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**THE CODIFICATION OF RIGHTS IN THE THAILAND CONSTITUTION:
A COMPARATIVE POINT OF VIEW**

1. Thailand 1997: a constitution with constitutionalism

The Constitution of 1997 is a break point in the history of Thailand.

The enactment of a new constitution is not, in itself, a novelty for Thailand; this is, after all, the sixteenth constitution which the country has had in quite a brief period of time (since 1932).

Nevertheless, as everybody knows, Constitution is one of the words with the most ambiguous and wide-ranging meaning in political/legal language. Objects that are very different, both in content and in functions, can be concealed behind it.

It is also a well-known fact that the modern constitutions date from the cultural and philosophical movement of constitutionalism, which developed originally in France and the United States of America at the end of the 18th century and then spread in irregular waves to other parts of the world in the 20th century, in connection with democratization processes. Modern constitutions present two fundamental characteristics.

In terms of function, as fundamental laws, expressions of a higher lawmaking which takes its distance from the politics of every day, or normal lawmaking [Ackerman 1991], they are oriented both at limiting power and creating a framework of rules for coexistence among the members of the society.

The content, as a consequence, is constituted both by regulations which aim to organize the separation of powers and by regulations which are specifically directed at protecting rights and at defining shared principles within which ordinary constitutional life can develop.

These are constitutions which look to the future, which demand to be expanded and enforced, which outline a program for the development of the legal system.

The Constitution of 1997 represents, in the constitutional history of Thailand, the first “constitution of constitutionalism” .The past constitutions can be positioned in the category, fairly commonly used in reference to Asian constitutional experiences, of “constitutions without constitutionalism” [T.L. McDorman, M.Young 1998]. They were, in fact, documents conceived essentially to legitimate the political power, and to this end their content was largely dedicated to the organization of the State, with the exception of those few references to rights which are by now required for the legitimacy of power, especially in an international perspective.

The sequence coup d'état-constitution which has connoted the Thai experience in the 20th century well demonstrates how earlier Constitutions were merely tools for maintaining the status quo of power, and therefore destined to last only until a new request for legitimization, in the wake of yet another interruption of constitutional life, made the approval of a new Constitution necessary.

The Constitution of 1997 interrupts this cycle, as the process followed for its adoption clearly demonstrated: it is referred to as the “People’s Constitution” in order to underline the participatory nature of its origins. The process was in large part removed from politicians and entrusted to an alliance among technicians (jurists) and organized civil society (NGOs - non governmental organizations) [v. Laird 2000; Nanakorn 2002]. It was also drawn up not following a traumatic event, with the objective of stabilizing a new regime, already in power, but as an element of an ongoing process of transition [Ghai 2005]. It is not a constitution which takes stock of the past, but a constitution which proposes a program for the future.

The Constitution is oriented at a new foundation of the legal order, in a palingenetic and anti-political way: to that end, fundamental rights and the rules of democracy are positioned in the centre for the first time.

In spite of this, nearly ten years after coming into force, the Constitution still had difficulty asserting itself with all its innovative power, and the distance between “law (constitution) on the books” and “law (constitution) in action” was still very wide. The effectiveness of the constitutional regulations appears problematic, as happens in many democracies during the consolidation phase, especially in areas of the planet which have no history of constitutionalism.

The recent events of September 2006, the ease with which the 1997 Constitution was suspended and yet another “interim Constitution” proclaimed, seem to demonstrate that its roots are not yet deep enough to guarantee stability.

There are many causes of this weakness in the constitutional order, and many economic, social, political and cultural factors can be invoked to explain it.

The aim of this paper, much more limited, is to examine the bill of rights contained in the Constitution of 1997, comparing it principally to other constitutional experiences in the area (Eastern Asia), especially those that belong to the same

constitutional cycle, identifiable as the “third wave of democratization” of Huntington (the Philippines, South Korea, Cambodia, Indonesia, Mongolia).

The comparison will be made taking into account the following conceptual grid:

1. techniques of constitutionalizing rights: the presence of a preamble; the systematic collocation of rights in the text of the constitution; the proclamation of the inviolability of rights; eligibility to hold rights; the length of the catalogue of rights; the degree of specification of the regulations; the open or closed character of the catalogue of rights; the existence of a hierarchy among the different rights;

2. content: civil and social rights; programmatic rules; equality; human dignity; collective rights; the role of duties; types of limitation clauses.

3. forms of guarantee: institutional guarantees (constitutional revision, independence of the judiciary; position of international law; emergency suspension clauses); judicial guarantees (constitutional justice: decentralized or centralized system? Is there a specific direct complaint for the guarantee of rights?); presence of a commission on human rights or of an ombudsman.

I can speak in advance about some of my conclusions, for it seems possible to say that there are still two weak points in the 1997 Constitution despite the considerable progress made compared to the one of 1991.

One weakness is closely linked to the formulation of the provisions about rights, which leave excessive room to the general interest, thus opening the door to types of limitation, on the part of the lawmakers, that are inevitably removed from legal controls.

