment to the essence of that freedom.

For the reasons stated above, the Constitutional Court ruled by a non-unanimous resolution that the Announcement of the Revolutionary

Council No.45, dated January 17th, 1972, article 3, as amended by the Announcement of the Revolutionary Council No.252, dated November 16th, 1972, clause 1, was contrary to or inconsistent with the Constitution of the Kingdom of Thailand, B.E. 2550 (1997), section 29, paragraph one and section 43, and thus unenforceable under the Constitution.

2. Analysis of the ruling

The Constitutional Court Ruling in this case, in addition to being one of only a few cases[82] that the Constitutional Court decided that acts of state were unconstitutional in restricting freedom of occupation, it is also a case regarding the restriction on freedom by rules that aim to solve immediate problems at the time of enactment. In such cases, it often reveals the controversies to how much weight the Constitutional Court should give to the differences between the circumstances at the time the law was enacted and the time the Constitutional Court decided the case: Should the fact that the Constitutional Court took into account the changing circumstances in which the lawmaker could not predict at the time of enactment be considered as an unnecessary restriction on the discretionary power of the legislature?[83] Although this ruling was about the Announcement of the Revolutionary Council, which was not passed by the legislative branch, so that some distinctions between the two would be inevitable. But, considering the Announcements of the

[82] In addition to the cases in Ruling No.12/2549 (2006), in No.25/2547 (2004), the Constitutional Court ruled that Liquor Act, B.E. 2493 (1950), section 24 and section 26 regarding "alcoholic spirits" which according to the definition of section 4 provides It means fermented rice flour. Only in the part that refers to rice flour, it is a provision of the law that is contrary to or inconsistent with. Constitution section 50 and in Ruling No.13/2563(2020), the Constitutional Court ruled that Local Government Act, B.E. 2457 (1914), section 12 (11) in the part that stipulates that violating the election law is a prohibited characteristic of a person to be chosen as a village headman without classifying the type of action and the severity of the condition according to nature and the circumstances of that action It increases the burden or limits a person's rights more than is reasonable. Therefore, it is contrary to or contrary to the Constitution section 26, paragraph one.

[83] See Worachet Pakeerut, Journal of Law, Year 30, Issue 2, page 188.

Revolutionary Council have been consistently accepted as law, even after the country has already transitioned back to democracy, the ruling would set a precedent like any other rulings. So, when the Constitutional Court ruled that "when considering laws that restrict rights and freedoms of the people recognized by the Constitution, in addition to taking into account the circumstances of the country as well as the people's way of life at the time the law was enacted, it was also necessary to consider the situation of the country as well as the people's way of life when the law is in effect," the Constitutional Court intended to set a standard for following cases on restrictions of rights and freedoms. The author therefore deems it appropriate to regard this ruling as a landmark case. The German Constitutional Court's (BVerfG) rulings will be used comparatively to demonstrate the similarities and differences in such issues.

2.1 *"Ratio legis"* of the law and the changing circumstances after it came into force

This case involves rules that restricted the owner or occupant of a location from selling food or beverages between 1:00 a.m. and 5:00 a.m. unless a permission was obtained. This affected the way of selling food and beverages, which people consider an occupation to earn a living. It was thus reasonable that the Constitutional Court determined that the regulation directly restricted freedom of occupation. This was so apparent that the Court did not need to further elaborate on this point.

The issue that the Constitutional Court viewed as a matter that required careful examination and resolution was whether such restriction on freedom falls under the exceptions as provided by the Constitution. The Constitutional Court began by laying down the principle that **when diagnosing law that restricts the person's rights and freedoms, the circumstances at the time of law enactment must be considered, as well as the circumstances while the law is in force.** The Constitutional Court

then provided different reasons to explain how the announcement of the Revolutionary Council did not meet the conditions outlined in the Constitution. The Court pointed out that the Revolutionary Council's announcement was made with the intention of ensuring that the people did not cause disorder that would jeopardize the country's stability. Therefore, freedom must be restricted to prevent people from being outside of their homes at night, which was difficult to control and monitor and may result in a conspiracy to cause unrest. **This was only necessary during the time when the country was in a period of coup d'etat. However, when the country transitioned back to normality, the situation changed, so the *ratio legis* of the Announcement would no longer stand.** Such restriction on freedom not only restricted opportunities for occupation and imposed unnecessary burdens on the people who engaged in other honest occupations, it was also clear that such restrictions on freedom did not benefit the state's stability or the national economy, public utility protection, maintaining peace and order or good morals of the people, or other purposes as specified in the Constitution, section 43, paragraph two. When the Constitutional Court provided reason that even though the announcement of the Revolutionary Council was necessary at the time the country was in the midst of a coup d'etat, such necessity was no longer applicable when the situation changed. This shows that deciding whether the restriction on freedom is in accordance with the conditions provided by the Constitution, particularly in the light of the reasons for the law's enactment and the necessity of the measures provided in the Act, was a decision based on the proportionality principle. The Constitutional Court would take into account the circumstances while the law was in effect, rather than just those at the time of its enactment. In this sense, it can be considered that in enacting any law, the lawmakers must assess whether the effects of restricting rights and freedoms of such law are proportionate to the benefits that the public will gain. **The condition of future changes**

throughout the period that the law will be in effect must also be predicted.[84]

However, it is impossible to predict future changes with precision. If the later circumstances do not turn out as predicted, it does not mean that the lawmaker did not use his discretion in making a reasonable prediction at the time the law was enacted. In this ruling, the Constitutional Court did not mention the discretion of the authority in weighing reasons and necessity for mandating the Announcement in question. The author cannot therefore analyze how the Court would have ruled, had the Court first determined that the authority did appropriately exercise its discretion and weighed the reasons and necessity in enacting the law, and changes in circumstances, as would later become evident, were beyond a person's ability to predict. Would the Constitutional Court continue to conclude that the mentioned law restricted freedom beyond necessity and was unconstitutional? If that's the case, it would suggest that the Constitutional Court not only aimed to examine the use of discretion by the lawmaker but intended to act on behalf of the legislative branch to consider the reasons and necessity of the law. How the Constitutional Court's applies the principle established in this case, must therefore be closely monitored.

2.2 The German Constitutional Court's (BVerfG) ruling on the proportionality of laws that are no longer necessary.

2.2.1 Recognition of the discretionary power of the lawmaker to exercise its lawmaking power based on proportionality principle

[84] In the Supreme Administrative Court Judgment F. 45/2557 (2014), the Supreme Administrative Court discussed the reasoning for issuing the agency's rules as well, stating that "The issuing of ministerial announcement in question is done with reason, information, facts and supporting law as well as the necessity to solve the problems aforementioned." However, The Supreme Administrative Court did not lay down additional principles that whether and to what extent the agencies should use reason, data, and facts to analyze and predict the future happening and use the results of such analysis to consider the reasons for the necessity of issuing rules.

In its decision on Apotheken-Urteil[85,86], the German Constitutional Court (BVerfG) established a precedent for determining the constitutionality of rules that restrict freedom of occupation based on the severity of the restriction on freedom. The Court has set conditions that can be divided into two categories, namely, conditions in the reasoning for restricting rights, which must primarily protect the public interest from potential dangers, and conditions in the probability of danger to the public if the state does not use measures to restrict such freedom. For the first condition, the German Constitutional Court (BVerfG) used broad phrases, which showed that the Court accepted the lawmakers' discretion in determining which cases were the public interest and the state should enact laws to safeguard or protect from danger.[87] However, for the conditions in the probability of potential danger that may harm the public interest, in the Apotheken-Urteil case, the Court not only examined whether the legislature has reliably exercised its discretion based on accurate information, but also examined the facts in detail to justify the decision that the lawmaker was unable to demonstrate that there was a higher probability that other measures with less severity would be less effective in preventing danger to the public interest than the measures specified. Thus, there are signs suggesting that the Court used discretion in place of the legislative branch.[88]

Later, however, the German Constitutional Court (BVerfG) tended to recognize the lawmaker's discretion, including the predictions about how the law will be needed in the future. The Court would examine whether lawmakers exercised discretion based on complete information and if the justification was reliable. In particular, the Court

[85] BVerfG NJW 1958, 1035

[86] See item A.4.3.2 (a) above.

[87] Scholz, Artikel 12 Grundgesetz, in: Dürig/Herzog/Scholz (ed.), Grundgesetz Kommentar, marginal no.336

[88] Scholz, Artikel 12 Grundgesetz, in: Dürig/Herzog/Scholz (ed.), Grundgesetz Kommentar, marginal no.337

has recognized that the lawmaker with a mission of formulating policies to solve economic and social problems made decisions based on prediction about future developments. Such predictions were naturally constrained. Therefore, the Court may not use post-enactment facts to restrict the lawmaker's discretion at the time of enactment if the lawmaker exercised that discretion based on complete information and a convincing reason has been given.

2.2.2 Precedents on the rulings of the German Constitutional Court (BVerfG) on Mühlengesetz-Urteil

In the case of enacting a law to solve an immediate problem of which the lawmaker is already aware that such problems will only exist temporarily. If later it was discovered that the said problem has been resolved, the German Constitutional Court (BVerfG) did not use the said fact to rule that the law was unconstitutional. As stated in the ruling on Muhlengesetz case,[89] the German Constitutional Court (BVerfG) would assess whether the lawmaker exercised discretion in adequately setting the purposes and chosen measures. The German Constitutional Court (BVerfG) must rule on the legitimacy of the mill law, which was enacted to address economic issues generated by the mill's excess production capacity. The construction of a mill and the growth of manufacturing capacity were banned unless permission was obtained. Permission was granted only when it was required to meet market demand for mill goods. In this case, the lawmakers had predicted at the beginning that this problem would last for just a short length of time. Therefore, the said law has been determined to be ineffective when the specified time has ended. However, laws may be enacted in order to extend the validity of the said law. The ruling of the German Constitutional Court (BVerfG) has laid down the principle that **in considering whether the reasons for enacting a law are constitutional, the Court must give weight primarily**

[89] BVerfG NJW 1969, 499

to the considerations of the lawmaker. The lawmaker must use the information available at the time the law was enacted to weigh the expected impacts of the restriction on freedom against the benefits that will be attained. If later the effects or benefits were not as predicted, that did not mean that such a law was always contrary to or inconsistent with the Constitution. Otherwise, it would be disempowerment of lawmakers in using discretion to predict problems that may arise in the future and determine measures to reduce the impact or prevent such problems from occurring at all. A legislator has a duty to amend or repeal various laws to align with constantly changing circumstances.

In the case of the mill law, lawmakers want to control the mill's production volume in order to maintain market equilibrium and prevent future shortages of consumer goods caused by the closure of various mills due to increased supply, which causes price competition and forces the mill to cease operations. The prediction was based on economic theory and prior experience. The said prediction was done following the economics theory and past experiences. The German Constitutional Court (BVerfG) therefore held that the setting of purposes by the lawmaker was based on reliable information with justified reasons. Moreover, the Court also viewed that determining measures to organize or solve economics problems must consider variable facts. Therefore, lawmakers need to use discretion when selecting and designing appropriate measures. The Court would decide that the measures chosen at the discretion of lawmaker were unnecessary severe measures only if it can be shown to the court that other measures with less severe effects on individual rights and freedoms can achieve the purposes as well. In this case, the petitioner failed to demonstrate that.

The German Constitutional Court (BVerfG) determined that the mill law was intended to temporarily solve the problem. It was not meant to permanently organize occupations. As a result, lawmakers

specified a variety of measures to ensure that the law affected freedoms only to the extent necessary, such as specifying that the law would expire when it was due or mandating a scope review of the provisions. As a result, it shows that lawmaker already considered proportionality principle. However, if the experts later clearly stated that the necessity of the said law has ended, the lawmaker cannot offer reasons for this decision in order to recognize the constitutionality of the said law.

2.2.3 Analysis of the ruling on Muhlengesetz-Urteil case

In the ruling on Muhlengesetzcase, the German Constitutional Court (BVerfG) has clearly laid down the principles. When considering whether or not the lawmaker had valid reasons for enacting the law, and the measures have been determined in accordance with proportionality principle, the Constitutional Court would primarily give weight to **the considerations of the lawmaker at the time the law was enacted.** The Constitutional Court would only examine whether lawmaker used complete information and provided convincing reasons. The German Constitutional Court (BVerfG) stated at the end of the decision that in cases where the expert can clearly point out that the *ratio legis* of the said law has ended, the lawmaker cannot cite reasons in this ruling to recognize the constitutionality of the said law again. However, this does not mean that the Court accepted the use of such reasons to decide that the laws duly enacted in the past are unconstitutional. The Court referred to cases where lawmakers would enact a new law to extend the effective period of the mill law. If the lawmaker has information from experts that the necessity of having a law on mills has ended, the lawmaker cannot refer to the Court's reasoning as shown in this ruling to claim the constitutionality of the new law to be enacted.

Furthermore, in the case of the mill law, the lawmaker had anticipated at the beginning that such measures would be employed for a short length of time only until the problem of oversupply in the market was resolved. The lawmaker, therefore, set the sunset date in the law as

well. The German Constitutional Court (BVerfG) also accepted that the setting of sunset date was already appropriate to the characteristic and purpose of this law. However, the German Constitutional Court (BVerfG) did not state clearly whether or not and to what extent the setting of sunset date of the law related to proportionality of the law. However, it may be inferred that setting a sunset date for the law aimed at solving immediate problems played a part in the effect of restricting an individual's rights and freedoms only to the extent necessary. Therefore, if the mill law was enacted without specifying the sunset date at the beginning, it was probable that the German Constitutional Court (BVerfG) would consider that the lawmakers, who must be aware of the purposes of the said law, did not specify measures to ensure that such a law would result in restrictions on rights and freedoms only to the extent necessary. Therefore, it was considered an abuse of discretion to consider the law "necessary". Alternatively, the Court may consider that the impact of such a law on persons was not limited to cases where the state has a need to maintain the market equilibrium but will continue to have consequences after the aforementioned necessity has ended. The effects of restrictions on rights and freedoms generated by the said law were therefore not proportionate (proportionality in a narrow sense) to public interest that would be derived.

2.3 Summary

In Ruling No.12/2549 (2006) the Constitutional Court ruled that the Announcement of the Revolutionary Council prohibiting persons from selling food or beverages between 1:00 a.m. and 5:00 a.m. was contrary to or inconsistent with the Constitution of the Kingdom of Thailand. When considering the context of the said Announcement, which not only obviously aimed to restrict individual's rights and freedoms, but was also an "order" that denied sovereign power of the people who are holders of the rights and freedoms protected by the Constitution, it cannot be denied that this ruling aimed to protect the rights and freedoms of

individuals in a liberal democracy according to the spirit of the constitution.

However, the circumstances of the country at the time of the coup were not a permanent state. It was just an exception to the normal circumstances of the country. The principles that the Constitutional Court has laid down in various rulings may not only reflect specific characteristics of each case, but rather act as principles appropriate to the situation of the country in normal circumstances. The Constitutional Court's laid down principle in this ruling that when considering the laws that restrict the rights and freedoms of persons guaranteed by the Constitution, etc., the Court must take into account the circumstances of the country as well as the people's way of life **while the law was in effect.** Even though this had a beneficial effect on those affected by the said Announcement of the Revolutionary Council. One should not forget, however, that the ruling will also act as foundation for the exercise of power by the legislature going forward. When considering the law of the legislature, the lawmaker has the duty to predict into the future, when the law will come into force, whether and how the circumstances will change. Furthermore, consideration must be given to the design of measures in the draft law to be proportionate and align with circumstances that may change as well. If we consider that the future is not something that can be accurately predicted by nature, the principles laid down by the Constitutional Court in this ruling may quite substantially restrict the use of discretion by lawmakers. Therefore, whether and to what extent the Constitutional Court would expand or define the principles established in this ruling is worth monitoring.

