

Thailand's Reforms: Human Rights and the National Commission

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Early in 2004, 20 schools in Thailand's southern province of Narathiwat were torched by Muslim separatists, and four soldiers were killed in an attack on an army camp. Five Thai Muslims stand accused of these crimes and allege that they were tortured by the police. One, for example, alleges that he was tortured into confession when he was arrested, kicked, beaten, urinated upon and had electric shocks administered to his genitals. Their defence attorney, a Thai Muslim human rights lawyer, subsequently disappeared; more than a year later this case was still giving rise to concern and nothing had been resolved. In April 2004, the military stormed a mosque where Muslim separatists were holed up, and 107 of them were killed. These events were interspersed with several assassinations of Thai officials in the four southern Muslim provinces. In October 2004, in an incident known as the Tak Bai riot, 78 Muslim protesters were suffocated after being arrested and herded into army trucks. Altogether 85 persons, including mere bystanders, are reported to have died. The unrest that had existed prior to these events has continued, and further incidents have been reported with some frequency.¹ However, at the time of this article's final submission in May 2005, although much effort had been devoted to bringing the perpetrators to justice, including an investigation by a sub-panel of the National Human Rights Commission (NHRC), nobody had been charged with human rights abuses, despite some very disturbing findings by the panel.² Efforts to punish separatist terrorists resulted in the acquittal in May 2005 of four men charged with plotting terrorist offences. The government has appointed a National Reconciliation

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¹ The issue of 'the troubled south' centres on four predominantly Muslim provinces that formed the ancient Malay kingdom of Patani. Discontent and separatist tendencies have been evident for many years, but have resurfaced in the early years of the present century. Since early 2004, more than 600 people have died as a result of terrorist attacks in this region.

² The Commissioner appointed to chair the investigation, Khunying Amporn Meesuk, is reported ('Police Ignored Charter, Human Rights' (5 May 2005) *Bangkok Post*) as saying that extensive field trips and in-depth interviews showed that the whole process, including treatment of protesters, crowd control, dispersal of protesters, detention of suspects, damage compensation and prosecution of suspects, had failed to meet human rights standards upheld by the Constitution and governed by international conventions. Indeed, it was also reported that 58 protesters had been charged; the sub-panel recommended that these charges be dropped as they had been made randomly. The sub-panel also recommended other measures, including the award of compensation to the victims. Its report has been forwarded to the prime minister and a committee is dealing with the matter of compensation.

Commission (NRC) under the chairmanship of the former prime minister and architect of constitutional reforms, Anand Panyarachun.³ This would appear to signal a change in government policy that would emphasise human rights and good governance. However, it is not within the remit of the NPRC to investigate human rights violations as such.

It can be seen from the foregoing that the topic of this article is a difficult one. When tensions are very high, as they clearly are in the troubled southern Muslim provinces of Thailand, human rights tend to take a back seat, and yet it is precisely in such situations that their value becomes apparent. The facts and allegations stated above are not only the subject of investigations; they are also the subject of international concerns. However, the fact that they are being investigated at all is a new situation in that for many years, and despite many advances in governance and democracy, notably the implementation of a new anti-corruption, rule-of-law Constitution in 1997,⁴ the conduct of the police and the armed forces has been beyond the reach of the law, and beyond the scope of any form of accountability. The findings of the sub-panel show that the soldiers dealing with the Tak Bai riot regarded themselves as following not only orders, but normal procedures in dealing with protesters, that is to treat them as prisoners. The fact that they had such orders and saw no reason to exercise some judgment in the matter is already a cause for some disquiet.

The purpose of this article is to attempt to explore the problems and paradoxes of human rights in the Thai context, addressing human rights as a test case for constitutional reform in Thailand following the adoption of the 1997 Constitution, on the assumption that the reform of governance and the advancement of human rights are intimately related in this particular context. How, after all, can governance can be successfully reformed in the way in which the constitution-makers desired without parallel advances in the application of human rights? How can human rights be successfully applied without parallel advances in the reform of governance?⁵ The article is, therefore, as much about governance as it is about human rights, and takes the view that the resolution of problems such as that of the Muslim south is rooted in questions of governance, not just in questions of human rights.

HUMAN RIGHTS AND HYPOCRISY

Before drawing some rather too unalloyed conclusions from the very distressing facts set out above, it is necessary to reflect briefly on human rights generally as the concept has evolved to this point. Human rights are an essential part of what I have elsewhere referred to as 'global doctrine' in opposition to, or in tension with, 'local knowledge'.⁶ If human rights are now global doctrine, we have nonetheless to recognise that so far

³ 'Press Leads the Cheers for the National Reconciliation Commission' (3 April 2005) *Bangkok Post*.