A second weakness is connected, more broadly, to the notion of constitution which seems to prevail and which emerges especially from the amending formula. This allows, by absolute majority, the modification of each single article and also of the entire constitution. This relatively “easy” amending formula is understandable given the role that the constitution plays in the democratic transition, and the fact that it has to be modified periodically as the transition proceeds [Harding 2001]. All the same, entrusting the possibility of amending the constitution to the absolute majority means negating its very nature. Even if it may happen, as it has in Thailand, that the modifications are not, concretely, very frequent, still the fact itself that such a possibility is always available to the political majorities, empties the constitution of its sacred role and stabilizing function, and opens the door to suspensions or rewriting.

2. Techniques for constitutionalizing rights

As has been pointed out by commentators, the 1997 Constitution “focused utmost interest on rights and liberties”, and not on political structure [Varunyou 2003] for the first time in the constitutional history of Thailand. In this way it follows the tendency towards the universalization of the rights of the person, a tendency which marks, in an incessant and increasing way, the constitutionalism of the second half of the 20th century [this has been called “constitutionalism in the age of rights”: Weinrib 2004].

This is evident from the very beginning in the preamble (as it was for the 1991 Constitution as well). The preamble includes the protection of rights as one of the main aims pursued by the constituents, along with the increase of participation and improvement of the democratic structure of the government.

The collocation of the articles on rights is another element which indicates the centrality of the issue: sect. 4, placed among the “general provisions” included in Chapter I, states that the “human dignity, right and liberty of the people shall be protected.” The expression “human rights” continues being absent, for the “subversive” character which was, especially in the past, connected to it [Muntarbhorn 2004]. Despite the use of the “pseudonym” of human dignity, sect. 4 represents an important novelty compared to the constitution of 1991.

This distinguishes the Thai Constitution from other East Asian constitutions, which in the majority of the cases make no reference to rights among the fundamental principles (which usually contain the proclamation of the sovereignty and the definition of the form of State), or in the preamble (with some exceptions, like Cambodia and South Korea).

As for the structure of the constitutional text, the subject of rights comes after that of the monarchy, true founding element of the Thai Constitution, but precedes the articles about the organization of the powers. There is no reference to the inviolable or fundamental nature of rights (different from the constitutions of Japan, articles 11 and 97; South Korea, sect. 10).

As for the eligibility to hold rights, there is the tendency in the Thai Constitution, as in many Asian constitutions, to transform human rights in rights of citizens, following a technique which proceeds in an opposite sense from that of universalization. This is true for the principle of equality as well. The reference term when speaking about rights or dignity is “people” or “person” in a chapter that is, however, dedicated to the “Rights and Liberties of the Thai People”. The principle of equality, formulated among the general provisions of Chapter I, also refers to the “Thai people” [Muntarbhorn 2004], even if the interpretation has been to extend most of the provisions to foreigners as well. Different from many constitutions of countries in the area, there is no mention of the juridical position of the foreigner, about how one

becomes a citizen or loses citizenship, or about the protection of citizens residing abroad.

Another limit to universalization, which can be found in the Thai Constitution as well, is the position of closure to international law: this distinguishes the Asian constitutions, even the most recent, from those of the countries of Latin America or Central and Eastern Europe. These Asian constitutions firmly reassert national sovereignty, to the point of claiming that the Nation State, as created in Westphalia, has now fully materialized in Eastern Asia [Alagappa 2002]. Examples to the contrary can be found in sect. 31 of the Cambodian Constitution¹ and in sect. 6 of the South Korean Constitution². In particular, international law (customary or treaty law) is not used as a parameter to check the constitutionality of the laws, while it can be used by the National Human Rights Commission, according to sect. 200, to indicate violations to the national assembly³.

On the contrary, the Thai Constitution, along with that of the Philippines, offers an example of other tendencies towards the specification and positive definition of rights. This tendency, typical of more recent constitutionalism, distances it from other constitutions of Eastern Asia and moves it closer to the model most common in the “third wave”.

Thus, the catalogue of rights is a “long” catalogue in both senses of the word: both for the number of juridical positions protected and for the detail of the provisions given. In addition, there is an original opening clause which in reference to fundamental rights does not limit itself to consider only those expressly codified in the Constitution but assimilates others recognized “implicitly” or through decisions from the Constitutional Court⁴.

3. The contents of the Bill of Rights

The Thai Constitution, like others in Eastern Asia, expressly states the principle of human dignity, as I’ve already mentioned.

¹ This Article, which opens Chapter III, dedicated to the rights and duties of citizens, states: “The Kingdom of Cambodia shall recognize and respect Human Rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights, the covenants and conventions related to human rights, women’s and children’s rights”.

² Based on the provision: “Treaties duly concluded and promulgated under the Constitution and the generally recognized rule of international law have the same effect as the domestic laws of the Republic of Korea”.

³ From this point of view, the Interim Constitution 2006 marks a difference: sect. 3, actually, establishes that “human dignity, rights, liberties and equality enjoyed by the Thai people under conventions pursuant to a democratic form of government with the King as Head of State and *Thailand’s existing international obligation* shall ne protected under this Constitution” (emphasis added).