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Bibliography

Textbooks and academic articles

Banjerd Singkaneti, Basic Principles of Rights, Freedom and Human Dignity, 6th edition, 2019

Pakorn Nilpraphan, Encyclopedia of the Constitution of the Kingdom of Thailand (1997) Rights and freedoms of speech Economy, King Prajadhipok's Institute, 1st edition, 2001

Phadorn Suchiwa, Restrictions on freedom of occupation in the position of juristic person executive according to the convention Combating Transnational Organized Crime 2000, Thesis, Chulalongkorn University, 2002

Worachet Pakeerut, Conditions for enacting laws limiting people's rights and freedoms: "Measures" In controlling and examining the constitutionality of laws, Journal of Law, Year 30, Issue 2, June 2000

Worapoj Wisarutpit, Human rights and constitutional rights and freedoms, in: Constitution 60: 60 years Somkid Lertpaitoon, collection of academic articles on the occasion of the 60th anniversary of Professor Dr. Somkid Lertpaitoon, October Publishing, 2019, page 86

Daiber, Birgit, Verhältnismäßigkeit im engeren Sinne, in: Juristische Arbeitsblätter (JA) 2020, 37-40

Kloepfe, Michael, Verfassungsrecht II – Grundrechte -, München, 2010

Mann, Thomas/Worthmann, Esther-Maria, Berufsfreiheit (Art. 12 GG) – Strukturen und Problemkonstellationen, in: Juristische Schulung (JuS) 2013, 385-392

Pieroth, Bodo/Schlinke, Bernhard, Grundrechte, Staatsrecht II, Heidelberg, 2002

Scholz, Rupert, Artikel 12 Grundgesetz, last editin 2006, in: Dürig/Herzog/Scholz (ed.), Grundgesetz Kommentar, C.H.Beck

Schröder, Ulrich Jan, Der Schutzbereich der Grundrechte, in: Juristische Arbeitsblätter (JA) 2016, 641pp.

Decision of the Constitutional Court of the Federal Republic of Germany (BVerfG)

Ruling of the Federal Constitutional Court of 10 June 1958, Docket No.1BvR 596/56 = BVerfGE 7, 377-444 = BVerfG NJW 1958, 1035 (Apotheken-Urteil)

Ruling of the Federal Constitutional Court of 30 October 1961, Docket No. 1BvR833/59 = BVerfGE 13, 181-204 = BVerfG NJW 1961, 2299

Ruling of the Federal Constitutional Court of 15 December 1965, Docket No. 1BvR13/65 = BVerfGE 19, 342-353 = BVerfG NJW 1966, 243

Ruling of the Federal Constitutional Court of 11 July 1967, Case No. 2BvR 556/66, 2 BvR 567/66, 2 BvR 79/67 = BVerfGE 22, 180-220 = BVerfG NJW 1967, 1795

Ruling of the Federal Constitutional Court of 11 July 1967, Case No. 2BvL 5/64, 1 BvL 14/64, 1 BvL 5/65 = BVerfGE 25, 1-24 = BVerfG NJW 1969, 499

Rulingof the Federal Constitutional Court of 2 October 1973, Docket No. 1BvR 459/72, 1 BvR 477/72 = BVerfGE 36, 47-65 = BVerfG NJW 1974, 30

Ruling of the Federal Constitutional Court of 11 October 1977, copy no.1BvR 343/73, 1 BvR 83/74, 1 BvR 183/75, 1 BvR 428/75 = BVerfGE 47, 1-46 =BVerfG NJW 1978, 877

Ruling of the Federal Constitutional Court of 1 March 1979, Docket No. 1BvR 532/77, 1 BvR 533/77, 1 BvR 419/78 and 1 BvL 21/78= BVerfGE 50, 290-381= BVerfG NJW 1979, 699 (Mitbestimmungsgesetz-Urteil)

Ruling of the Federal Constitutional Court of 8 April 1997, Docket No. 1BvR 48/94 = BVerfGE 95, 267-322 = BVerfG NJW 1997, 1975

Ruling of the Federal Constitutional Court of 26 June 2002, Docket No. 1BvR670/91 = BVerfGE 105, 279-312, BVerfG NJW 2002, 2626 (Osho-Urteil)

Ruling of the Federal Constitutional Court of 26 June 2002, Docket No. 1BvR 558/91, 1 BvR 1428/91 = BVerfGE 105, 252-279, BVerfG NJW 2002, 2621(Glykol-Urteil)

Ruling of the Federal Constitutional Court of 17 March 2004, Docket No. 1BvR1266/00 = BVerfGE 110, 177-199 = BVerfGNVwZ 2005, 797

Ruling of the Federal Constitutional Court of 28 March 2006, Docket No. 1BvR 1054/01; BVerfGE 115, 276-320 = BVerfG NJW 2006, 1261 (Sportwetten-Urteil)

Judgment of the Administrative Court of the Federal Republic of Germany (BVerwG)

Judgment of the Federal Administrative Court of November 4th, 1965, Docket No. I C6/63 = BVerwGE 22, 286

Rights and Liberties of Officials of the State[1]

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1. Introduction

The Constitution of the Kingdom of Thailand, B.E. 2560 (2017), Section 27, paragraph five, stipulates that *"Members of the armed forces, police force, government officials, other officials of the State, and officers or employees of State organizations shall enjoy the same rights and liberties as those enjoyed by other persons, except those restricted by law specifically in relation to politics, capacities, disciplines or ethics."* The recognition of the rights and liberties of individuals in the public sector is not new. This can be seen from the previous constitutions of the Kingdom of Thailand since the 1949 version which had similar provisions.[2] When compared to the Constitution of Germany, it can be seen that the 1949 Constitution of the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland: GG) does not specifically guarantee the rights and liberties of individuals in the public sector. However, it is generally accepted, especially by the Constitutional Court of the Federal Republic of Germany (hereinafter referred to as the "Federal Constitutional Court"), that the protection of fundamental constitutional rights or other rights equivalent to fundamental constitutional rights also extends to individuals in the public sector. In addition to being a member who performs duties in their position using the power of the state for the affairs of the state, such member also has the status of a natural person who has a private life like

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1 The English version is the translation of the original in Thai for information purposes only. In case of any discrepancy (except for the foot note no. 15), the Thai original will prevail.

2 For example, section 45 of the Constitution of the Kingdom of Thailand, B.E. 2492 (1949), section 52 of the Constitution of the Kingdom of Thailand, B.E. 2517 (1974), and section 64 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

other ordinary people[3], and when considering the provisions of Article 17a, paragraph one of the Constitution of the Federal Republic of Germany[4], which specifically provides for the enactment of laws on military service and service or service in lieu of military service to limit some basic constitutional rights of military personnel, it can be concluded on the contrary *(argumentum e contrario)* that the provisions of the fundamental constitutional rights intend to provide comprehensive protection to such members in the state. Otherwise, it would be incomprehensible as to why there must be a provision to limit the rights in accordance with Article 17a, paragraph one. In any event, it can be seen that Article 17a, paragraph one, leaves room to limit some basic constitutional rights of military personnel beyond other ordinary persons. In addition, Article 33, paragraph five of the Constitution of the Federal Republic of Germany[5] stipulates that the traditional principles of the professional civil service (HergebrachteGrundsätze des Berufsbeamtentums) must be taken into account when enacting and developing laws concerning civil service. This stipulation elevates the status of the traditional principles of the professional civil service (Hergebrachte Grundsätzedes Berufsbeamtentums) to the level of being part of the constitution (Verfassungsrang), which may be used as another reason to limit the basic rights of members in the public sector.

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3 Federal Constitutional Court, Ruling 1 BvR 471/10, 1 BvR 1181/10 of 27 January 2015; Battis, 2021, marginal no. 75; Grabenwarter, 2021, marginal no. 149 ff.

4 Grundgesetz für die Bundesrepublik Deutschland Art 17a

(1) Gesetze über Wehrdienst und Ersatzdienst können bestimmen, dass für die Angehörigen der Streitkräfte und des Ersatzdienstes während der Zeit des Wehr- oder Ersatzdienstes das Grundrecht, seine Meinung in Wort, Schrift und Bild frei zu äußern und zu verbreiten (Artikel 5 Abs. 1 Satz 1 erster Halbsatz), das Grundrecht der Versammlungsfreiheit (Artikel 8) und das Petitionsrecht (Artikel 17), soweit es das Recht gewährt, Bitten oder Beschwerden in Gemeinschaft mit anderen vorzubringen, eingeschränkt werden.

5 Grundgesetz für die Bundesrepublik Deutschland Art 33

(5) Das Recht des öffentlichen Dienstes ist unter Berücksichtigung der hergebrachten Grundsätze des Berufsbeamtentums zu regeln und fortzuentwickeln.

2. Summary of Interesting Rulings in Cases Involving the Rights and Liberties of Officials of the State

The Constitutional Court and the Supreme Administrative Court have made rulings on several cases involving the liberty of state officials. Here, four interesting cases will be presented. The first three cases were ruled by the Constitutional Court and the other case was ruled by the Administrative Court. The contents of the cases, including the principles laid down by the two superior courts in the four cases, can be summarized as follows:

The Constitutional Court's Ruling No.24/2546 regarding the Ombudsman's request to the Constitutional Court to consider in accordance with Section 198 of the Constitution on the issue regarding the constitutionality of Section 19, paragraph three of the Military Court Act, B.E. 2498 (1955)

This ruling is a case where the Ombudsman, by the complaint of Sergeant Major First Class Anek Udthiya and Sergeant Major First Class Phanom Thepkiri, requested the Constitutional Court to consider on the issue regarding the constitutionality of Section 19, paragraph three of the Act on the Military Court Act, B.E. 2498 (1955) under the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), which states that in cases where the Provincial Military Court has no power to adjudicate, the Provincial Military Court shall make an opinion and send the case file to the District Military Court or the Bangkok Military Court for adjudication, as the case may be. The Ombudsman, the petitioner, considered that the said section conflicted with Section 236 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) which stipulated that a judge who is presiding over a case cannot make a judgment or decision on that case unless in the event of force majeure or other unavoidable necessities. In accordance with the law, in considering this case, the Judge Advocate General's Department disputed the petitioner's opinion by providing reasons that can be summarized as follows: Section 281 of the

Constitution of the Kingdom of Thailand, B.E. 2540 (1997) guarantees the establishment of military courts and guarantees the power of military courts to consider and adjudicate cases separately, which means that the military must have its own criminal procedure system, different from the system used with civilians. Soldiers are different from ordinary people. They are individuals who have to sacrifice and have their rights and liberties restricted to a certain extent. In cases where the judges see fit to imprison or fine the defendants in excess of the degree stipulated by law, the military court system requires judges from the District Military Court, who are more senior than the judges from the Provincial Military Court, to review the verdict again to ensure that the verdict in the case is more accurate and just. The process under Section 19, paragraph three of the Military Court Act, B.E. 2498 (1955) is therefore a process of filtering the verdicts of the Provincial Military Courts that appear only in the military court of first instance. The District Military Court judges will not interfere with the hearing of the facts that the Provincial Military Court judges were made aware of while considering the case, unless it can be clearly seen that there were deficiencies or mistakes in the hearing that appear in the case record, in which case there will be corrections.

In this case, the Constitutional Court considered and ruled that ***"Section 236 of the Constitution [B.E. 2540 (1997)] provides a guarantee of the rights of the parties in the court proceedings by requiring a full panel of judges to preside over the hearing and the person making the judgment or decision must be the person sitting in the panel. A person not in the panel cannot make a judgment or decision unless in the case of force majeure or other unavoidable necessities. This exception provides that other than a person who is not in the panel of a case cannot make a judgment or decision in that case unless in the case of force majeure or other unavoidable necessities as prescribed by law, the person must also be a judge in the court with the jurisdiction to consider that case."*** And on the

issue of whether Section 19, paragraph three of the Military Court Act conflicts with or contradicts the said section of the Constitution, the Constitutional Court considered and ruled that ***"The Provincial Military Court, the District Military Court, the Bangkok Military Court, and the Military Court of a military unit are all courts of first instances. However, when the Provincial Military Court has conducted the criminal proceedings in accordance with the power granted by the law, if the Court wants to pass a judgment at a higher degree than stipulated by law, it has no power to do so and must submit an opinion and send the case file to the same type of court of first instance, namely the District Military Court or the Bangkok Military Court, whichever is applicable, which is the court that makes the judgment in accordance with Section 19, paragraph three, whereby the District Military Court or the Bangkok Military Court did not initially consider the case in any way. In addition, the explanation from the Department of Justice and Section 19, paragraph three of the Military Court Act, B.E. 2498 (1955), do not contain any provisions of law that state the details of force majeure or other unavoidable necessities in any way. Therefore, this Section 19, paragraph three, conflicts with or contradicts Section 236 of the Constitution."***

The Constitutional Court's Ruling No. 26/2546: The Supreme Court sent the argument of the first defendant (Sergeant Major First Class Sarawut Tharathon) for the Constitutional Court to consider in accordance with Section 264 of the Constitution, of whether Section 10 of the Act on Measures for the Suppression of Offenders in an Offence Relating to Narcotics, B.E. 2534 (1991) conflicts with or contradicts Section 64 of the Constitution or not.

This ruling is a case where the Supreme Court sent the argument from Sergeant Major First Class Sarawut Tharathon, the petitioner, who was one of the defendants in a criminal case, in which

the Criminal Court ruled that the petitioner was guilty under the Psychotropic Substances Act, B.E. 2518 (1975), punishing him for producing a Category II psychotropic substance. Since the petitioner was a government official, the punishment for narcotic-related offences is three times the punishment prescribed for offences under Section 10 of the Act on Measures for the Suppression of Offenders in an Offence Relating to Narcotics, B.E. 2534 (1991). The petitioner believed that the provision that increases the punishment for narcotic-related offenders who are government officials violates Section 64 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), which stipulates that "Members of the armed forces, police force, government officials, other officials of the State, local government officials and officers or employees of State organizations shall enjoy the same rights and liberties under the Constitution as those enjoyed by other persons, except those restricted by law, rules, or regulations that are issued pursuant to the provisions of the law specifically in relation to politics, capabilities, disciplines or ethics." Although the petitioner was a military officer, he has the same rights enjoyed by other persons. If he is to be punished, he should be penalized as other persons would. As the Supreme Court required the said provision to decide on the case, it had submitted the matter to the Constitutional Court to consider whether this provision was constitutional or not.

In this case, the Constitutional Court considered and ruled that ***"Section 10 of the Act on Measures for the Suppression of Offenders in an Offence Relating to Narcotics B.E. 2534 (1991) is a provision that stipulates a greater degree of punishment for narcotic offenders who are members of the committee or subcommittee under the law on narcotics, etc., as well as persons according to Section 64 of the Constitution, namely, members of the armed forces, police force, government officials or other officials of the State, local government officials and officers or employees of State organizations,***

from other persons, which is in accordance with Section 32 of the Constitution, [B.E. 2540 (1997)] that stipulates that "No person shall be inflicted with a criminal punishment unless he or she has committed an act which the law in force at the time of commission provides to be an offence and imposes a punishment therefore..." The punishment under the law must be appropriate to the offence and proportionate to the status, responsibilities of the offender, and the impact on society. The fact that Section 10 of the Act on Measures for the Suppression of Offenders in an Offence Relating to Narcotics, B.E. 2534 (1991) prescribes a different punishment rate for narcotic offenders who are members of the armed forces, police force, government officials or other officials of the State, local government officials and officers or employees of State organizations from other persons is simply a different prescription of the degree of punishment for the offenders. It is not a difference in rights and liberties under the Constitution. Therefore, the provisions of Section 64 of the Constitution, [B.E. 2540 (1997)] and Section 10 of the Act on Measures for the Suppression of Offenders in an Offence Relating to Narcotics, B.E. 2534 (1991) are separate matters, unrelated to each other, and there is no case in which they can conflict." For the above reasons, the Constitutional Court ruled that the provisions of the said sections do not conflict with Section 64 of the Constitution of the Kingdom of Thailand, [B.E. 2540 (1997)].

The Constitutional Court's Ruling No.9/2563 on whether Section 9 of the Civil Service Pension Act (No.5) B.E. 2502 (1959) conflicts with or contradicts Sections 4 and 6 of the Constitution or not.