⁴ Section 27: “Rights and liberties recognised by this Constitution expressly, by implication or by decisions of the Constitutional Court shall be protected and directly binding on the National Assembly, the Council of Ministers, Courts and other State organs in enacting, applying and interpreting laws”.

Besides appearing as a fundamental principle in the aforementioned sect.4 of the Thai Constitution, it is also mentioned in the Constitution of South Korea (sect.10), at the beginning of the Bill of Rights, and it occurs many times in the Indonesian Constitution, as modified after 1999 (for example, in sect. 28H, which speaks about “dignified human being”), in the Philippine Constitution, where among the public policies (sect. II, Section 11) can be found the affirmation that the State “The State values the dignity of every human person and guarantees full respect for human rights” and in the Cambodian Constitution (sect. 38, par. 2): “The law shall protect the life, honour and dignity of the citizens”.

Within the category of fundamental rights and freedoms there are both the traditional negative freedoms and positive freedoms (to use the words of Isaiah Berlin).

The latter, which take concrete form in economic, cultural and social rights, appear doubly in the text of the Constitution: firstly as rights (of minors, elderly, the indigent, women, etc.) and then as principles which the State should follow in its own policies (with reference each time to this or that category), or better, programmatic provisions which have no further juridical value than that of directing the activity of the public powers (as sect. 88 expressly specifies).⁵

The principle of equality, codified among the general provisions with reference to citizens, is mentioned again in sect. 30 with reference to “all persons”. The possibility of affirmative actions to overcome inequalities and reach substantial equality is also confirmed⁶. The equality of men and women is specifically disciplined in this article.

The list of civil and political rights includes, in more or less detail, the rights to freedom and personal security, place of dwelling, communication, movement, expression of thought, information, religion, meeting, association, active and passive electorate, petition, citizenship, freedom from torture and from inhuman or degrading treatment, the right to a fair trial. The freedom of association includes an examination of the democratic nature of the activity of political parties, and the possibility that their resolutions be set aside by the Constitutional Court on this basis (sect. 47). There are

⁵ Sect.88 of the Thai Constitution states that “The provisions of this Chapter are intended to serve as directive principles for legislating and determining policies for the administration of the State affairs. In stating its policies to the National Assembly under section 211, the Council of Ministers which will assume the administration of the State affairs shall clearly state to the National Assembly the activities intended to be carried out for the administration of the State affairs in implementation of the directive principles of fundamental State policies provided in this Chapter and shall prepare and submit to the National Assembly an annual report on the result of the implementation, including problems and obstacles encountered”.

⁶ Sect. 30 states: “All persons are equal before the law and shall enjoy equal protection under the law. Men and women shall enjoy equal rights. Unjust discrimination against a person on the grounds of the difference in origin, race, language, sex, age, physical or health condition, personal status, economic or social standing, religious belief, education or constitutionally political view, shall not be permitted. Measures determined by the State in order to eliminate obstacle to or to promote persons' ability to exercise their rights and liberties as other persons shall not be deemed as unjust discrimination under paragraph three”.

even “third generation rights”, like “the right of a person to give to the State and communities participation in the preservation and exploitation of natural resources and biological diversity and in the protection, promotion and preservation of the quality of the environment for usual and consistent survival in the environment which is not hazardous to his or her health and sanitary condition, welfare or quality of life” (sect.56), or “the right of a person as a consumer (sect. 57)”, or “the right to get access to public information in possession of a State agency, State enterprise or local government organisation” (sect.58), or to “receive information, explanation and reason from a State agency, State enterprise or local government organisation before permission is given for the operation of any project or activity which may affect the quality of the environment, health and sanitary conditions, the quality of life or any other material interest concerning him or her or a local community and shall have the right to express his or her opinions on such matters in accordance with the public hearing procedure, as provided by law” (sect.59).

There is no provision for a State religion (differently from what happens in other countries of the area: Buddhism in Cambodia, sect. 43, Islam in Indonesia, sect. 29, Brunei, sect. 3, Malaysia, sect. 3).

References to collective rights are quite a bit less common in the constitutions of Eastern Asia than the discussion about “Asian values” would lead one to believe. And this is true for Thailand as well, as has been pointed out: “There is no attempt to construct a notion of rights based on “Asian values”: none of the rights would be out of place in a European Constitution, and no significant right generally enshrined in European Constitutions seems missing” [Harding 2001].

Any reference to the value of tradition, forms of customary or autochthonous rights, ancestral or religious institutions is absent, unlike in the Constitutions of other parts of the world, especially in the African ones. Alongside the rights of the family, protected in all the Constitutions (see, in particular, sect. XV of the Philippine Constitution), in some there is a specific protection of linguistic rights seen as collective rights, or of the rights of the autochthonous peoples⁷. Article 28I of the Indonesian

⁷ The Indonesian Constitution provides (Sect. 32) for the right of the minority groups to speak their own language, and in the form of duties that the public powers respect and preserve the local languages. The right of people of every nationality to use and develop its own language, spoken or written, together with the right of maintaining or changing their own uses and customs appears among the general provisions in Chapter I of the Chinese Constitution (Sect. 4). The Vietnamese Constitution also contains the right of every nationality to use its language and system of writing, besides preserving its identity and promoting its own uses, customs, traditions and culture (Sect. 5). This right is recognized in the Laotian Constitution (sect. 8) as well. The Philippine Constitution simply provides for the possibility of creating a consulting organ that provides an opinion to the president about the policies that involve indigenous cultural communities, composed of a majority of members of that community (Sect. XV, section 12). The Malaysian Constitution, in the article about the principle of equality, provides that this principle will not invalidate the rules and regulations created to protect the aboriginal peoples, including the reservation of land, or the reservation for these communities of a certain number of positions in public services (Sect. 8). In Thailand (Sect. 46), the traditional communities have the right to protect or recuperate their own customs, traditions, beliefs, artistic and cultural goods, and to participate in the protection and use of the natural and environmental resources. In Taiwan, the legal protection of the status and of the right to

Constitution offers an interesting example of compromise when it states (par. 3): “The cultural identities and rights of traditional communities shall be respected in accordance with the development of times and civilisations.”

Lastly, the Thai Constitution even protects the right to resist “any act committed for the acquisition of the power to rule the country by a means which is not in accordance with the modes provided in this Constitution” (sect. 65).

A particularly important element is the express provision of the access to justice for the recognition of rights, as outlined in sect. 29.2: “A person whose rights and liberties recognised by this Constitution are violated can invoke the provisions of this Constitution to bring a lawsuit or to defend himself or herself in the court”.

The duties of citizens are also extensively provided. This is common among Constitutions of Eastern Asian countries, where the subject of rights is never separated from that of duties. This connection not only emerges in the title of the chapter dedicated to rights (where the two words are invariably associated); in some cases it is explicated in the text of the Constitution⁸. The duties mentioned are the traditional ones of obedience to the law and to the Constitution, loyalty to the country, payment of taxes, defence and military service.

In Chapter IV of the Thai Constitution the duties of conserving local artistic and cultural patrimony, protecting the environment and natural resources (sect. 69), promoting the country, religion, the king and the democratic regime (sect. 66) are also mentioned. The Thai Constitution (sect. 51) provides that the prohibition of forced labour can be suspended, by law, in case of imminent natural disaster, when the country is in a state of war, or when a state of emergency or martial law has been declared. In some cases what would be considered rights in Western constitutionalism are formulated as duties, e.g., the right to vote (Thailand, sect. 68), the right to instruction (formulated as the duty to receive instruction, Thailand sect. 69, Indonesia sect. 31.2, China sect. 46) and the right to work (frequently considered as a right/duty: Japan sect. 27, South Korea sect. 32, China sect. 42).

Rights are limited in the constitutions of Eastern Asia using different techniques, which can be traced back to all three categories identified in the literature [Kretzmer 1999].

From a comparative point of view, the choices expressed in the Constitutions concerning the necessity of balancing guaranteed rights or interests against others can be of three types, each of which has a notable influence on the role of the judges and on the balancing techniques used by them.

political participation for aborigines is stated in Sect. 9 of the additional provisions of 1994.

⁸ See, for example, sect. 51 of the Constitution of Vietnam: “The citizen's rights are inseparable from his duties. The State guarantees the rights of the citizen; the citizen must fulfill his duties to the State and society”.

In the first place it is possible, as in the United States, that the Constitution disregards the matter and that it only indicates the rights guaranteed, without giving any indication about their limitation. The creation of balancing principles is thus left fully to the courts, whose role of interpreting the constitution is therefore emphasized.

A second route, followed, for example, by the Italian Constitution and by the European Convention on Human Rights, inserts provisions that contain specific limits regarding single rights into the constitutional text.

A third possibility, adopted, among others, by the Canadian Charter of Rights and Freedom, the New Zealand Bill of Rights, the fundamental laws of Israel and by the project of the European Constitution, consists of furnishing a general balancing test to evaluate the legitimacy of the limitation of all of the rights guaranteed⁹.

Apart from a very few constitutions that follow the U.S. model (such as Japan), most Eastern Asian Constitutions can be classified into the second and the third category, according to the limitation clause.

In some countries specific limitation clauses for the various rights and freedoms do exist, each of which is therefore limited in its own way and for its own reasons. In most cases the law is entrusted with limiting the right without any additional indications being given by the constitution (like in Cambodia and Vietnam). When some indication can be found, it refers to public safety, public interest and public health, depending on the right being considered (see, e.g., the Philippine Constitution). In some cases the breadth of the limitation clause is such that it completely negates the guaranteed right. The Singapore Constitution offers an example of this: the few guaranteed rights (freedom of expression, of assembly and of association) are subject to penetrating limits that the parliament can establish by law. Regarding the freedom of expression there is reference to the interest of national security, friendly relationships with other countries, public order, decency and of any other limitation aimed at protecting the Parliament and the Courts from offence. The freedom of assembly is limited by all those restrictions deemed necessary to ensure national security and public order, while limits to the freedom of association can be set by any law relative to work or education (sect. 14). The same can be said about the Malaysian Constitution. Here not only the same freedoms (of movement, expression, assembly, association: articles 9 and 10) can be limited by parliament by law, for a series of given reasons (nearly identical to those given in the Singapore Constitution), but when a judicial review of legislation is needed, for reasons linked to the federal nature of the State, it is explicitly stated that no law can be declared unconstitutional because it limits said rights contrary to the causes of limitation provided by the Constitution (see sect. 4). To modify a law approved on the basis of the limitation clause, it is also necessary to have a 2/3 majority