This ruling is a case that the Central Administrative Court sent the argument of the plaintiff (Colonel Akkarawit or Sutthipong Charoenphon) who filed a lawsuit against the Comptroller General's Department and the Director-General of the Comptroller General's Department requesting

an amendment to the order for the payment of normal pensions by calculating the pension based on the official service time that the plaintiff served in the military until retirement, combined with the official service time that was multiplied according to the Civil Service Pension Act B.E. 2494 (1951), totaling 52 years, 6 months, and 27 days of official service time, which, when calculating the pension using the method according to Section 32 of the Civil Service Pension Act, B.E. 2494 (1951), it would result in a sum higher than the final salary of the plaintiff. However, the Comptroller General's Department and the Director-General of the Comptroller General's Department ordered the payment of a pension to the plaintiff in the amount equal to only his last month's salary. In this regard, the Director-General of the Comptroller General's Department explained that the calculation of such pension is in accordance with Section 32 of the Civil Service Pension Act, B.E. 2494 (1951), together with Section 9 of the Civil Service Pension Act (No.5), B.E. 2502 (1959). Section 9 of the said Act limits the maximum pension amount to no more than the final salary. However, the plaintiff argued that Section 9 of the said Act was enacted because the government had proposed the draft law on civil service regulations and the law on judicial civil service regulations to cancel the temporary additional monthly allowance by including the additional allowance as salary, so the law was amended to be consistent. Unlike the case of the plaintiff, which did not include the temporary additional monthly allowance with the salary and considered it as salary; therefore, Section 9 could not be applied to the plaintiff. In addition, Section 32 of the Civil Service Pension Act, B.E. 2494 (1951) and Section 9 of the Civil Service Pension Act (No.5), B.E. 2502 (1959) are not related and are not in the same law. Therefore, Section 9 could not be applied as a higher hierarchy or as a condition of Section 32 in calculating the pension. In addition, Section 32 of the Civil Service Pension Act, B.E. 2494 (1951) was amended and promulgated in B.E. 2539 (1996), while Section 9 was promulgated in B.E. 2502 (1959).

If the two provisions conflict, the law promulgated later must be applied. In addition, the calculation of double official hours according to Section 24 of the Civil Service Pension Act, B.E. 2494 (1951) is a result of performing duties in an area where martial law has been declared or in a dangerous area, etc. If the official service time is equal to or more than 50 years, the sum of the pension calculation would be more than the last month's salary. The determination of the maximum pension ceiling not exceeding the final salary of Section 9 is therefore a specific limitation of the right to receive pensions for government officials who have been in service for more than 50 years. It is a law that does not have general effect but is intended to be applied to a particular case. Furthermore, the enactment of this Act did not specify the reasons for the necessity of limiting the rights, so it is not in accordance with the conditions stipulated in the Constitution, which is contrary to the rule of law by limiting the rights of individuals beyond what is reasonable. It is also contrary to the principle of equality of individuals who are entitled to receive a pension according to their official service time. Since Section 9 of the Civil Service Pension Act (No.5), B.E. 2502 (1959) was an important provision to decide on the case, the Administrative Court therefore requested the Constitutional Court to rule on whether the provisions of the said Section conflicted with or contradicted Sections 4 and 26 of the Constitution or not.

In this case, the Constitutional Court considered and ruled that ***"Although the provisions of Section 9 of the Civil Service Pension Act (No. 5), B.E. 2502 (1959) limits the rights of individuals, such limitation of rights are appropriate and balanced between public benefits and the rights of government officials who have served the country. They do not affect the normal pension calculated based on actual official service time, which is a basic right that all government officials must receive. They are in accordance with the principle of proportionality and appropriateness and do not***

conflict with the rule of law, human dignity, or individual equality. Furthermore, it is a law that is generally applicable and is not intended to be applied to any specific case or person."
In considering the appropriateness of this restriction of rights, the Constitutional Court saw that, *"The calculation of the "Final Monthly Salary" pension includes monthly special allowances for training fees and/or promotion allowances and/or for positions that require regular danger and/or for combat and/or for suppressing offenders. This is considered a benefit to government officials in return for the state's recognition of the sacrifices that government officials make in performing their duties for a long time and is an allocation of special benefits to enable them to make a living appropriately."*
The restriction of rights by setting a ceiling on pensions in this case is therefore an appropriate restriction that will create a balance between the right to receive compensation of government officials who have left government service with government budget funds and the principle of good fiscal discipline as prescribed by Section 62 of the Constitution as a principle for spending government budget funds.

The Supreme Administrative Court's Judgment, Red Case No. Aor. Bor. 238/2562, Re: Dispute over the issuance of an unlawful order by a government official (Appeal of Judgment)

This judgment arose from a case where the plaintiff, a municipal employee in the position of Disaster Prevention and Mitigation Officer 6Wor., under the Disaster Prevention and Mitigation Division, Administration Division of Chiang Dao Subdistrict Municipality, filed a lawsuit against the Mayor of Chiang Dao Subdistrict Municipality who issued an order not to increase the plaintiff's salary for the first time in the fiscal year 2013 because the plaintiff did not pass the performance and efficiency evaluation and was absent from work without reason for 2 days, even though the first-level commander had evaluated the plaintiff's performance as being at an acceptable level and agreed by the committee for screening

and evaluating the performance of Chiang Dao Subdistrict Municipality employees and the Clerk of Chiang Dao Subdistrict Municipality, but the defendant did not agree and had revised the evaluation to be at a level that needed improvement. The reasons given for the assessment were that the plaintiff did not uphold the discipline of the municipality employees, was not politically neutral in performing official duties during the election period and at that moment, and also sent information to the opposing political party for political gain, behaved inappropriately as a municipality employee, did not comply with government regulations, did not uphold the political etiquette of the municipality employees, did not participate in municipality activities, state ceremonies and traditional events, and was absent from work without reasonable cause, citing the case where the defendant did not allow the plaintiff to take leave for two days in March 2013. In this case, the Administrative Court of First Instance ruled to revoke the order to suspend the salary increase for the plaintiff, as it was viewed that the defendant did not have the authority to evaluate the plaintiff's performance. The issuance of the order was, therefore, unlawful. In addition, the Administrative Court of First Instance found that the substance of the order was incorrect because the plaintiff was not subject to the conditions to receive a salary promotion in the said evaluation round. Firstly, the plaintiff was not absent from work without reason as claimed by the defendant. The plaintiff had applied for business leave on 25 March 2013 to attend to business concerning his child's education on 26 March 2013, which was considered an essential business for the father to pay attention to and help to ensure success for the future security of his child and the Clerk of Chiang Dao Subdistrict Municipality, the plaintiff's superior, considered and was of the opinion that the plaintiff should be allowed to take business leave on that day, indicating that granting the plaintiff business leave did not obstruct his official duties in any way. However, the defendant did not allow the plaintiff to take business leave,

claiming that the plaintiff's wife could manage their child's education by herself. Therefore, it was the defendant's expectation that did not take into account the family institution, especially the duties of a father. In addition, it does not appear that the plaintiff was informed of the order to reject and the reasons behind the discretion to consider rejection from the defendant in any way, which is the reason that the plaintiff had the understanding that permission was granted. The subsequent request for business leave on the next day was because the business that had to be done on 26 March 2013 was not completed. The plaintiff claimed that he had tried to contact his first-level commander but could not, so he submitted a retroactive leave request on 28 March 2013, which was the first day that the plaintiff came to work, but the defendant still issued an order not to permit business leave on 27 March 2013, without any evidence that the defendant called the plaintiff to explain the reasons for the necessity in any way. The denial of leave on the two days mentioned above is therefore an unlawful and unfair decision. It cannot be used as a reason to claim that the plaintiff was absent from work without reason. And secondly, the claim that the plaintiff did not uphold the discipline of municipal employees, was not politically neutral, behaved inappropriately as a municipal employee, did not comply with government regulations, did not uphold the political etiquette of municipal employees, and did not participate in municipal activities, state ceremonies and traditional events, there is no evidence to support such claim. Plus, the defendant's claim that the plaintiff is a political opponent of the defendant without any evidence to support it shows the defendant's bias towards the plaintiff. Such claim is, therefore, unacceptable.

The defendant later appealed to the Supreme Administrative Court and the Supreme Administrative Court reversed the judgment of the Administrative Court of First Instance and dismissed the case because

the Court viewed that the defendant, who was the mayor, had the authority to order a salary increase as he saw fit without having to be bound by the opinion of the first-level commander. In terms of absence from official duties, it was considered that although the plaintiff's child's education was an important family business, it was not necessary for both parents to be absent at the same time. Either the father or the mother can manage the business related to the child's education, whereby the defendant had already permitted the plaintiff's wife to take business leave on that day. Furthermore, as the said business was not a necessity, the fact that the defendant did not permit the plaintiff's business leave the following day was a proper exercise of discretion because the reason for the absence was without proper reason. The order to suspend the salary increase in the evaluation round was therefore lawful. However, the Supreme Administrative Court also considered the reason of the plaintiff's political neutrality, which the defendant had also cited as a reason for evaluating the plaintiff's performance, and held that, ***"The fact that the plaintiff favored the political party opposing Mr. Sakchai Hantrakul, the winner of the election for mayor of Chiang Dao Subdistrict Municipality, and testified against the Election Commission to object the election results is merely a difference of political opinion, and it is the plaintiff's right to give a statement to the Election Commission about the election results, but it is not an act that violates the prohibition according to the Cabinet Office Regulation [on the political etiquette of government officials dated 16 March B.E. 2499 (1956)] above. In this case, it cannot be considered that the plaintiff did not maintain the discipline of municipal employees regarding political neutrality, behaved inappropriately as a municipal employee, and did not have political etiquette as claimed by the defendant."***

3. Analysis

(1) Analysis of the Constitutional Court's Ruling No.24/2546

In the part of the constitutional cases, it can be seen that in the Ruling No.24/2546, the Constitutional Court of the Kingdom of Thailand ruled to confirm that the Constitution of the Kingdom of Thailand at that time did not protect the rights of the parties to receive a judgment from the judges presiding over the case (Section 236 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997)) only for the general public in the process of the courts of justice. But the said right also protected members of the armed forces in the process of the trial of the military court. In the consideration, although it was claimed that *"The constitution guarantees the existence of military courts and guarantees the power to try cases separately (Section 281 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997))"* and claims that *"members of the armed forces" are individuals with different characteristics from ordinary people, where they must sacrifice and have their rights and liberties restricted to a certain extent."* But from the ruling of the Constitutional Court, it shows that even so, the restriction of the rights and liberties of members of the armed forces to be different from other ordinary people must be reasonable. It can be seen that in the consideration of the case, the Judge Advocate General's Department, which gave an opinion opposing the petition, was only able to claim that *"Members of the armed forces must be in the status of individuals under the jurisdiction of the military court, therefore, they must have a system of governance and control that is different from ordinary citizens."* However, no reason was given as to why it should be different. Being a person who has to sacrifice more for the country than others does not show the necessity for members of the armed forces to give up their constitutional right to be adjudicated only by the presiding judges. Because the protection of such constitutional rights is based on the reason stated by the Ombudsman who filed the petition that "the judge(s)

presiding are the people who have directly seen, heard, or learned about the facts, messages, information and evidence in the case and also has the opportunity to cross-examine the parties and witnesses, which enable them to thoroughly understand the facts in the case." In particular, in considering the credibility of witnesses and those involved from their actions and expressions in court.[6] It can be seen that the reasons for the necessity for the Constitution to protect such rights are reasons that arise, exist and are applicable both in the trial process in the courts of justice for ordinary people and in the trial process in the military court for people who are members of the armed forces without the slightest difference. In addition, this ruling by the Constitutional Court is also in accordance with Section 64 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) (currently Section 27, paragraph five, with slightly different wordings), which stipulates that members of the armed forces shall enjoy the same rights and liberties under the Constitution as those enjoyed by other persons, except those restricted by law, etc., that are issued pursuant to the provisions of the law specifically in relation to politics, capabilities, disciplines or ethics.

Looking at this case from the perspective of German constitutional law, it can be seen that Article 17a of the Constitution of the Federal Republic of Germany leaves room for provisions in the law on military service and service or alternative military service to further restrict the freedom of soldiers. This provision could be interpreted as giving the legislature power to limit the rights and liberties over military personnel above or different from other individuals. However, Article 17a only allows such action to be taken against three fundamental constitutional rights: (1) freedom of expression (Article 5, paragraph one, first half of the first sentence); (2) freedom of assembly (Article 8); and (3) the right to file appeals (Article 17), specifically in the part that

[6] Federal Supreme Court, Ruling no. 4 StR 440/87 of 17 December 1987.

provides for the right to file a collective petition or complaint against other persons. Therefore, considering only this provision, under the German constitution, the constitutional rights concerning the court proceedings (Prozessgrundrechte) of military personnel cannot be limited differently from those of other individuals, and upon consideration of their constitutional case, it can be seen that the Federal Constitutional Court (without referring to Article 17a) has ruled in a similar manner. That is, it ensures that the constitutional rights related to court proceedings (Prozessgrundrechte) also protect military personnel in disciplinary cases that are also subject to the jurisdiction of military courts. For example, in its Ruling No. 2 BvR 993/94 on 14 June 2000, in that case, the Federal Constitutional Court stated at the beginning of its ruling as a principle that, *"Article 2, paragraph one, of the Constitution of the Federal Republic of Germany, together with the rule of law, guarantees a general right in relation to judicial proceedings to a fair trial. The right to a fair trial accepted by the courts is a general principle applicable in all procedural law in judicial proceedings."* However, the constitutional right related to that court proceeding was not the right of the parties to have their case adjudicated by the presiding judges like in the ruling no. 24/2546 of the Constitutional Court of the Kingdom of Thailand. It is also interesting to note that the principle that the judges deciding the case must normally be the presiding judges, the examiner of evidence, and the person who uses his/her senses to perceive the evidence by themselves (Grundsatz der formellenUnmittelbarkeit)[7] is a principle that is accepted in many German procedural laws, such as the German Criminal Procedure Code (Article 226, paragraph one), the German Civil Procedure Code (Article 128, paragraph one; Article 355, paragraph one, Article 309), and the German Code of Administrative Procedure (Article 96, paragraph one, sentence one; Article 112);

[7] Fischer, 2019, marginal no. 20; Musielak, 2021, marginal no. 47 f.

however, this principle in itself is not recognized as a constitutional right.[8] If compared with the Constitution of the Kingdom of Thailand, it can be seen that the Constitution of the Kingdom of Thailand, B.E. 2560 (2017) also does not recognize this right as a constitutional right.

(2) Analysis of the Constitutional Court's Ruling No.26/2546

In this case, the Constitutional Court Rulings can be summarized that the determination of a greater degree of punishment for certain groups of government officials, such as members of the armed forces, police, government officials, or other officials of the State, from other individuals, does not conflict with the provisions that guarantee that government officials have the same rights and liberties as other individuals (provisions of Section 64 of the Constitution [B.E. 2540 (1997)] or the provisions of Section 27, paragraph five of the current Constitution). The reason briefly given is that *"It is simply a different prescription of the degree of punishment for the offenders, not a difference in rights and liberties under the Constitution. Therefore, the provisions of Section 64 of the Constitution [B.E. 2540 (1997)] and Section 10 of the Act on Measures for the Suppression of Offenders in an Offence Relating to Narcotics, B.E. 2534 (1991) are separate matters, unrelated to each other. There is no case in which they can conflict with or contradict each other."* The Constitutional Court referred to the provisions of Section 32 of the Constitution [B.E. 2540 (1997)] (the provisions of Section 29, paragraph one of the current Constitution), which stipulates that, *"No person shall be subject to criminal punishment unless he or she has committed an act which the law in force at the time of commission provides to be an offence and prescribes a punishment therefore..."* It further explains that *"the punishment under the law must be appropriate to the offence and proportionate to the status, responsibilities of the offender and the impact on society."* From the

[8] Federal Constitutional Court, Ruling No. 2 BvR 2300/07 of 30 January 2008, Bach, 2021, marginal no. 2.

above judgment, it can be seen that the Constitutional Court considered the *nullapoena sine lege* principle, which can be simply translated to *"no punishment without law".* In this case, Section 10 of the Act on Measures for the Suppression of Offenders in an Offence Relating to Narcotics B.E. 2534 (1991) is a law that provides that many groups of people in the government sector must receive a greater degree of punishment than the general public if they commit an offence. This shows that since a law has been established, punishment can be given according to the law, without violating the *nullapoena sine lege* principle of the Constitution in any way. The consideration in this section is reasonable, but what is interesting is the additional explanation that shows that the Constitutional Court understands that the determination of punishment according to the law must take into account many elements. For example, the offence and proportionality to status, etc., but that does not prevent the Constitutional Court from ruling in the manner that the difference in the degree of punishment is not a difference in rights and liberties, they are two separate and unrelated matters, which the further explanation and conclusion in the ruling are very contradictory in themselves. Because the determination of punishment according to the law does not only mean determining whether an action is punishable or not (das Ob), but also means determining what kind of punishment there is (das Wie), which includes the degree of punishment as well. The reason for the author's opinion on this issue is in the explanation of the Constitution itself, which explains that in determining the punishment, in addition to considering the offence, it must also consider proportionality to the status, etc. Another issue is that the principle of determining punishment under the law must consider the offence, proportionality to the status, the offender's conscience and the impact on society, etc., also comes from the Constitution itself, especially from "human dignity", which is something that the Constitution of the

Kingdom of Thailand, B.E. 2560 (2017) guarantees and protects in Section 4 and is considered an important part of other constitutional rights and liberties of individuals in many respects.[9] Therefore, it may be too early and unreasonable to conclude that the determination of the degree of punishment and rights and liberties are separate matters.

From the perspective of German constitutional law, the determination of punishment, including the determination of the degree of punishment, must take into account not only the *nullapoena sine lege* principle (Article 103, paragraph 2 of the Constitution of the Federal Republic of Germany[10]), but also the *nullapoena sine culpa* principle, which can be simply translated as "no punishment without guilt", or more briefly, the principle of guilt (Schuldprinzip). The Federal Constitutional Court has accepted and elevated the principle of guilt (Schuldprinzip) to the status of an integral part of the Constitution (Verfassungsrang) because the Court considers that the principle is based on the principle of material justice (Materielle Gerechtigkeit), which is part of the rule of law (Rechtsstaatsprinzip), an important principle of the Constitution.[11] According to the principle of material justice, the determination of the elements and the legal consequences must be proportionate.[12] At the same time, the principle of guilt (Schuldprinzip) has its essential roots in human dignity (Article 1, paragraph 1 of the Constitution of the Federal Republic of Germany[13]) and human responsibility (which forms part of the general freedom of action enshrined in Article 2, paragraph 1 of the

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9 Compare Herdegen, 2021, marginal no. 26.

10 Grundgesetz für die Bundesrepublik Deutschland Art 103

(2) Eine Tat kann nur bestraft werden, wenn die Strafbarkeit gesetzlich bestimmt war, bevor die Tat begangenwurde.

11 Federal Constitutional Court, Ruling No. 2 BvR 506/63 of 25 October 1966.

12 Ibid.

13 Grundgesetz für die Bundesrepublik Deutschland Art 1

(1) Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.

Constitution of the Federal Republic of Germany[14]).[15] The principle of guilt (Schuldprinzip) is based on the initial idea that *"Those who can be punished must be those who have committed evil acts."*[16] This initial idea is based on the idea that *"Humans who are able to determine their own actions and can exercise their liberty in their own desires to decide whether to do what is right or wrong must be held responsible for their actions."*[17] The protection of human dignity is based on the initial idea that *"Humans are living beings with souls and morals, and these characteristics aim to allow humans to have the freedom to determine and improve themselves."*[18]

In addition to the constitutional law, it can be seen that the principle of guilt (Schuldprinzip) is also stipulated in Article 46, paragraph one, first sentence of the German Criminal Code.[19] The said Article stipulates that the wickedness of the offender is the basis for determining the degree of punishment. However, since the principle of guilt (Schuldprinzip) is a principle that comes from the three main principles and freedoms of the Constitution as mentioned above, especially human dignity, which is the highest guarantee of the Constitution that binds the powers of the state in all branches, legislative, executive and judicial (Article 1, paragraphs one and three of the Constitution of the Federal

[14] Grundgesetz für die Bundesrepublik Deutschland Art 2
(1) Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.

[15] Federal Constitutional Court, Ruling No. 2 BvR 1041/88, 2 BvR 78/89 of 3 June 1992.

[16] Federal Constitutional Court, Ruling No. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 of 30 June 2009.

[17] Ibid.

[18] Ibid.

[19] Strafgesetzbuch (StGB) § 46 Grundsätze der Strafzumessung
(1) Die Schuld des Täters ist Grundlage für die Zumessung der Strafe.

Republic of Germany[20]). Therefore, regardless of whether such a principle is established in a subordinate law such as the Criminal Code, it is binding on the three powers of the state. As a result, in the legislation prescribing the punishment and the degree of punishment, including the types and ranges of penalties, the legislature cannot be arbitrary, but must take into account the material and volume of injustice (Unrechtsgehalt) and the material and volume of guilt (Schuldgehalt) present in each criminal offence.[21] The elements of the offence (of which guilt (Schuld) is one of the main elements of criminal acts in German criminal law) and the legal consequences must be proportionate.[22] If considering the above Thai constitutional case from the perspective of German constitutional law, it can be seen that the determination of the degree of punishment is a matter directly related to the rights and liberties, namely human dignity, which is the foundation of other constitutional rights and liberties.

The next issue to be considered is whether the imposition of a greater degree of punishment on public officials, such as members of the armed forces, government officials, etc., in narcotic cases is in accordance with and subject to the principle of guilt (Schuldprinzip). When considering criminal cases in German justice courts involving acts committed by government officials, it is found that the Federal Supreme Court has held that *"The defendant's professional status can be used as a reason for imposing a greater degree of punishment only if that status gives rise to a special duty, and the breach of that special duty must have a significant bearing on the offence under consideration"*

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[20] Grundgesetz für die Bundesrepublik Deutschland Art 1

(1) Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtungaller staatlichen Gewalt. ...

(3) Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht.

[21] Kinzig, 2019, marginal no. 40.

[22] Ibid.

and *"where the offence took place within the defendant's private life, the duties arising from his profession can be used as a reason for imposing a greater degree of punishment only if the defendant's occupation and the offence are intrinsically related to each other in a way that increases the severity of the offence"*[23]. For example, in the case where the Minister of Justice discloses state secrets that is received from reports from the Office of the Attorney General without his having the right to disclose such secrets[24], etc. However, the relationship between duty and offence in such a manner does not occur in every case. For example, in the case of a civil servant or military personnel whose duty is to do administrative work and consumes or provides narcotics to others outside of work hours, the capacity of such person does not create a duty related to the offence that would indicate greater evil and render that person to commit an offence within their capacity as a government official and would not cause that person to receive a greater degree of criminal punishment beyond that of other ordinary persons.

The duties that must be distinguished from special duties, where the commission of an offense demonstrates an escalation of malevolence, are those arising from the status of being a public official or a person in the public sector, who typically has specific responsibilities of their own. In particular, the duty not to break the law as such person's breach of the law may undermine the trust and confidence of the state, the employer, and may undermine the trust and confidence of the general public in allowing such person to continue their government duties.[25] However, the arrangement for government officials to perform their duties arise from being government officials, including dealing with breaches of duty, is a specific duty of the disciplinary law.[26] Therefore,

[23] Federal Supreme Court, Ruling No. 2 StR 500/86 of 29 April 1987; Ruling No. 3 StR 575/96 of 28 January 1998.

[24] Federal Supreme Court, Ruling No. 1 StR 83/08 of 16 April 2008.

[25] Compare Federal Administrative Court, Ruling No. 2 C 25/17 of 17 November 2017.

[26] Jarass, 2020, GG Art. 33 marginal no. 88.

according to German law, if a government official or military personnel commits an offence relating to narcotics, it may result in a greater degree of punishment from ordinary people. That is, they may be subject to both criminal and disciplinary punishments.[27] However, the determination of a greater degree of punishment for members of the armed forces, government officials and other persons in the government sector from ordinary persons based solely on their civil servant status or their status as government officials is unlikely to be in accordance with the principle of guilt (Schuldprinzip). As a result, such actions by the legislature are inconsistent with human dignity, human responsibility, and the rule of law as stipulated in the Constitution.

(3) Analysis of the Constitutional Court's Ruling No.9/2563

For the calculation of the pensions to be paid by the state to government officials who have retired under Article 33, paragraph five of the Constitution of the Federal Republic of Germany stipulates that the enactment or development of laws related to civil service, including the calculation of pensions, shall take into account the traditional principles of the professional civil service (HergebrachteGrundsätze des Berufsbeamtentums). The Federal Constitutional Court has defined the term *"the traditional principles of the professional civil service (HergebrachteGrundsätze des Berufsbeamtentums)"* as follows, *"The essential structural principles that have generally or largely been accepted as binding or have been observed over a long period of time, a period of time that had formed a tradition, which at the very least has been accepted as binding or observed under the Constitution of the Weimar Republic."*[28] In terms of enacting or developing laws on the calculation of pensions, Article 33, paragraph 5 of the Constitution of the Federal Republic of Germany provides the legislature with a fairly

[27] Weber, 2017, marginal no. 1787 ff.

[28] For example, Federal Constitutional Court, Ruling No. 2 BvR 1387/02 of 27 September 2005.

broad freedom to create provisions, but there is a significant limitation on the principle of Alimentation (Alimentationsprinzip). According to this principle, the state as an employer has a duty to provide appropriate financial support to government officials and their families throughout their lifetime, and has a duty to provide government officials with a living allowance that is appropriate and commensurate with their civil service positions, which must be consistent with their positions, the responsibilities related to their civil service positions, the importance of their civil service careers to the public, the general development of the economic and financial situation, and the general standard of living.[29] In addition, the calculation of pensions is based on the principle that it must normally be calculated on the basis of all salaries that the government officials received in their last positions and must be in accordance with the principle of performance (Leistungsprinzip), that is, the amount of pension to be received must reflect the official service time.[30] These principles have been ruled by the Federal Constitutional Court as part of the traditional principles of the professional civil service (Hergebrachte-Grundsätze des Berufsbeamtentums) according to Article 33, paragraph five of the Constitution of the Federal Republic of Germany.[31] It can be seen that these principles, especially the principle of Alimentation (Alimentationsprinzip), are principles that must take into account the context that changes according to the situation at each period of time. Therefore, government officials have no right to demand that any legal provisions related to the calculation of salary or pensions that are in effect during the period when such government officials become government officials or retirees remain unchanged.[32] However, the duty of the state to provide pensions to government officials does not originate from the

[29] The Federal Constitutional Court, recently cited.
[30] Ibid.
[31] Ibid.
[32] Ibid.

principle of social state (Sozialstaatsprinzip), and is therefore different from the duty under the principle of social state (Sozialstaatsprinzip) in which the state must help individuals in society to receive the minimum necessary for their lives in terms of security and social standards.[33] Thus, in fulfilling its duty to pay pensions to pensioned government officials, the state cannot reduce the pension amount simply on the basis of its own economic capacity, an assessment of political necessity, or the size or scope of its efforts to comply with the principle of social state (Sozialstaatsprinzip).[34] This means that the law cannot be amended to reduce pensions only on the grounds that the state is trying to save money, but there must be other accompanying reasons, which are inherent in the pension system and can justify the reduction.[35]

Considering the substance of the Constitutional Court Ruling No. 9/2563 with the principles of German Constitutional law, it can be seen that the determination of the maximum person ceiling for pensions to be paid to retired government officials to not exceed the final salary, is consistent with the principle that requires the use of all salaries that government officials received in their last positions as the basis for calculation. Moreover, it does not violate the principle of performance (Leistungsprinzip) because at the very least, the calculation takes into account the actual length of service of each government official. Although, there is a reason to reduce the state's expenses according to fiscal and financial discipline in determining the maximum ceiling for the pensions to be paid to retired government officials, there is also a reason in the salary and pension system for government officials itself. That is, the changes in the Civil Service Regulations and the law on judicial civil service regulations to cancel the temporary additional monthly allowance by including the additional allowance as salary, necessitated the

[33] Ibid.
[34] Ibid.
[35] Ibid.

establishment of a maximum ceiling for pensions, which, when considered in accordance with the German Constitution, should still be a sufficient and justifiable reason to limit the rights of pensioned government officials by setting such a maximum ceiling. Although the plaintiff in the case claimed that such reasoning did not apply to him because he was not a civil servant or a judicial officer and in his case, did not include the temporary additional monthly allowance with the salary and considered it as salary; in any event, if the maximum ceiling for pensions to be paid to pensioned government officials is not set to not exceed the final salary, a strange phenomenon may occur, namely, pensioned government officials who have left their civil service would receive a pension in an amount greater than the salary they received during their last day of service. Considering the principles of German constitutional law, this phenomenon may not be consistent with the principle that requires the total salary received by government officials during their last service as the basis for calculation. Therefore, the result obtained, from the perspective of German constitutional law, is the same as the ruling of the Constitutional Court of the Kingdom of Thailand.

Another thing to note is that when considering the Constitutional Court's ruling, especially in the part where the Constitutional Court commented that *"The calculation of the "final salary" pension includes special monthly allowances for academic fees and/or promotion allowances and/or position allowances that require regular exposure to danger and/or for combat and/or for suppressing offenders. This is considered as providing benefits to government officials in which the state recognizes the sacrifices government officials make in performing their duties for a long period and is an allocation of special benefits so that they can live appropriately."* It can be seen that such comment is similar to the Alimentation principle (Alimentationsprinzip), which is an important principle in determining salaries and pensions under the German Constitution.

(4) Analysis of the Supreme Administrative Court's Judgment, Red Case No. Aor. Bor. 238/2562

When studying the details of the ruling of this case, it can be seen that in considering whether the mayor can use discretion to decide to allow his subordinate municipal employee to take leave to engage in personal business or not, both the Administrative Court of First Instance and the Supreme Administrative Court considered by taking into account the family rights of the said municipal employee, which are protected under Section 32, paragraph one of the Constitution of the Kingdom of Thailand. In considering this issue, the Administrative Court of First Instance considered that the exercise of discretion to not permit business leave did not take into account the family institution, especially the duties of a father. The fact that the commanding officer (the defendant) claimed that the wife of the municipal employee (the plaintiff) could manage the education of the child alone was merely speculation. However, on this issue, the Supreme Administrative Court held a different opinion, believing that the defendant had weighed the plaintiff's personal interests against the interests of the government and the public interests of the people in the municipality, which was a proper exercise of discretion.

From the perspective of German law, an order permitting or denying leave for government officials, is an administrative order (Verwaltungsakt)[36]. In exercising discretion to issue an administrative order, the person issuing the order, as the person exercising state power, which in this case is the executive power, is bound by fundamental constitutional rights in accordance with Article 1, paragraph three of the Constitution of the Federal Republic of Germany.[37] The exercise of discretion must therefore take into account the relevant constitutional

[36] Ansbach Administrative Court, Ruling No. AN 1 K 15.00797 of 25 August 2015.

[37] Grundgesetz für die Bundesrepublik Deutschland Art 1

(3) Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechts prechung als unmittelbar geltendes Recht.

rights and liberties. In cases where the leave is for officers of employees of state organizations who are employed under an employment contract, the order to permit or deny leave is not considered an administrative order (Verwaltungsakt) but rather a decision of the government as the employer (through the person performing the duties of a supervisor) which must comply with the principles of private law employment contracts.[38] Article 7, paragraph 1, sentence 1 of the Federal Holidays Act (Bundesurlaubsgesetz) stipulates, *"In determining the holiday period, the employee's need for taking leave shall be taken into account, unless there are urgent reasons related to the company's interests or the need for taking leaves of other employees who, given social considerations, deserve a prior leave."*[39] Therefore, in determining the holiday period or the permission or deny of leave, the employee's desires must be taken into account. However, in private law relations, fundamental rights provided for in the Constitution do not directly apply. But according to the understanding of German constitutional law, fundamental rights do not only protect individuals from infringement by the state but are also the foundation of the value order of the Federal Republic of Germany.[40] Therefore, the influence of fundamental rights spreads to all other areas of law, including private law, through statutory provisions that are stated in broad general terms (Generalklausel)[41]. For example, Article 242 of the German Civil Code provides for the principle of Treu und Glauben, which can be simply translated as the principle of good faith and honesty or

[38] Spinner, 2020, marginal no. 119.