⁹ This formulation in D.Kretzmer, *Basic Laws as Surrogate of Bill of Rights: The Case of Israel*, in P. Alston, ed., *Promoting Human Rights Through Bills of Rights*, p. 82.

in each of the two Chambers (sect. 159), that is a majority identical to that necessary for constitutional revision.

In other countries there is a general limitation clause. For example, Indonesia's constitution states: "In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society" (sect. 28J). At the same time it states that some rights (the right to life, to freedom from torture, the freedom of thought and conscience, freedom of religion, the freedom from enslavement, the recognition as a person before the law and the right not to be tried under a law with retrospective effect) cannot be limited in any circumstance (Indonesia, sect. 28I). There is a general limitation clause in South Korea as well, on the basis of sect. 37, par. 2¹⁰. The Taiwan Constitution also has an option for a general limitation clause, according to which no right can be limited if not by law and in the measure in which it may be necessary "to prevent infringement upon the freedoms of others, to avert an imminent danger, to maintain social order, or to promote public welfare" (sect. 23).

As far as the Thai Constitution is concerned, first of all we find an analogous type of clause, i.e. a general limitation clause, in sect. 29. This states that "the restriction of such rights and liberties as recognised by the Constitution shall not be imposed on a person except by virtue of provisions of the law specifically enacted for the purpose determined by this Constitution and only to the extent of necessity and provided that it shall not affect the essential substances of such rights and liberties. The law under paragraph one shall be of general application and shall not be intended to apply to any particular case or person; provided that the provision of the Constitution authorising its enactment shall also be mentioned therein". This does not, however, prevent the possibility of other limits on the freedom of travelling (sect. 36), communication (sect. 37), expression (sect. 39), scholarship and research (sect. 42), meetings (sect. 44), association (sect. 45) and occupation (sect. 50).

Sect. 28, moreover, circumscribes the possibility of exercising one's rights and freedoms, should these be in contrast with the rights of others or with "good morals": "A person can invoke human dignity or exercise his or her rights and liberties in so far as it is not in violation of rights and liberties of other persons or contrary to this Constitution or good morals". Sect. 63, then, states that "no person shall exercise the rights and liberties prescribed in the Constitution to overthrow the democratic regime of government with the King as Head of the State under this Constitution or to acquire the power to rule the country by any means which is not in accordance with the modes

¹⁰ This article states: "The freedoms and rights of citizens may be restricted by law only when necessary for national security, the maintenance of law and order, or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated".

provided in this Constitution. In the case where a person or a political party has committed the act under paragraph one, the person knowing of such act shall have the right to request the Prosecutor General to investigate its facts and submit a motion to the Constitutional Court for ordering cessation of such act without, however, prejudice to the institution of a criminal action against such person”.

4. The system of guarantees

The weak protection of rights in the constitutions of Eastern Asia is further shown by the guarantee provisions. This is true even in those constitutions which would seem more openly marked by the protection of fundamental rights [Beer 1992, Hassal, Saunders 2002]. The Thai Constitution seems to be by far the most attentive to the guarantee of rights and provides for a complex mechanism of control and guarantee bodies.

The regulatory (or institutional) guarantees, understood as all of those techniques which aim at protecting rights without undertaking judicial procedures, can essentially be identified in the typical affirmation about the supremacy of the Constitution (Thailand sect. 6; Cambodia sect. 131; Singapore sect.4; Malaysia sect.4; Vietnam sect.146) and its binding nature for all public powers¹¹, as well as, with the exception of the three socialist states in the area¹², in the proclamation of the principle of the rule of law (Indonesia, sect. 1, section 3) and of the independence of the judiciary (Cambodia, sect. 109, where a Magistrate’s Governing Council is also provided for to that end; Thailand, sect. 249; South Korea, sect. 103; Japan, sect. 76). The principle of the rule of law is in any event affirmed less frequently than in other parts of the world: there is no reference, for example, to the principle of the separation of power [considered foreign to the Asiatic tradition: De Vergottini 1998].

Other procedures which could be identified as “institutional guarantees” and that are very common in the constitutions of the “third wave”, are completely absent from Eastern Asia Constitutions: the “over-entrenched” procedures for constitutional amendment as far as the catalogue of rights is concerned; the mechanisms to resolve the problem of legislative omissions; the presence of clauses of openness to international law [Ceccherini 2002].

¹¹ The Thai Constitution, sect.26, says: “In exercising powers of all State authorities, regard shall be had to human dignity, rights and liberties in accordance with the provisions of this Constitution”; and sect. 27: “Rights and liberties recognised by this Constitution expressly, by implication or by decisions of the Constitutional Court shall be protected and directly binding on the National Assembly, the Council of Ministers, Courts and other State organs in enacting, applying and interpreting laws”, and the Japanese Constitution, sect. 99: “The Emperor or the Regent as well as Ministers of States, members of the Diet, judges, and all other public officials have the obligation to respect and uphold this Constitution”. After the constitutional reform of 2004, the Chinese Constitution, in sect. 33.3 provides, as has been said, that “the State respects and guarantees human rights”.

¹² But see sect.126 of the Chinese Constitution, which declares the independence of the judicial power, even if within the limits provided for by law.

As for constitutional amendment, almost all the States in the area, Thailand included, provide for only one amending formula. In the majority of the cases a parliamentary vote is sufficient, with a qualified majority (which varies among the countries from the absolute majority to a $\frac{3}{4}$ majority) of the legislative assembly¹³. In Thailand, sect. 313 requires three readings, the first and the last by not less than half of the total number of the existing members of both Houses, the second by a simple majority of votes.

Only the Constitution of Singapore can be defined as having a “variable rigidity”; nevertheless, the most reinforced procedure (which besides requiring a $\frac{2}{3}$ majority in Parliament requires a $\frac{2}{3}$ majority in the referendum as well) is reserved for the regulations which deal with the organization of the State, not those that deal with rights (sect. 5).

In Malaysia there is a “flexibilization” clause. The Constitution, which is expressly indicated (sect. 4) as the supreme law of the federation (with the consequence that any law in contrast with the constitution is null), can only be modified with a law approved by a $\frac{2}{3}$ majority in both of the Houses (sect. 159). Nevertheless, for some matters the rigidity is eliminated, and the modification can be carried out with ordinary law: these are (and this is even more contradictory) matters closely connected with the federal nature of the State, like the admission of a State to the federation, the alteration of the confines of the State, changing the federal capital, or the composition of the second house.

Lastly, even where material limits to constitutional revision are provided for, they do not deal with fundamental rights (they mention the unitary form of the State in Indonesia, sect.37; the liberal and pluralistic system of democracy and the form of government of the constitutional monarchy in Cambodia, sect. 134). In Thailand, “a motion for amendment which has the effect of changing the democratic regime of government with the King as Head of the State or changing the form of the State shall be prohibited” (sect. 313).

Among the guarantees it should be pointed out that the Thai Constitution provides for the creation of a specific body devoted to ensuring that the governing principles of public policies (including many social rights, codified in the form of programmatic norms) can be implemented¹⁴. And the Taiwan Constitution explicitly

¹³ It is the absolute majority in Thailand, sect. 313 and Indonesia, sect.37; see, however, the more complex procedure, with the possibility of convoking a constitutional convention and of a referendum provided by the Constitution of the Philippines, sect.XVII; in South Korea a $\frac{2}{3}$ parliamentary majority is needed and the approval in an obligatory popular referendum, sect.130; in Taiwan a $\frac{3}{4}$ majority and the possibility of the referendum is provided for, sect.164; in Cambodia the majority is of $\frac{2}{3}$, sect.132; as in Vietnam, sect.147, Laos, sect.80, Cina, sect.64.

¹⁴ Sect.89: “For the purpose of the implementation of this Chapter, the State shall establish the National Economic and Social Council to be charged with the duty to give advice and recommendations to the Council of Ministers on economic and social problems A national economic and social development plan and other plans as provided by law shall obtain opinions of the National Economic and Social Council before they can be adopted and published. The composition, source, powers and duties and the operation

provides civil and penal responsibility for public employees who have damaged fundamental rights¹⁵.

Another aspect which distinguishes the constitutions of the Eastern Asian countries from the most recent tendencies of constitutionalism has to do with the provisions for emergency situations.

In the face of the emergency, in fact, the tendency of constitutions is more and more that of codification, through regulations which allow modifications to the organization of public power and to the provisions for rights for limited times during international or internal emergencies. Even though this risks opening the way to authoritarianism, these possibilities represent an attempt to bring the subject of the emergency within the sphere of law, thereby removing it from the sphere of pure event, in order to limit the arbitrariness of governments and allow jurisdictional control of their decisions.

On the contrary, the provisions for these matters which can be found in the constitution of the countries of Eastern Asia are quite succinct. They are generally limited to entrusting the executive power with the possibility of declaring the state of emergency, without providing the conditions and without indicating limits (Indonesia, sect. 12, gives this power to the President, as does sect. 43 of the Constitution of Taiwan; about martial law, sect. 222 of the Thai Constitution gives this power to the king; on the contrary, in Cambodia the declaration of the state of emergency and its management are put into the hands of the legislative assembly, sect. 86). The Constitution of South Korea provides the president¹⁶ with emergency powers, along with the proclamation of martial law¹⁷.

The constitutions which provide for emergency powers seem to do so not so much in order to regulate and contain them as to consent almost unlimited possibilities of intervention to the executive power (Singapore, Malaysia, Brunei).

of the National Economic and Social Council shall be in accordance with the provision of law”.