[39] Mindesturlaubsgesetz für Arbeitnehmer (Bundesurlaubsgesetz) § 7 Zeitpunkt, Übertragbarkeit und Abgeltung des Urlaubs

(1) Bei der zeitlichen Festlegung des Urlaubs sind die Urlaubswünsche des Arbeitnehmers zu berücksichtigen, es sei denn, daß ihrer Berücksichtigung dringende betriebliche Belange oder Urlaubswünsche anderer Arbeitnehmer, die unter sozialen Gesichtspunkten den Vorrang verdienen, entgegenstehen.

[40] Federal Constitutional Court, Ruling No. 1 BvR 400/51 of 15 January 1958; Voßkuhle/Kaiser, p.411 f.; Schubert, 2019, marginal no. 53.

[41] Ibid.

can be translated to the good faith principle. The Article stipulates that *"The debtor is obliged to perform his obligations in a manner determined by Treu and Glauben, taking into account the business practices for the particular transaction (Verkehrssitte)."*[42] For the word Treu, if to translate it according to its meaning, it could be translated as the expression and attitude towards others which originate from being a reliable and trustworthy person (Zuverlässigkeit), behaving in accordance with our inner beliefs or being a real person (Aufrichtigkeit) and being thoughtful towards others.[43] As for the word Glauben, it means trusting in the expression or attitude. Therefore, the combination of the words Treu and Glauben is the introduction of social ethical values to the law.[44] One of these values is fundamental constitutional rights, which is considered the most important core value as mentioned above. Therefore, the employer's duty to comply with Article 7, paragraph 1, sentence 1 of the Federal Holiday Act (Bundesurlaubsgesetz) in conjunction with Article 242 of the German Civil Code (BürgerlichesGesetzbuch) in determining the employees' holiday period, the employer must take into account the fundamental constitutional rights involved. If considering the role of the court, in the case where lawsuits are filed, as the court is exercising state power and has the duty to uphold the fundamental constitutional rights in accordance with Article 1, paragraph 3 of the Constitution of the Federal Republic of Germany, the court also has the duty to protect such fundamental rights (StaatlicherSchutzauftrag/ Staatliche Schutzpflicht).[45]

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[42] Bürgerliches Gesetzbuch (BGB) § 242 Leistung nach Treu und Glauben
Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.

[43] Grüneberg, 2018, marginal no. 6.

[44] Ibid.

[45] Federal Constitutional Court, Ruling No. 1 BvF 1 - 6/74 of 25 February 1975; Federal Labor Court, Ruling No. 6 AZR 563/18 of 19 December 2019; Schubert, 2019, marginal no. 54.

In considering the case on the issue of determining the holiday period or whether the permission or deny of leave is consistent with the provisions of the law or not, the court must take into account the fundamental rights of the employer and the fundamental rights of the employee or other constitutional rights or principles and strike a balance between these conflicting rights (HerstellungpraktischerKonkordanz).[46] However, the context of each case must be considered. Considering the case of Red Case No. Aor. Bor. 238/2562 of the Supreme Administrative Court from the perspective of German law, it can be seen that the refusal to grant leave may still be within the scope of proper discretion because the person who denied leave had taken into account the person taking leave's rights relating to family or family institution (Article 6, paragraph one of the Constitution of the Federal Republic of Germany). It considered that the wife of the person taking leave could solely manage their child's education and the leave application was submitted by the person taking leave only one day prior to the leave date. When considering that in conjunction with the person taking leave's position as a Disaster Prevention and Mitigation Officer 6Wor., under the Disaster Prevention and Mitigation Division, which is an important position in the event of an emergency and emergencies may occur at any time. In this case, the duty to the employer and the duty to the public may be more important than the duty of the father to the child, which is consistent with the ruling of the Supreme Administrative Court.

As for the reasoning in the judgment regarding the right to express opinions, although municipal employees must perform their duties with political neutrality according to the Cabinet Office Regulation on the Political Etiquette of Government Officials dated 16 March, B.E. 2499 (1956), but in this case, when considering the actions of the municipal employee who filed the lawsuit, both the Administrative Court of First

[46] For the principle of balancing (Grundsatz praktischer Konkordanz), compare only Jarass, 2020, Vorbemerkungen vor Art. 1: Allgemeine Grundrechtslehren, marginal no. 53.

Instance and the Supreme Administrative Court found that there was no evidence of impartial behavior. The Supreme Administrative Court clearly ruled that the plaintiff's support for a political party opposing the person who won the mayoral election and went to testify against the Election Commission to object to the election results was a difference of political opinion and it was the plaintiff's right to give a statement to the Election Commission about the election results.

When considering German law, in the Federal Republic of Germany, individuals such as government officials, officers or employees of state organizations, in addition to having the status of government personnel, also have the status of individuals. Therefore, they are protected in terms of freedom of thought under Article 5, paragraph one, first half of the first sentence of the Constitution of the Federal Republic of Germany, which states that *"Everyone has the right to express and disseminate his or her opinions by speech, writing and images."*[47] However, such public sector personnel also have the duty to be politically neutral (for example, Article 60 of the Federal Civil Service Act (Bundesbeamtengesetz)[48]), where the duty to be neutral (Neutralitätspflicht) has its main origins from democracy, as per Article 20, paragraph two of the Constitution of the Federal Republic of Germany.[49] It stipulates

[47] Grundgesetz für die Bundesrepublik Deutschland Art 5

(1) Jeder hat das Recht, seine Meinung in Wort, Schrift und Bild frei zu äußern und zu verbreiten ...

[48] Bundesbeamtengesetz (BBG) § 60 Grundpflichten

(1) Beamtinnen und Beamte dienen dem ganzen Volk, nicht einer Partei. Sie haben ihre Aufgaben unparteiisch und gerecht zu erfüllen und ihr Amt zum Wohl der Allgemeinheit zu führen. Beamtinnen und Beamte müssen sich durch ihr gesamtes Verhalten zu der freiheitlichen demokratischen Grundordnung im Sinne des Grundgesetzes bekennen und für deren Erhaltung eintreten.

(2) Beamtinnen und Beamte haben bei politischer Betätigung diejenige Mäßigung und Zurückhaltung zu wahren, die sich aus ihrer Stellung gegenüber der Allgemeinheit und aus der Rücksicht auf die Pflichten ihres Amtes ergeben.

[49] Wissenschaftliche Dienste des Deutschen Bundestages, 2019, p. 4.

that *"all state power shall derive from the people, and shall be exercised by the people in elections and by voting, and through special legislative, executive and judicial organs."*[50] When the power of the state originates from the people, the creation of political will must go in the same direction, starting from the people up to the state organizations, with political parties as the link to help create the political will of the people in accordance with Article 21, paragraph one, first sentence of the Constitution of the Federal Republic of Germany.[51] Therefore, in order to prevent the creation of political will in the opposite direction, that is, from the state to the people, the state must remain politically neutral, resulting in government personnel who are exercising state power having to remain neutral as well.[52] However, as mentioned earlier, Article 5, paragraph one, first half of the first sentence of the Constitution of the Federal Republic of Germany also protects the freedom of opinion of such government personnel. Therefore, such personnel can have and express their own political opinions as well, but they must be within a more limited scope than others. However, the extent of the limitation depends on the situation and the surrounding context. For example, while performing official duties, government officials or officers may be more limited in their freedom of expression than expressing opinions outside of official duties while living their lives as ordinary people.[53]

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[50] Grundgesetz für die Bundesrepublik Deutschland Art 20

(2) Alle Staatsgewalt geht vom Volke aus. Sie wird vom Volke in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausgeübt.

[51] Grundgesetz für die Bundesrepublik Deutschland Art 21

(1) Die Parteien wirken bei der politischen Willensbildung des Volkes mit.

[52] Federal Constitutional Court, Ruling No. 2 BvE 1/76 of 2 March 1977; Ruling No. 2 BvE 2/14 of 16 December 2014; Wissenschaftliche Dienste des Deutschen Bundesstages, 2019, p. 4 ff.

[53] Masuch, 2021, p. 521 ff.; Wissenschaftliche Dienste des Deutschen Bundestages, 2019, p. 5.

If considering the judgment of the Supreme Administrative Court, Red Case No. Aor. Bor. 238/2562, it is consistent with the idea of German law, namely, the Supreme Administrative Court did not see that the political differences of the municipal employee were not politically neutral, which shows that the court respected the political freedom of thought of the municipal employee. As for the part where the court saw that giving testimony against the Election Commission to object to the election results was a right, it is noted that such testimony may not be just a right, but a citizen's duty that municipal employees must cooperate in acting as witnesses in the fact-finding process of the Election Commission, just like any other citizen. According to German law, the duty to be a witness is a general duty of citizens.[54]

4. Conclusion

Members of the armed forces, police force, government officials, other officials of the State, and officers or employees of State organizations have two statuses: on the one hand, they are people who perform their duties in their positions that arise from the power of the state for the affairs of the state, and on the other hand, they are ordinary people. As a person acting in his or her position arising from the power of the state for the affairs of the state, such person is considered an agent of the state, who is not entitled to the constitutional liberties in Chapter 3 of the Constitution of the Kingdom of Thailand and is not entitled to fundamental rights or rights equivalent to fundamental rights under the Constitution of the Federal Republic of Germany. As the state is not the one receiving the protection of rights and liberties, but is the one who has the duty to protect those rights and liberties. On the contrary, as ordinary human beings, persons in the state sector have the same rights and liberties under the constitution as ordinary people, both under the Constitution of the Kingdom of Thailand and the Constitution of the

[54] Compare Federal Constitutional Court, Ruling No. 2 BvL 3/78 of 10 October 1978.

Federal Republic of Germany. Upon consideration of the four constitutional cases that were analyzed, it can be seen that all of them are cases that have issues regarding state actions that affect the rights and liberties of individuals in the state sector as individuals. However, the actions of a person in the public sector may affect the state and public confidence in that person and the public's trust in the state. Therefore, the rights and liberties of individuals in the public sector may be more restricted than those of other individuals, especially by disciplinary laws. When considering the contents of the four constitutional cases, it can be seen that the Constitutional Court and the Supreme Administrative Court of the Kingdom of Thailand have ruled to recognize the rights and liberties of individuals in the public sector. Most of the rulings and judgments, when considered from the perspective of the German Constitution, have similar reasonings and results to the principles in German law, except in the case of the determination of the degree of punishment in the Constitutional Court Ruling No. 26/2546.

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Bibliography

Bach, I. (2021). ZPO § 355 Unmittelbarkeit der Beweisaufnahme. In V. Vorwerk & C. Wolf (eds.) BeckOK ZPO (41st Edition, marginal no. 1-29). C.H.Beck.

Battis, U. (2021). GG Art. 33 [Gleichstellung als Staatsbürger, öffentlicher Dienst]. In M. Sachs (ed.), GrundgesetzKommentar (9th edition, marginal no. 1-76). C.H.Beck.

Fischer, T (2019). Einleitung. In R. Hannich (ed.), Karlsruher Kommentar zur Strafprozessordnung. (8th Edition, marginal no. 1-457). C.H.Beck.

Grabenwarter, C. (2021). GG Art. 5 Abs. 1, Abs. 2. In R. Herzog, R. Scholz, M. Herdegen & H. H. Klein (eds.), Grundgesetz Kommentar (Maunz/Dürig) (94th supplement, volume 1, marginal no. 1-1037). C.H.Beck.

Grüneberg, C. (2018). BGB § 242. In G. Brudermüller, J. Ellenberger et al, Beckscheʼ Kurz-Kommentare Bürgerliches Gesetzbuch (Palandt) (77th Edition, marginal no. 1-107). C.H.Beck.

Herdegen, M. (2021). GG Art. 1 Abs. 1. In R. Herzog, R. Scholz, M. Herdegen & H. H. Klein (eds.), Grundgesetz Kommentar (Maunz/Dürig) (94th supplement, volume 1, marginal no. 1-121). C.H.Beck.

Jarass, H. D. (2020). Vorbemerkungen vor Art. 1: Allgemeine Grundrechtslehren. In H. D. Jarass & M. Kment, Grundgesetz für die Bundesrepublik Deutschland (Jarass/Pieroth) (16th Edition, marginal no. 1-58). C.H.Beck.

Jarass, H. D. (2020). GG Art. 33 [Gleiche (staats)bürgerliche Rechte, Öffentlicher Dienst]. In H. D. Jarass & M. Kment, Grundgesetz für die Bundesrepublik Deutschland (Jarass/Pieroth) (16th Edition, marginal no. 1-88). C.H.Beck.

Kinzig, J. (2019). Vorbemerkungen zu den §§ 38 ff. In A. Eser (ed.), Schönke/Schröder Strafgesetzbuch (30th Edition, marginal no. 1-66). C.H.Beck.

Masuch, T. (2021). Vom Maß der Freiheit – Der Beamte zwischen Meinungsfreiheit und Mäßigungsgebot, Neue Zeitschrift für Verwaltungsrecht (NVwZ), issue 8, p. 520-525. C.H.Beck.

Musielak, H-J. (2021). Einleitung. In H-J. Musielak & W. Voit (eds.), Zivilprozessordnung mit Gerichtsverfassungsgesetz Kommentar (18th Edition, marginal no. 1-78). Vahlen.

Schubert, C. (2019). BGB § 242 Leistung nach Treu und Glauben. In W. Krüger (ed), Münchener Kommentar zum Bürgerlichen Gesetzbuch (8th Edition, volume 2, marginal no. 1-547). C.H.Beck.

Spinner, G. (2020). BGB § 611a Arbeitsvertrag. In M. Henssler & W. Krüger (eds.), Münchener Kommentar zum Bürgerlichen Gesetzbuch (8th Edition, volume 5, marginal no. 1-1215). C.H.Beck.

Voßkuhle, A. & Kaiser, A-B. (2011). 'Grundwissen – Öffentliches Recht: Funktionen der Grundrechte', Juristische Schulung, issue 5, p. 411-413.

Weber, K. (2017). Vorbemerkungen zu den §§ 29 ff. In K. Weber (ed.), Betäubungsmittelgesetz Arzneimittelgesetz Anti-Doping-Gesetz Neue- psychoaktive-Stoffe-Gesetz Kommentar (5. Edition, marginal no. 1-1815). C.H.Beck.

Wissenschaftliche Dienste des Deutschen Bundestages (2019). Sachstand: Mäßigungsgebot für Bedienstete im öffentlichen Dienst (Sachstand WD 6 – 3000 – 045/19), p. 1-9. Deutscher Bundestag

Rulings of the Constitutional Court of the Federal Republic of Germany

Ruling No. 1 BvR 400/51 of 15 January 1958

Ruling No. 2 BvR 506/63 of 25 October 1966

Ruling No. 1 BvF 1 - 6/74 of 25 February 1975

Ruling No. 2 BvE 1/76 of 2 March 1977

Ruling No. 2 BvL 3/78 of 10 October 1978

Ruling No. 2 BvR 1041/88, 2 BvR 78/89 of 3 June 1992

Ruling No. 2 BvR 993/94 of 14 June 2000

Ruling No. 2 BvR 1387/02 of 27 September 2005

Ruling No. 2 BvR 2300/07 of 30 January 2008

Ruling No. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 of 30 June 2009

Ruling No. 2 BvE 2/14 of 16 December 2014

Ruling No. 1 BvR 471/10, 1 BvR 1181/10 of 27 January 2015

Judgments and Rulings of the Supreme Court of the Federal Republic of Germany

Ruling No. 2 StR 500/86 of 29 April 1987

Ruling No. 4 StR 440/87 of 17 December 1987

Ruling No. 3 StR 575/96 of 28 January 1998

Ruling No. 1 StR 83/08 of 16 April 2008

Rulings of the Labour Court of the Federal Republic of Germany

Ruling No. 6 AZR 563/18 of 19 Dec 2019

Rulings of the Administrative Court of the Federal Republic of Germany

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Other Court Rulings

Ansbach Administrative Court, Ruling No. AN 1 K 15.00797 of 25 August 2015.