¹⁵ Sect.24 of the Taiwan Constitution states: “Any public employee who, in violation of law, infringes upon the freedom or right of any person shall, in addition to being subject to disciplinary punishment in accordance with law, be liable to criminal and civil action. The victim may, in accordance with law, claim damages from the State for any injury sustained therefrom”.

¹⁶ Sect. 76: “1) In time of internal turmoil, external menace, natural calamity, or a grave financial or economic crisis, the President may take in respect to them the minimum necessary financial and economic actions or issue orders having the effect of law, only when it is required to take urgent measures for the maintenance of national security or public peace and order, and there is no time to await the convocation of the National Assembly. 2) In case of major hostilities affecting national security, the President may issue orders having the effect of law, only when it is required to preserve the integrity of the nation, and it is impossible to convene the National Assembly. 3) In the case of actions taken or orders issued under paragraphs 1) and 2), the President promptly notifies the National Assembly and obtains its approval”.

¹⁷ The state of war can be proclaimed “when it is required to cope with a military necessity or to maintain the public safety and order by mobilization of the military forces in time of war, armed conflict or similar national emergency” (sect.77). The law provides for the conditions; the same article also states that “Special measures may be taken with respect to the necessity for warrants, freedom of speech, the press, assembly and association, or the powers of the Executive and the Judiciary under the conditions as prescribed by law”.

As for jurisdictional guarantees, these are also explicitly recognized in few constitutions. They are particularly limited in the constitutions of the three Socialist States of the region, where the role of monitoring the application of the constitution and of the laws is entrusted to political bodies, like the Permanent Committee of the National Assembly (Vietnam sect.91; China, sect.67). Sect. 109 of the Cambodian Constitution explicitly states that “the judiciary guarantees and defends with impartiality the rights and freedoms of the citizens”¹⁸.

In most of the countries a centralized system of constitutional justice was instituted (Japan and the Philippines, that have a decentralized system of judicial review of legislation, are exceptions); this entrusts the judicial review of legislation to a specialized court. These constitutional courts are also called upon to resolve conflicts among powers and to carry out other functions, such as control of the parties or of the elections [Ginsburg 2003].

For example, the 1947 Constitution of Taiwan entrusted the task of interpreting the Constitution to the Council of the Grand Justices of the Judicial Yuan (supreme justices of the State; articles 78 and 79): this power, which can be activated by request of individuals, public bodies and political parties, was revitalized by the constitutional reform at the end of the 1990s to the point that the Grand Justices now function like a true constitutional court, in charge of both abstract and concrete review and they receive a growing number of petitions.

The “constitutional question”¹⁹ exists in South Korea as well, where it is placed alongside the direct individual complaint, modelled on the German system (according to sect. 68, par. 1, of the Constitutional Court Act), which occupies the majority of the work of the Court²⁰.

In Cambodia, the Constitutional Council reviews the constitutionality of the laws, but only 1/10 of the members of parliament or the President of the Parliament can formulate a constitutional challenge (sect. 121).

In Indonesia, even though there is a Constitutional Court charged with judicial review of legislation, access to it is not directly provided for in the Constitution (sect. 24C). Moreover, its power was limited by the legislation for its implementation, which

¹⁸ Sect. 28 of the Thai Constitution should be mentioned: “A person can invoke human dignity or exercise his or her rights and liberties in so far as it is not in violation of rights and liberties of other persons or contrary to this Constitution or good morals. A person whose rights and liberties recognised by this Constitution are violated can invoke the provisions of this Constitution to bring a lawsuit or to defend himself or herself in the Court”.

¹⁹Constitutional questions are raised by ordinary judges. When the ordinary judge has to decide a case, if he believes that the applicable statute is unconstitutional, he can refer the question to the constitutional court. The Court will review the constitutionality of the statute, but it will not decide the case: the decision is up to the ordinary judge, that has to wait (as the ordinary trial is suspended) the decision on the constitutionality of the statute, before reassuming the proceeding.

²⁰ The “constitutional complaint” allows individuals to directly invoke Court’s jurisdiction if they consider that their fundamental rights have been violated (this procedure is very popular in Spain and Germany, and in Central and Eastern European countries as well).

removed power to review any law before 19 October 1999 – date of the first revision of the Constitution after the democratic transition – from this Constitutional Court²¹.

In Thailand (sect. 264) the incidental question can be brought by ordinary judges even on request by one of the parties to the case: when the question is raised by this avenue, the decision of the Constitutional Court will have *inter partes* effect. There is also the provision (sect. 198) of an appeal to the Ombudsman. Abstract and *a priori* review is provided only for organic laws and the proceeding rules of parliament.