The Principle of Equality in Bearing Public Burdens

Ruthai Hongsiri, Ph. D.
President of a Chamber of the Supreme Administrative Court

The Supreme Administrative Court Judgment No. A. 1198/2558 (2015): The Principle of Equality in Bearing Public Burdens (Le principe de l'égalité devant les charges publiques)

In this case, the facts are that the eight plaintiffs were the owners of a durian orchard located in Hat Yai District, with 60 trees, approximately 28 years old. In late 2004, the Royal Irrigation Department (the defendant) dug and expanded an irrigation canal approximately 10 meters away from the plaintiffs' land in order to construct a flood mitigation project in Hat Yai District. The defendant closed the original irrigation canal to pour concrete on the floor and walls, causing the eight plaintiffs' durian trees, which relied on water from the original irrigation canal, to die.

The Supreme Administrative Court considered that the defendant carried out the construction of the flood relief project, which was an exercise of legal power for the public benefit to prevent and alleviate floods. Since the construction of the project did not encroach on the land of the eight plaintiffs, it cannot be considered an unlawful act. Closing the original irrigation canal and draining water to pour concrete for the floor and walls of the new irrigation canal cannot be considered an intentional or negligent act. Therefore, it is not a tort against the plaintiffs.

However, *section 30, paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) states that all persons are equal before the law and shall enjoy equal protection under the law.* When the construction of the Hat Yai District Flood Mitigation Project, Songkhla Province, under the royal initiative, is a construction for public benefit to prevent and mitigate flooding in Hat Yai District, which is of

great benefit to the general public. However, the eight plaintiffs claimed that during the construction of the project, the defendant closed the original irrigation canal and drained the water to pour concrete. As a result, the durian orchards of the eight plaintiffs, which had been receiving water from the original irrigation canal for 30 years, were dehydrated and the water in the shallow wells in the plaintiffs' orchards dried up ... The Songkhla governor therefore issued an order appointing a working group to investigate the cause of death of the durian trees ... The working group investigated and resolved that the plaintiffs' eight durian trees died due to lack of water from the digging of irrigation canals as drainage canals under the Hat Yai District Flood Mitigation Project ... In addition, in 2005 there was little rainfall, resulting in insufficient water... In this case, it can be heard that the cause of the death of the plaintiff's eight durian trees was the closure of the original irrigation canal to construct a flood mitigation project in Hat Yai District. Therefore, even after the construction of the Hat Yai District Flood Mitigation Project is completed ... it will be beneficial to the public, including the eight plaintiffs. But for the eight plaintiffs, who are durian growers, to bear the sole responsibility for the damages, as all the plaintiffs' durian trees in the orchard have died, resulting in a loss of income from their occupation ... is unfair. Therefore, it is appropriate for the defendants to ... share responsibility for the damages caused to the eight plaintiffs, which is another responsibility of the government agencies ... In addition, it appears that the facts in the meeting report of the working group investigating the cause of death of the durian trees ... are that the cause of death of the durian trees of the eight plaintiffs was because in 2005 there was little rain, resulting in insufficient water. And the eight plaintiffs who were durian orchard owners must try to find other water sources to prevent or alleviate the damage that will occur and solve the problem of the durian trees not dying from lack of water. When considering the circumstances and the seriousness of the defendants' actions, it is therefore appropriate to determine the damages for the eight plaintiffs at the amount of 1,000,000 baht.

Notes

The facts of this case (hereinafter referred to as the "Durian Orchard Case") are that the Royal Irrigation Department, which was digging and expanding an irrigation canal located far from the land of the eight plaintiffs in order to construct a flood alleviation project in Hat Yai District, had to close the original irrigation canal in order to pour concrete for the floor and walls. This caused the durians in the plaintiffs' eight orchards, which relied on water from the irrigation canal, to die of dehydration. The court ruled that even though the construction was beneficial to the general public, including the eight plaintiffs, it was unfair to have the eight plaintiffs bear the sole responsibility for the damages caused by the death of all the durian trees in the orchard, resulting in a loss of income. Therefore, the court ruled that the Royal Irrigation Department be jointly liable for the damages caused to the eight plaintiffs, which is another liability of a government agency.

In the past, demanding money from the government or holding the state or government agencies accountable was usually when the state agency or official acted unlawfully, causing damage to another person, or what the law calls a tort under section 420 of the Civil and Commercial Code. But in reality, state liability can mainly come from 3 main sources. The first ground is contract, the second ground is tort, and the third ground is liability for causes other than contract and tort, or what section 9, paragraph one (3) of the Administrative Court Act and Administrative Court Procedure, B.E. 2542 (1999) calls "other liabilities".[1] In this case, the Supreme Administrative Court ruled that

[1] **Administrative Court Act and Administrative Court Procedure, B.E. 2542 section 9 Paragraph One (3)**

The Administrative Court has the power to consider, adjudicate or issue an order in the following matters...

(3) Cases of disputes regarding torts or other liabilities of administrative agencies or government officials resulting from the exercise of powers under the law or from rules,

the Royal Irrigation Department's actions were not a tort because they were not illegal or unlawful. They were actions in accordance with the Royal Irrigation Department's authority to prevent and alleviate flooding, which was a lawful action. However, the Royal Irrigation Department is still liable to the eight plaintiffs as other liabilities, which shows that the state's liability does not necessarily have to arise from unlawful acts. Even lawful acts may give rise to state liability, or what some textbooks call "responsabilité sans faute".[2]

In the case of other liabilities arising from the exercise of state power, the Administrative Court has previously ruled that state agencies must be held liable in many cases. For example, in a lawsuit to claim compensation for expropriation under the Expropriation of Real Estate Act, or in a lawsuit to claim compensation because the plaintiff's land was crossed by the Electricity Generating Authority of Thailand (EGAT)'s power lines under the Electricity Generating Authority of Thailand Act, or in a lawsuit to claim compensation for ordering the killing of animals or destroying animal carcasses that are infected with an epidemic or are suspected of being infected with an epidemic under the Animal Epidemics Act, etc. This is a legal liability in specific matters because the payment of government money must be provided for by law.[3] But what

administrative orders or other orders, or from neglect of duties as required by law or from the performance of such duties with excessive delay.

2 Bertrand SEILLER, Droit administratif 2. L'action administrative (5th edition, Champs université, 2014) 298. The author is of the view that this liability without fault is an example of the special nature of the principle of state liability affirmed in the Blanco decision of the Court of Conflict of Cases, and it is true that the conduct of administrative activities for the public interest, especially when exercising state power, is the origin of orders or actions that, even if lawful, can cause damage to others.

3 In addition, there are currently many cases that the Supreme Administrative Court has ruled to be other types of liability, such as the right to claim travel expenses under the Ministry of Interior regulations on travel expenses for local officials, or the right to receive emergency disaster relief funds under the criteria and procedures for providing assistance to disaster victims in emergency cases, or the right to receive a refund under the first-time new car project under government policy and Cabinet resolutions, or the right to receive

is interesting in this case is that the court has ruled that the government agencies in the administrative sector, which the law calls administrative agencies,[4] shall bear liabilities in other forms. Although there is no specific law stipulating this, it does not determine which law the Royal Irrigation Department must be held liable for, which is different from cases of land expropriation or cases where the right to use the land is restricted because it is crossed by an electric cable route or cases of ordering the killing of animals or destroying the carcasses of animals that are or are suspected of having an epidemic.[5] The law specifically stipulates the cases in which liability must be taken, including the criteria for calculating the amount of compensation to be paid for such liability. For example, in the case of expropriation, the price, condition, cause and purpose

compensation for damages resulting from the Royal Irrigation Department's water management to prevent public disasters (Supreme Administrative Court judgments No. Aor. 930/2561, No. Aor. 253/2562, No. Aor Ror. 7/2563, and No. Aor. 604/2560).

4 **Administrative Court Act and Administrative Litigation Procedure, B.E. 2542 section 3** In this Act

"Administrative agency" means a ministry, department, government agency with another name and with the status of a department.a regional government, a local government, a state enterprise established by an Act or a Royal Decree or other government agency, and includes an agency assigned to exercise administrative power or to conduct administrative activities...

5 **Animal Epidemics Act, B.E. 2558 section 13 (4)**

When a notification is made under section 11 or it is found or there is reasonable suspicion that an animal is sick or has died from an epidemic, in addition to the veterinarian having the authority under section 40, he shall have the authority to inspect animals or animal carcasses, including issuing written orders for the owner of the animal or animal carcasses to take action as follows... (4) Destroy animals that are infected with an epidemic or are reasonably suspected of being infected with an epidemic, or animals or animal carcasses that are carriers of an epidemic, in accordance with the criteria and methods announced by the Director-General. In this regard, the owner of the animal or animal carcasses shall be compensated at a price not less than three-quarters of the price of the animal or animal carcasses that could have been sold in the local market before the epidemic occurred, in accordance with the criteria and methods specified in the Ministerial Regulations, except in cases where the owner of the animal or animal carcasses intentionally commits an offense under the provisions of this Act.

of the expropriation must be taken into account.[6] Or in the case of an animal epidemic, the owner of the animal or animal carcass shall be compensated at a price not less than three-quarters of the price of the animal or animal carcass which could have been sold in the local market before the epidemic occurred.[7] Such criteria or details may be prescribed in a law or regulation issued under the authority of that law.

However, this durian orchard case is not the first case where the Supreme Administrative Court has ruled that a state agency must be liable to another person even though it did not commit any wrongdoing or tort, and there is no law that specifically requires the state to be liable. Because before that, there was a Supreme Administrative Court's judgment, No. A. 29/2557, or what many people call the "Weighing Station Case", which ruled in a similar manner for government agencies as: The Department of Highways is liable in the case of constructing a permanent weighing station in the highway area in front of the land where the plaintiff is the estate manager to detect trucks that are overloaded by law in order to extend the lifespan of the road without encroaching on the plaintiff's land. The determination of the weight checkpoints has

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[6] **Expropriation and Acquisition of Real Estate Act, B.E. 2562 section 20 paragraph one and Paragraph Two**

The determination of the initial price for expropriated land shall take into account the price, condition, cause and purpose as follows:

(1) The normal market price of the land on the date of enforcement of the Royal Decree...

(2) The government land assessment price...

(3) The asset assessment price for collecting the fee for registering rights and legal transactions...

(4) The condition and location of the land and

(5) The cause and purpose of the expropriation.

The determination of the initial price according to the first paragraph shall be in accordance with the criteria and methods specified in the Ministerial Regulation.

[7] Animal Epidemics Act, B.E. 2558 section 13 (4) together with the Ministerial Regulations on the Compensation of the Price of Items Destroyed Due to Containing an Epidemic Disease or There is Reasonable Suspicion of Containing an Epidemic Disease, B.E. 2560

adopted the guidelines for determining permanent weight checkpoints on highways nationwide, which are criteria obtained from surveys conducted on highways nationwide based on engineering principles under the standard determination and academic control of the Director-General of the Department of Highways as authorized by law. It is heard that the Department of Highways and its associates, the defendants, have exercised their discretion under the criteria and guidelines in determining the construction point of the permanent weight checkpoint, taking into account the public interest properly. And when comparing the proportion between the impacts that the plaintiff has received and the public benefits, it is seen that the construction of a permanent weighing station in the said area will be of public benefit. As the plaintiff was only affected by the inconvenience in entering and exiting the land, it was not a tort against the plaintiff. However, setting up checkpoints to control vehicles from carrying excessive weight to prevent damage to the road is a form of public service within the scope of the defendant's duties. Where such action, even though not a violation, causes the plaintiff to bear the burden of inconvenience in entering and exiting his land. While other landowners in the vicinity are not subject to such burdens. Therefore, it is another liability that the defendant must compensate the plaintiff for such inconvenience.[8] But in the Supreme Administrative

[8] However, in some cases, such as the Supreme Administrative Court's judgment No.1497/2559, even though the court found that the construction of the permanent weighing station by the defendants would not constitute a tort against the two plaintiffs, who were the landowners, but if it caused the two plaintiffs, as the owners of the property, to suffer more than should be expected or expected to be normal and reasonable when considering the condition and location of the property, the two plaintiffs have the right to take action to eliminate such distress or damage in accordance with section 1337 of the Civil and Commercial Code. The court also ruled to demolish some of the structures that blocked the plaintiffs' land to remedy the distress or damage to the plaintiffs, etc. However, if the construction of the permanent weighing station changes the construction site without reasonable cause, without any prior survey to determine whether the construction would cause distress to the affected landowners, even though the construction

Court's judgment No. A. 29/2557, there is no reason given as to why it is another liability for which the Department of Highways must be held liable, and based on which legal principle. It simply stated that such action caused the plaintiff to bear the burden of inconvenience in entering and exiting his land, while other landowners in the vicinity did not have to bear such burden. Although government agencies can cite court rulings as reasons for having to pay government money to victims, but in legal perspective, the court itself cannot order a government agency to pay government money without law or having reasons as stipulated by law.

Therefore, the Supreme Administrative Court's judgment No. A.1198/2558 or the Durian Garden case, which was decided the following year, referring to the Constitutional Principle of Equality, is the answer to the legal principle used in the Supreme Administrative Court's judgment No. A.29/2557. The Supreme Administrative Court ruled on similar grounds that even though the construction would benefit the general public, including the eight plaintiffs, it would be unfair to have the eight plaintiffs bear the sole responsibility for the damages caused by the death of all the durian trees in the orchard, resulting in a loss of income. Therefore, the court ruled that the Royal Irrigation Department be jointly liable for the damages caused to the eight plaintiffs, which is another liability of a government agency. In this case, the court referred to the principle of equality under section 30, paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) to determine whether the Royal Irrigation Department was liable, as it believed that the closure of the original irrigation canal was for the public benefit, in which the general public, including the eight plaintiffs, benefited. But when damage occurs, the burden falls solely on the eight plaintiffs

site can be changed for appropriateness, the court found that it was an exercise of legal rights, which would only cause damage to the plaintiffs. Therefore, it is a tort resulting from the exercise of legal power, and ruled that the Department of Highways and others The three defendants demolished all permanent weighing buildings and checkpoints away from the plaintiffs' land (Supreme Administrative Court Decision No. A. 217/2558 and No. A. 1427/2558).

who have to be responsible for the said damage. This is unfair because it creates inequality or inequity for the people who have to bear the burden that should belong to the state. Therefore, it is necessary to compensate the eight plaintiffs for damages.

From the Supreme Administrative Court's judgment in the Durian Orchard and Weighing Station cases, it can be seen that the liability of the state or state agencies, namely the Royal Irrigation Department and the Department of Highways, arises from lawful actions, not from tort or from the state or state agencies breaching a contract. But government agencies must be held liable, which is a liability without fault. Therefore, it is another liability of the state and is another liability arising from the exercise of legal power. It is the use of the power and duty of the Royal Irrigation Department in constructing the Hat Yai District flood relief project or the Department of Highways in constructing the weighing station to maintain the road so that it is not damaged. And the reason that caused both government agencies to be held liable was because both government agencies used their power according to the law for the public benefit or for the benefit of the general public. It causes special damage or burden to the plaintiff while other citizens are not responsible for such damage or burden, resulting in inequality or injustice to the plaintiff. Because such action is beneficial to both the public and the plaintiff, but when a burden or damage occurs, it falls solely on the plaintiff, while other people who benefit do not have to bear the burden or damage. This results in the liability of the state or government agency that must compensate the plaintiff.[9]

[9] Yves Gaudemet, Traité de Droit administrative, Droit administratif general (T.1, 16e éd., LGDJ2001) 804. The author explains that the principle of individual equality in bearing state burdens is one of the sources of administrative responsibility. In providing public services, the state provides them for the collective benefit of the country or locality. The country or locality benefits from such services. Therefore, if the provision of such public services causes special damage to any individual, it is right that the country or locality bears the burden of compensating such damage. This is the concept of individual equality in bearing state burdens.