Only Thailand introduced the Ombudsman in the Constitution, a body which has had great success in the most recent constitutions of Latin America, central and eastern Europe and Africa. Sections 196 and 197 of the Constitution provide for the Ombudsman, seen essentially as the body appointed to verify the activity of the public administration. There is also a Human Rights Commission (sections 189 and 190), proposed by the Senate and nominated by the King, which watches over the protection of human rights, and promotes awareness and respect of them. The powers of the Commission include the possibility of sending recommendations and comments, as well as an annual report, to Parliament. There are limitations: during its work, the Commission has to keep in mind the interests of the country and of the community [Harding 2006]. The Philippines Constitution (sect. XIII, sections 17 and 18) also provides for a Human Rights Commission – whose composition is to be defined by the law – charged with investigating violations of human rights, seeing to the measures necessary to protect the rights of and the legal assistance for all those whose rights have been violated, visiting gaols and prisons, researching, educating and informing about human rights, monitoring the activity of the Philippine government in fulfilment of international obligations in this area, recommending measures to Parliament for the promotion of human rights and for the payment of damages to victims of violations²².

5. Perspectives

The coup d'état in September 2006 seems to have again set in motion what has been defined as the “cycle of Thai politics”: “a military coup suspends the old constitution; a new constitution is enacted; elections are held; time passed until a perceived crisis leads to another military coup” [McDorman 1995].

In other words, the least optimistic previsions about the 1997 Constitution seem to have been confirmed. The difficulty of a sudden change in behaviour towards the constitution, which for 70 years had been nothing more than a document approved only to then be suspended by a new coup d'état, was broadly emphasized [e.g., Streckfuss,

²¹ According to sect.50 of law 24/2003.

²² In other countries, like Indonesia, the Human Rights Commission is instituted by law (law 39/1999). There are even dedicated Human Rights Courts within the power of the judiciary, called on to judge gross violations of human rights (law 26/2000):see Stockmann 2004, p. 289.

Templeton 2002]. In particular as regards human rights, it was said (with reference to the 1991 Constitution), that “the Thai Constitution and its reference to rights is not representative of a social contract between the state and its people. It is not genuinely based upon the universality of human rights...it has more to do with the functions of government” [McDorman 1995]. In comparison, the 1997 Constitution presented some important developments: the introduction of the reference to rights among the general provisions of the Constitution; the codification of new rights, such as social rights, (in precedence formulated only as Directive Principles of State Policies) and rights of third generation; the introduction of some general clauses about rights (articles 26-29) which aim at pointing out the obligatory nature of the regulations about rights, even for public authority, and of a general limitation clause; the introduction of the principle of justiciability of rights.

But there are many common features between the two texts. Despite the limitation clause of sect. 29, each right continues to find its limits in the law, which can intervene on the basis of generic formulas, such as the recurrent necessity of protecting public order or good morals. There is ample attention given to the duties of the person. The affirmation of the universality of rights continues to be absent, rights continue to be linked to the idea of citizenship and there is no openness to international law on human rights.

On the subject of the guarantee of rights, perplexity remains over the excessive weakness of the amending formula and over the absence of limits on constitutional amendment that make explicit reference to rights and their inviolable nature.

One area where a great deal of improvement has been made in the 1997 Constitution has to do with the Constitutional Court and other watchdogs. The Court was a pure pretence in the 1991 Constitution; in 1997 it is, instead, enabled to carry out an effective role of guaranteeing, according to the anti-majoritarian model which characterizes constitutional justice in the world, even though the direct complaint to protect fundamental rights, as can be found in Spain or Germany, would have provided a further emphasis on the centrality of rights, and guaranteed immediate justice to the people whose rights had been violated.

The Interim Constitution of 1 October 2006 takes an ambivalent position.

On one hand, it seems to reconfirm rights and freedoms, as early as its preamble. Sect. 38 seems to lend itself to be interpreted as aimed at maintaining in force the 1997 Constitution provisions about rights, when it affirms that “When no provision of this Constitution is applicable to a case, it shall be decided in accordance with Thailand’s conventions under the democratic form of government with the King as Head of State”.

On the other hand, however, the Interim Constitution signals the end of the existence of the Constitutional Court by establishing a Constitutional Tribunal composed of justices from the Supreme Court and by declaring that all the cases which

were to be decided by the Constitutional Court at the moment of the coup are transferred to the new Tribunal (Sect. 35)

The weakness of constitutionalism in Thailand, as is testified by many aspects of the codification of human rights, contributes to making the Constitution a mere piece of paper. As long as a culture of human rights and an awareness of the close relationship between the constitution and the protection of rights have not been developed, as long as the constitution is not felt to be a founding act of the legal system, it will be difficult for it to fulfil that fundamental role of stabilization which it so well has fulfilled in many parts of the world during democratization processes. It would be only a law, may be higher than ordinary law, but a law: that can be suspended, changed by majority or by force, eliminated.

Unfortunately, the Interim Constitution seems to go in the opposite direction, providing for a constituent process which, despite the affirmations of the preamble (which claims to wish to “draft and enact a new Constitution with broad public participation in every step”), places the writing of the new Constitution in the hands of bodies formed not on democratic bases but essentially selected by the members of the military now in power: the people will only be called upon to ratify the product in a referendum. The effort of 1997 seems to have been cancelled: the constitution seems destined to remain, as is by now tradition in Thai history, a “piece of paper”, very far from that compact founding a new order which, instead, the Thai society had hoped for and that is the main explanation for constitutional longevity.

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