Later, the Supreme Administrative Court applied the aforementioned legal principles to other matters, such as liability from the state's water management, in the case of the Supreme Administrative Court's ruling No. A.W.L. 270/2563[10] which ruled that even though the blocking and dredging of the canal was an act to mitigate flooding in Bang Rakam District, Phitsanulok Province and connected areas, which was beneficial to the public, it caused special damage to the plaintiff in particular. Therefore, compensation should be paid to ensure fairness to the plaintiff who must bear the burden resulting from the implementation of state activities for the public benefit, which is another liability of the state agency, and is "liability without fault". Even though there is no law that specifically requires liability.[11] This shows the evolution in the matter of state liability or disputes regarding other liabilities of administrative agencies that are under the Administrative Court in accordance with section 9, paragraph one (3)

[10] In this case, the Royal Irrigation Department's canal digging was in accordance with the Bang Rakam Model policy of the Prime Minister at that time and was an operation within the Yom River – Nan River management network of the Royal Irrigation Department to alleviate flooding in Bang Rakam District, Phitsanulok Province and connecting areas. In dredging the canal, it was necessary to construct an earthen dam to block the canal's waterway so as not to be an obstacle to the canal dredging work. As a result, water from heavy rain could not drain along the canal into the Yom River as usual because the earthen dam blocked the waterway. Therefore, the area above the earthen dam blocking the canal was flooded, causing the plaintiff's 47 rai of rice fields to be flooded.

[11] The Supreme Administrative Court's judgment in A.P. 230/2564 followed suit. However, in a similar case, such as the Supreme Administrative Court's judgment in A.P. 95/2563, the Supreme Administrative Court ruled differently from this judgment, ruling that the exercise of power by the Royal Irrigation Department was a tort, not another liability, because the second defendant (the Royal Irrigation Department) could see that the construction of the dam during the flood season could cause damage to farmers both upstream and downstream, and when it caused damage to the plaintiff, the rice fields were damaged. Therefore, the second defendant was negligent and acted against the plaintiff in an illegal manner, causing damage to the plaintiff's property, which was a tort against the plaintiff (the Supreme Administrative Court's judgments in A.P. 137/2563 and A.P. 359/2563 followed suit).

of the Act on Establishment of Administrative Courts and Administrative Court Procedures, B.E. 2542 (1999). The Administrative Court's decision is an application of the principle of equality to the case, which has the effect of expanding the state's liability to protect those who are harmed by the use of state power, even if it is a lawful act. If the aforementioned legal principles are not applied, the damages will be borne by the injured party, even though if the canal had not been dredged and the earthen dam had not been built to block the canal, the injured party would have suffered less damages, which would be unfair to the injured party.

There are also examples of applying the legal principles of liability without fault and equality in this manner in other countries. For example, in France, where the classification of state liability is similar to that of Thailand. It is divided into liability arising from contracts, liability arising from administrative faults in the management of state affairs (faute administrative or faute de service), which is equivalent to a tort under Thai law, and liability without fault, which is equivalent to other liabilities under Thai law. Liability without fault is still a secondary theory because in principle the state is liable only when it has committed a wrong or a violation. However, administrative liability without fault is broader than civil liability because it covers not only cases where the state exposes private individuals to risk (la création d'un risqué), but also acts that violate the principle of equality in bearing public burdens.[12]

As for liability for risk (responsabilité pour risque), the French Supreme Administrative Court (Conseil d'Etat) held that the state was liable under this theory before the enactment of the labor protection law to protect workers who suffered accidents at work in state-owned factories (C.E., 21 June 1895, Cames, Gr. Ar. p. 29). And later this legal principle was used in the case of a person who occasionally assisted in government work or was requested to assist in government work.

[12] Jean Rivero, Droit administrative (9e éd., Dalloz 1980) 281-287.

According to this principle, when a person who participated in providing public services suffered damage from participating in the provision of such activities, the agency that benefited must be liable to that person (or his or her heir) on the basis of the risks that that person suffered as a result of participating in the provision of such activities.[13] In addition, the legal principle applies to cases where the damage is caused by weapons or dangerous objects (dommages causés par les choses dangereuses). For example, the case of the bombing of a government arsenal resulting in damage to others (C.E., 28 mars 1919, Regnault-Desrozxiers, RDP 1919, p. 239), or the use of police firearms that posed special risks to persons and property, as in the case of the owner of a coffee shop who was injured by a police bullet while sitting in front of his shop to intercept a suspicious car (C.E. Ass., 24 juin 1949, Lecomte et Franquette et Daramy, RDP 1949, p. 583).[14] And it is also used in cases where damage is caused by the organization of activities that are of dangerous nature, such as destroying a dirty building by setting it on fire and then the fire spreading to burn down the houses of others in the area (C.E., 24 déc. 1926, Walter, S., 1927. III, p. 44).[15]

In addition to liability for risks, the French Supreme Administrative Court has also held the state liable in other cases, based on the Principle of Equality in Bearing Public Burdens (Le principe de l'égalité devant les charges publiques). For example, in the case of public works (travaux publics) that cause permanent damage to people in the vicinity, even though such works do not involve dangerous objects or structures. The principle of equality in bearing the public burdens of the state in French law comes from Article 13 of the Declaration of the Rights of Man and of the Citizen of 1789, which states that for the benefit of maintaining the state's forces and the expenses of administering the country, the

[13] René CHAPUS, Droit administratif general (T.1, 15e éd., Montchrestien 2001) 1348.
[14] Ibid1338.
[15] Jean Rivero (Footnote No.12) 286.

collection of taxes from citizens is unavoidable. However, such taxes must be distributed equally among citizens and according to each person's ability.[16] Later, a panel of justice of the Constitutional Court (Conseil constitutionnel) ruled that the announcement is considered as a law with a mandatory force equivalent to a provision of the Constitution. Therefore, this principle is considered the general principle of law at the constitutional level that results in the state being liable for damages caused to private individuals. Even if there is no evidence that the state or its officials acted unlawfully, it is "liability without fault" (responsabilité sans faute).

The French Supreme Administrative Court has since applied this general principle of law to a number of other state liability cases, such as the Couitéas case.[17] This was a case of creditor is suing the state for damages after officials refused to enforce a judgment ordering the eviction of approximately 8,000 indigenous people from approximately 38,000 hectares (237,500 rai) of land, believing that such enforcement would cause unrest or insecurity in the country. The Court ruled that even though in such circumstances, the order refusing to use force was a lawful order, the damages resulting from such refusal could not be left to the stakeholder (judgment creditors) and ordered the state to pay compensation or compensation to Mr. Couitéas, the judgment creditor. Some French lawyers have described the case as an example of how the French Supreme Administrative Court is ruling on the principle of equality in bearing public burdens.[18] The court later applied this legal

[16] Déclaration des Droits de l'Homme et du Citoyen de 1789 Article 13 Pour l'entretien de la force publique, et pour les dépenses d'administration, une contribution commune est indispensable : elle doit être également répartie entre tous les citoyens, en raison de leurs facultés

[17] Couitéas, Rec. 789 (CE, 30 nov. 1923) and Long, et al, 2013, pp. 241-249.

[18] France's Supreme Administrative Court later ruled in a similar vein, granting compensation in cases where provincial governors refused to enforce a judgment by force against strikers who illegally occupied workplaces or occupied other people's homes without

principle to other cases, such as the Société anonyme des produits laitiers "La Fleurette" case (La Fleurette, or simply "La Fleurette"[19]). A dairy product manufacturing company is suing the state for damages or compensation because the legislature passed a law that forced the company to stop manufacturing the product, which caused damage to the company. Or in the case of Compagnie générale d'énergie Radio-Electrique[20], a private company that suffered damages from not being able to use a building that housed its radio station that was occupied by the German army during the World War, sued the state for compensation, claiming that the state had entered into treaties with another country that had the effect of changing the terms of the company's right to claim compensation. And the French Supreme Administrative Court has ruled in a similar vein to the "La Fleurette" case that those who have been harmed by the enforcement of a treaty by the government, even though they have no right to sue the state

their right. (C.E. ass., 3 juin 1938, Soc. Cartonnerie Saint-Clarles, Lebon, p.539; 5 mai 2006, Min. int., sécurité int. et lib. loc. c/ Vallée, Lebon, p.983 ; 18 février 2010, Soc. d'HLM de Guyaner, AJDA 2010, p.857) with reference in Marie-Christine Rouault, Droit administratif et institutionsadministratives (15e éd., Bruylant 2018) 493. The Court has also made similar rulings in cases of damage caused by the failure of competent officials to enable the general public to freely enjoy public property. (CE 25 mai 1977, SA Victoir Delforge, p.253) Bertrand SEILLER, Droit administratif 2. L'actionadministrative (5e éd., Champs université, 2014) 307. And René CHAPUS (Footnote No.13) 1367-1370.

19 Société anonyme des produits laitiers "La Fleurette", Rec. 25 (CE Ass. 14 janv. 1938) In this case, the facts were that Laferrad Company was a company that produced a product called Gradine, which was made from a mixture of milk, peanut oil and egg white. Later, the legislature passed a law on June 9, 1934, to protect dairy products. The law prohibited any person from manufacturing and commercializing a product intended to be used like a cream that was not made from milk alone. The company was forced to stop producing the product, as cited in Long, et al, Les grands arrêts de lajurisprudence administrative (19e éd., Dalloz 2013) 315.

20 Compagnie générale d'énergie Radio-Electrique, (CE Ass., 30 mars 1966, Rec. 257), cited in Long, et al, Les grands arrêts de la jurisprudence administrative (7e éd., Sirey 1978) 534-536.

for damages due to the tort, they have the right to demand compensation from the state on the basis of the principle of equality in bearing public burdens. The exercise of such a claim must be subject to two conditions: First, international treaties and the laws implementing them must not be intended to deprive an injured person of the right to seek compensation in such cases. And secondly, the damage received must be a specific (spécial) damage to the person who was damaged and must be a damage of a more serious nature than normal. However, the case of the plaintiff does not meet the criteria under the second condition, which is that the damage must be specifically to the person who is damaged, considering the number of French people who have been damaged in a similar manner to the case that the plaintiff claims. Therefore, the plaintiff is not entitled to compensation and the court dismissed the case, etc.

From the reasoning and legal principles used in the judgment, it can be seen that the French Supreme Administrative Court has ruled that the state is liable for compensation or reparations even if it has not committed a tort, based on the principle of individual equality in bearing public burdens, under two conditions.

That is, the first is the condition regarding the intention of the legislature. Consideration is given to the provisions of the law, including the documents in the drafting stage, whether the legislature intends to revoke rights or not, or to provide compensation to those who have been damaged or not. Because if the law has such an intention, the court cannot rule contrary to the law.

The second is the condition regarding the damage to the person who is damaged, that it must be of a specific nature (spécial), not damage that occurs to the general public. For example, in the case of Compagnie générale d'énergie Radio-Electrique, the court dismissed the case because a large number of French citizens had suffered damages similar to the plaintiff, and the damages had to be of an anormal grave

nature (anormalement grave)[21] Otherwise, it is the responsibility of the injured party to bear the burden of such damages, not that the state must be responsible in every case.[22] This is an important condition that gives the court discretion in considering whether the damage claimed by the plaintiff is of a more serious nature than normal for the state to be liable to compensate the plaintiff and to what extent, since compensation is limited to "for damages of a more serious nature than normal" only.[23]

Moreover, many French jurists consider this principle of equality in bearing public burdens of the state to be of theoretical importance regarding state liability. Because it is a fundamental principle that explains why the state must be held liable even though it has not committed any violation. Because in reality, the state's liability is a consequence of the said legal principle, since the actions of the government are for the benefit of the general public. Therefore, if such an act causes damage to a specific individual of a particularly serious nature and such individual is not compensated, it will cause such

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[21] It is noteworthy that the judgments of the Thai Supreme Administrative Court emphasize the condition that the damage must be specific to the person who is specifically damaged (spécial), such as in the Durian Garden case, which ruled that even though the construction of the Hat Yai flood relief project would benefit the general public, including the eight plaintiffs, it would be unfair to have the eight plaintiffs bear the burden of the damages alone. Or in the Weighing Station case, which ruled that the setting up of the checkpoint to control vehicles from overloading caused the plaintiffs to bear the burden of inconvenience in entering and exiting their land, while other landowners in the vicinity did not have to bear such burden, etc. However, it did not clearly emphasize the condition that the damage must be of an abnormally severe nature (anormalement grave), such as the judgments of the French Supreme Administrative Court, which considered this condition to be very important.

[22] Long, et al. (Footnote No.19) 563-570.

[23] CHAPUS René (Footnote No.13) 1372. For example, in the Soc. Boulenger case, where the court ordered the state to be liable for three-quarters of the damage suffered, or in the Port autonome de Marseille case, where the court held the state liable for damages occurring after the first two weeks of the ship being grounded and unable to sail, etc.

individual to make sacrifices for the greater good without any grounds to support this unfair discrimination. Compensation for the injured is therefore a necessary means to restore the balance between public and private interests that have been lost.[24] And this principle of equality in bearing public burdens is applicable to claiming compensation or compensation for damages resulting from actions or the use of state power, which is the issuance of regulations or administrative orders that are lawful or the refusal to use force to comply with a judgment, including the issuance of laws and the making of international treaties.[25]

Therefore, when compared with French law, it can be seen that Thai law has some characteristics that are similar to French law. The principle of equality in bearing public burdens is based on the constitutional principle of equality or under mandatory provisions as the Constitution. There is no specific law that provides for state liability as in the case of private property expropriation. It must be a case where the legislature or law does not intend to deprive rights or not provide compensation to those who have been damaged. However, the Supreme Administrative Court of Thailand's ruling emphasizes the inequality of individuals in shouldering state burdens. For example,

[24] Rivero & Waline, Droit administratif (20e éd., Dalloz 2004) 394.) However, some lawyers (Gilles PELLISSIER) believe that compensation for the injured is a way to restore the balance between public interests and private interests that have been lost, but it is not perfect because the inequality that is compensated for is only for damages that are more severe than normal and are only for those who have been specifically damaged. The state's liability is only to correct the consequences of serious inequalities and there are only a few cases, so it is not an obstacle or an excessive burden on the state's budget. Moreover, the court's power to exercise discretion in the part of the conditions of the damage that must be specific or more severe than normal makes the case that the state is liable under the principle of equality have the characteristics of an exception to the general principle that the state is not liable. (Gilles PELLISSIER, Le principe d'égalité en droit public (LGDJ 1996) 118.)

[25] Bertrand SEILLER (Footnote No.18) 306-310, Marie-Christine Rouault, (Footnote No.18) 492-497, GillesPELLISSIER, (Footnote No.24) 115-116. And CHAPUS René, (Footnote No.13) 1366-1377.

in the durian orchard case, it is a case that causes all eight plaintiffs, who are durian orchard owners, to bear the burden of damages alone, which is therefore unfair. Or in the case of the weighing station where the Supreme Administrative Court of Thailand ruled that the actions of the Department of Highways caused the plaintiff to bear the burden of inconvenience in entering and exiting his land, while other landowners in the nearby area did not have to bear such burden. But it did not rule that the damage had to be specifically to the person who was harmed and that it had to be of an extraordinary nature, which the French Supreme Administrative Court considered an essential condition. And if the conditions are not met, then there is no right to receive compensation or compensation from the government, for an example in the plaintiff in the Compagnie generale d'énergie Radio-Electrique case. However, when considering the facts of the durian orchard case or the weighing station case, it can be seen that these are cases where the plaintiff has suffered specific damages and these are damages that are more severe than normal. For example, in the durian orchard case, it turned out that all the durians in the plaintiff's orchard had died.

However, the Thai Supreme Administrative Court later applied the principle of equality in bearing public burdens to its ruling, similar to the French Administrative Court, for example, in the Supreme Administrative Court's judgments No. A.140/2565 and No. 147/2565, peasants filed a complaint against the Royal Irrigation Department with the Administrative Court regarding the case where the department's officials adjusted the floodgates of the Rasi Salai Dam from 0.10 meters to 0.20 meters to help with flooding upstream of the Rasi Salai Dam and nearby provinces along the Mun River and its tributaries. This caused flooding of the plaintiff's and farmers' rice fields downstream of the dam, damaging the plaintiff's dry season rice. The Supreme Administrative Court of Thailand ruled that the defendant's water management by adjusting the floodgates of the Rasi Salai Dam to help floods upstream

of the Rasi Salai Dam and nearby provinces along the Mun River and its tributaries, especially floods caused by Cyclone Mora in Surin Province, which is an area adjacent to the Rasi Salai Dam, was not illegal and did not constitute a tort against the plaintiff. But if the water management is for public benefit, namely, to alleviate damage from floods that may occur to a large number of people in the area upstream of the Rasi Salai Dam and nearby provinces adjacent to the Mun River and its tributaries, especially floods caused by cyclones that cause damage to the plaintiff. Therefore, it is considered that the plaintiff must bear more burdens towards the public than others, which is a violation of the principle of equality in bearing public burdens. The Royal Irrigation Department is therefore liable to compensate the plaintiff for damages, which is another liability of the Royal Irrigation Department for which the court may order the defendant to pay money to compensate the plaintiff for damages.

As for the conditions regarding the damages of the injured party in paying compensation, the Court ruled that there were two conditions similar to those in France. First, the damage that occurred is actual and specific damage. Second, the damage that occurred must be special damage, that is, it must have caused damage to a specific person or group of people, and such damage is not just a nuisance or inconvenience that may occur in general.

Therefore, it can be said that at present, the Thai Administrative Court has a similar approach to adjudicating cases based on the principle of equality in bearing public burdens as the French Supreme Administrative Court.

The consequence is that the application of the principle of equality in bearing public burdens of the state in administrative actions has the legal effect of broadening the scope of state liability. This results in the state being held liable for acts for which it is normally not liable, according to the legal principle of liability without fault. This is to

protect victims from administrative actions or the exercise of administrative power. Therefore, **this principle of equality plays an important role in Thai law as it is a legal basis for those who have been damaged by the actions of the state or government agencies to exercise their right to demand that the government agencies be liable for compensation or compensation that is more severe than normal. Even if the actions of the state or government agencies are lawful. This is to ensure fairness to those who have been damaged.** If there is no such legal principle, those who have been damaged will not have the right to claim money from the government because the government has not committed any tort or may have the right to claim compensation or compensation only according to the government regulations.[26]

However, the application of the principle of equality in bearing public burdens by the Thai administrative courts may not be able to develop as far as the French one because of the greater legal limitations in French law. In particular, in relation to the exercise of power other than the exercise of administrative power, such as holding the state accountable for the exercise of legislative power or the exercise of executive power, known as government action *(Acte de gouvernement)* because at present, the disputes regarding such actions are not disputes that are under the jurisdiction of the Administrative Court under section 9, paragraph one, in conjunction with section 3 of the Administrative Court Establishment Act and Administrative Court Procedures Act, B.E. 2542 (1999).

The next issue to be determined is, when the injured party has the right to demand that the government agency pay compensation or compensation according to the principle of equality in bearing public burdens, how much compensation must be paid? Since there is no law specifying the criteria for calculating compensation. This case is different

[26] For example, government assistance in the event of an emergency disaster due to flooding, according to the Ministry of Finance regulations on government reserve funds to assist victims of emergency disasters, B.E. 2546, etc.

from other liabilities that are specifically provided for by law. For example, in the case of expropriation of real estate, compensation must be determined by considering several criteria, such as the normal market price of the land on the date the Royal Decree is enforced, the government's land assessment price, the capital assessment price for collecting fees for registering rights and legal transactions, the condition and location of the land, and the reasons and purposes of the expropriation. Or in the case of an animal epidemic, compensation must be given to the owner of the animal or animal carcass, not less than three-quarters of the price of the animal or animal carcass, which could have been sold in the local market before the epidemic occurred, according to the criteria and methods specified in the Ministerial Regulations.[27] Or in the case of paying compensation to an injured person who has suffered damage to life, body or mind due to the criminal act of another person, where the injured person was not involved in committing a crime, where the law stipulates that compensation can only be paid as specified, such as necessary medical expenses, including physical and mental rehabilitation costs, compensation in the event of the victim's death, not exceeding the amount specified in the Ministerial Regulation, compensation for loss of earnings, and compensation for other damages as the Committee deems appropriate. This is in accordance with the criteria, methods and rates specified in the Ministerial Regulations[28] that

[27] Supra Note No.5 and 6.

[28] The Act on Compensation of Victims and Compensation and Expenses for Defendants in Criminal Cases B.E. 2544

Section3 In this Act

"victim" means a person who has suffered damage to life or body or mind due to the criminal act of another person, where he/she was not involved in the commission of such offense.

Section17 Offenses committed against the injured person for which compensation may be requested must be offenses listed at the end of this Act.

Section18 Compensation under section17 includes:

does not fully compensate for the damages that the person who will be damaged has received because it is not a case where the state has committed a tort against a private individual, which requires full compensation for the damages in order for the person who is damaged to return to their original status before the tort was committed. But when considering the verdict of the Thai Supreme Administrative Court, it can be seen that the court will consider the actual damages that occurred, how much and what caused them, without considering the amount of financial assistance according to the criteria set by the government to compensate those who were damaged due to other, separate causes.[29] For example, in the weighing station case, the construction of the weighing station caused the plaintiff's land to have a total length of approximately 53 meters, which was a point where it could not access the road at all, and the right to use it for public benefit by the Department of Highways was restricted. Or in cases where the damage is caused by other causes, such as in the durian orchard case, the court will consider the loss of income

(1) Expenses necessary for medical treatment, including expenses for physical and mental rehabilitation

(2) Compensation in the event of the victim's death, not exceeding the amount specified in the Ministerial Regulation

(3) Compensation for loss of earnings during the period when normal work cannot be performed

(4) Compensation for other damages as the Committee deems appropriate

In accordance with the criteria, methods and rates specified in the Ministerial Regulation...

[29] Supreme Administrative Court Judgment No. A.W.L. 230/2564 (a case similar to the Bang Rakam Model case) There are no laws or government regulations specifying the criteria for compensation or compensation for damages due to other state liabilities. However, it is compensation for damages that the state will pay only to the extent that the plaintiff will have to bear additional burdens for public benefits or the public benefits resulting from the state's lawful actions. As for the determination of the assistance money according to the Ministry of Finance Regulation on Government Reserve Funds to Assist Victims of Emergency Disasters, B.E. 2546 at the rate of 606 baht per rai, it is compensation for damages to victims of natural disasters, which is a separate amount from other state liabilities resulting from the exercise of legal power.

from the durian trees as usual and will determine the compensation to be paid to the injured party by deducting the damage caused by other causes. For example, in the durian orchard case, the court found that part of the plaintiff's damage was due to insufficient rainfall, which was one of the reasons the durian trees died. The court therefore ruled that the Royal Irrigation Department was only partially liable for the damages. Or in the Supreme Administrative Court's judgment at A.W.L. 270/2563 (Bang Rakam Model case), in which the court ruled that the cause of the damage suffered by the plaintiff (flooding of the plaintiff's rice field) was due to three related factors, namely, first, the construction of an earthen dam blocking the Khlong Mek - Khlong Bang Kaew canal by the Royal Irrigation Department; second, continuous rain for several days leading to flooding; and third, the condition of the rice field that the plaintiff rented was a low-lying area. And when considering the proportion of the cause of such damage, it is appropriate to order the Royal Irrigation Department to compensate only the damages, such as the production costs invested by the plaintiff, etc. And in some cases, this can be seen from the verdicts of the Thai Supreme Administrative Court, which aims to compensate the plaintiff in full for all damages. For example, in the weighing station case, the Supreme Administrative Court ruled to pay compensation to the plaintiff using the current appraisal price of the land in the area from the Land Department's data center at 1,500 baht per square wa, totaling 795,000 baht, even though the plaintiff was only affected by the inconvenience in entering and exiting the land, but the land was still the plaintiff's property and had not been expropriated by the government. This is in contrast to French law, where compensation is limited to damages that are of an excessively severe nature.[30] Therefore, the issue of compensation for the injured party, whether to compensate the plaintiff for the full amount of the damages, is still an issue that needs to wait for a clear ruling.

[30] Marie-Christine Rouault, (Footnote No.18) 494.

The next issue to be determined is which legal principle should be applied to state liability arising from this principle of equality in bearing public burdens. The Supreme Administrative Court's judgment also has different judgments. In some cases, the court has ruled that in cases of disputes regarding other liabilities of administrative agencies arising from the exercise of legal powers, where there is no law providing for them, as in cases of torts, the provisions of section 224 in conjunction with section 204 of the Civil and Commercial Code must be applied to the case as the most similar legal provisions. This is in accordance with section 4, paragraph two of the said Code.[31] However, in some cases, the court has ruled to apply section 224 in conjunction with section 206 of the Civil and Commercial Code, which is a default due to a tort, as the closest

[31] Supreme Administrative Court Judgment No. 208/2562, a case in which the two plaintiffs sued the Royal Irrigation Department for using administrative power under the law to manage water in the Ubonrat Dam Reservoir to prevent water from flooding houses and property of the people living below the dam, causing the plaintiffs' rice fields above the dam to flood, causing damage to the rice plants, is a case of a dispute regarding other liabilities of the administrative agency resulting from the exercise of legal power. Therefore, section 206 of the Civil and Commercial Code, which is a provision regarding debts arising from tort, cannot be applied. And since there is no law stipulating interest in the case of other liabilities of the administrative agency resulting from the exercise of legal power, as in the case of tort, the provisions of section 224 in conjunction with section 204 of the Civil and Commercial Code must be applied to this case as the closest legal provisions under section4, paragraph two of the said Code. (Supreme Administrative Court Judgement No. A.604/2560 ruled in a similar manner in the case of flooding caused by heavy rainfall in the said area due to the influence of storms and partly due to the officials of the first defendant rushing to release water from the dam in large quantities to manage the water in the dam to prevent it from increasing to the point where it may cause danger to the stability of the dam and agricultural areas or houses of the people, including areas of economic importance, causing serious damage.) And later in the Supreme Administrative Court Judgement No. A.140/2565 and No. A.147/2565 in the case of the Royal Irrigation Department releasing water from the Rasisalai Dam, the Court also ruled in a similar manner that it was applicable to the case as a very similar law.

legal provisions.[32] In fact, the liability of the state arising from the principle of equality in bearing public burdens is a type of debt, and when there is no law specifically stipulating an exception, the provisions on debt in the Civil and Commercial Code, Book 2 must be applied. This is not a case where the Civil and Commercial Code is applied to such liability as the closest legal provision, whether it is in terms of debt payment deadlines, defaults, or default interest. For example, in the case where the said liability is a debt that is not due on a calendar date, in principle, the government is not yet in default, unless it has been warned to pay the debt and the government does not pay it, then it will be in default and must pay the default interest to the injured person, according to section 204, paragraph one, in conjunction with section 224 of the Civil and Commercial Code. And section 206 cannot be applied to this liability because it is not a tort. The Supreme Administrative Court has used legal principles on debt to decide other liability cases in other cases, such as the Excise Department's liability to refund car buyers under the first-time

[32] Supreme Administrative Court Judgment No. A.W.L. 270/2563 (Bang Rakam Model Case) The Supreme Administrative Court ruled that other liabilities arising from proper water management are cases where there is no law directly specifying interest on such debt. Therefore, the provisions of section 224 in conjunction with section 206 of the Civil and Commercial Code must be applied to this case as the closest legal provisions (while Supreme Administrative Court Judgments No. A.W.L. 95/2563, No. A.W.L. 137/2563, and No. A.W.L. 359/2563 ruled that such actions constituted a tort, and therefore the criteria for default under section 206 were applied). Or in the Supreme Administrative Court Judgment No. A.W.L. 1476/2559, in which the Court ruled to apply the provisions of section 224 in conjunction with section 204 of the Civil and Commercial Code to this case as the closest legal provisions under section 4, paragraph two of the said Code. (A case in which the Royal Irrigation Department exercised its legal authority to manage water by releasing water from the Bhumibol Dam, Sirikit Dam, and Chao Phraya Dam in an amount exceeding 3,000 cubic meters per second, exceeding the capacity of the Chao Phraya River, causing the Chao Phraya River to overflow and flood houses in the Chao Phraya River basin and the area where the plaintiff's duck farm is located.)

new car measure, in accordance with government policy.[33] Or in the case of liability of the Insurance Commission in paying compensation based on past service costs to employees according to section 4, paragraph one of the Insurance Commission's regulations on compensation based on past service costs B.E. 2554 (2011)[34] or the liability of the Royal Irrigation Department in releasing water from the dam in an amount that exceeds the capacity of the river, causing the water to overflow from the river and cause flooding of people's homes[35], which is a liability of the state or a debt that is not due for payment on a calendar date, the debt must therefore become due and there is a warning to pay the debt first. If not paid, then the debt will be in default and the debt must be liable for interest during the default period, according to section 204, paragraph one, in conjunction with section 224, paragraph one of the Civil and Commercial Code. Originally, the interest rate was set at 7.5 percent per annum. Later, an emergency decree was issued to amend the Civil and Commercial Code, B.E. 2564 (2021), which was announced in the Government Gazette on April 10th, 2021 and came into effect on April 11th, 2021, amending the default interest due from April 11th,

[33] The Supreme Administrative Court's judgment No. A.W.L. 40/2562 ruled that when the plaintiff had possessed the said car for one year and had correctly complied with the criteria and conditions set for the first new car measure under the government's policy in every respect, the first defendant (Excise Department) was therefore legally liable to return the money, which was the debt due, to the plaintiff. When the plaintiff wrote to the Director-General of the Excise Department to complain about not receiving the right to return the money for the first new car, but the first defendant, who was obliged to return the money to the plaintiff, refused to return the money. The first defendant was therefore in default because he had been warned under section 204 of the Civil and Commercial Code, which required interest at the rate of 7.5 percent per annum under section 224, paragraph one of the same Code.

[34] The Supreme Administrative Court's judgments No. A.1418/2563 and No. A.1061/2561 ruled that the liability under the Insurance Commission's regulations on compensation based on past service costs B.E. 2554 is a debt that is not due on a calendar date and requires a warning before default.

[35] Supreme Administrative Court Judgment No. 1476/2559

2021, which was the effective date of the said emergency decree, to be calculated at the rate of 3 percent per annum or the new interest rate specified in the Royal Decree issued under section 7, paragraph two of the Civil and Commercial Code, as amended, plus an additional 2 percent per annum of the principal.[36] Therefore, this case is an application of the Civil and Commercial Code principles on debts to the case directly, not as a closely related law.

In summary, it can be seen that even though the Supreme Administrative Court's judgments have somewhat different judgments on some issues, but overall, there is consistency and it shows the evolution of the legal principles of state liability, especially other state liabilities or the principle of liability without fault, which tends to expand to protect victims from the use of power or the operation of the state in cases where there is no specific law. This is for the fairness of the case, including the important role of the Administrative Court in protecting the rights and freedoms of the people under the framework of the law and the rule of law.

[36] Civil and Commercial Code Amendment Act, B.E. 2564, section 3, section 4 and section 6

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Bibliography

Bertrand SEILLER, 2014. Droit administratif 2. L'action administrative, 5e éd., Champsuniversité, Paris:Flammarion

CHAPUS René, 2001. Droit administratif général, t.1, Domat droit public, 15e éd., Paris:Montchrestien

Yves Gaudemet, 2001. Traité de Droit administratif t.1, Droit administratif général, 16e éd., Paris:L.G.D.J.

Long, Weil & Braibant. 1978. Les grands arrêts de la jurisprudence administrative. 7e éd., Paris:Sirey.

Long, Weil, Braibant, Delvolvé & Genevois. 2013. Les grands arrêts de lajurisprudenceadministrative. 19e éd., Paris:Dalloz.

Jean Rivero. 1980. Droit administratif. 9e éd., Paris:Dalloz.

Jean Rivero & Jean Waline. 2004. Droit administratif. 20e éd.,.. Paris:Dalloz.

Gilles PELLISSIER, 1996. Le principe d'égalité en droit public, Paris:L.G.D.J..

Marie-Christine Rouault, 2018. Droit administratif et institutions administratives, 15e éd., Bruxelles: Bruylant

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