⁴ Uwanoo Borwornsak (2000) *Depoliticizing Key Institutions for Combating Corruption: Case Study of the New Thai Constitution* King Prajadhipok's Institute; McCargo, D (ed) (2002) *Reforming Thai Politics* NIAS; Pinai Nanakorn (2002) 'Re-making of the Constitution in Thailand' (6) *Singapore Journal of International and Comparative Law* 90.

⁵ For human rights and governance in Thailand, see generally, Vitit Muntarbhorn (1996) 'Human Rights in Thailand' in Palmier, L (ed) *State and Law in Eastern Asia* Aldershot; Streckfuss, D and Templeton, M (2002) 'Human Rights and Political Reform in Thailand' in McCargo, D (ed) *Reforming Thai Politics* NIAS chapter 6; Thomson, CN et al (ed) (2003) *Monitoring the Pulse of the Nation: Indicators of Good Governance and Development in Thailand* KPI.

⁶ Harding, AJ (2002) 'Global Doctrine and Local Knowledge: Law in South East Asia' (51) *International and Comparative Law Quarterly* 35-53.

as the legal culture of English-speaking peoples is concerned, they have only come to be regarded as universal after a long struggle that can be traced back to at least the 13th century. The struggle still goes on: the UN Declaration came only in 1948; Canada enacted its first bill of rights in 1960, the United Kingdom only in 1998; and, indeed, many countries have taken such a step only in the last couple of decades. This juncture — the formal enactment of a bill of rights — was reached in Thailand as early as 1932. I am not suggesting here that Thailand was in advance of the world in the implementation of human rights, but it is important to avoid historicism by trumpeting the latest achievements of global doctrine as both inevitable and as immediately transplantable, or neglecting to notice the trajectory and the paradoxes of human rights discourse in other cultures such as that of Thailand.

One might go rather further than this by pointing out that the field of human rights is clouded by a great deal of rank hypocrisy. Some countries, on the basis of national security, enact laws that they have consistently criticised, when used elsewhere, on the basis of 'global doctrine' (or international human rights) — until, that is, the use of such laws both in their own country and elsewhere became expedient; at this point the countries previously criticised are, of course, praised for their assistance in fighting international terrorism or the like, and their abuses of human rights are either overlooked or commended as 'decisive government'. On the other hand, some countries are happy to find that their erstwhile critics have now been forced to adopt laws that breach global doctrine, because this allows them to avoid criticism and even gain diplomatic points, while also using oppressive measures to remain in power and oppress minorities — all of which can be neatly justified on the basis of 'local knowledge' (or 'cultural essentialism'). There is also hypocrisy on all sides in the assumptions that human rights abuses take place only in other countries; are justified by some higher social good that is evident only in one's own country, such as inter-ethnic conflict or terrorism; are immune to criticism because they also occur in the critic's own country; and in the assumption that one's present or desired definition of human rights is a given universal that brooks no debate or serious reflection and should be imposed on everyone (however recently this 'self-evident' truth actually became self-evident). To describe human rights as a product of Euro-American intellectual and political history also obscures the fact that it was precisely the occurrence of human rights abuses on a truly unimaginable scale in Europe and elsewhere that led to the human rights movement in the first place. The Thai government has been quick to point out that the UK and the USA, both accused of human rights abuses in Iraq, are in no position to criticise Thailand in its present predicament. The only way of resolving these difficulties is by means of scrupulous objectivity and a sympathetic understanding of the trajectory of legal history in a given society.

HUMAN RIGHTS AND THAI SOCIETY

In the spirit of the foregoing paragraphs, human rights should be seen not as the political rhetoric they usually are, but as the delivery of actual justice to real people because they are human. Some highly commendable work on human rights in Thailand, such as that by Muntarbhorn and Taylor,⁷ has tried to express analytically, in statistics, the extent

⁷ Vitit Muntarbhorn and Taylor, C (1994) *Roads to Democracy: Human Rights and Democratic Development in Thailand* International Centre for Human Rights and Democratic Development/Centre International des

of the problems and the defects in human rights enforcement. This approach, if one might presume to extrapolate its theory, considers human rights in their local context, one in which there are specific and repeated abuses which require to be addressed. In Thailand, concerns have centred on particular groups: those who are disadvantaged by having to work as female and male prostitutes to support their deprived rural families; women and children who are victims of people-trafficking; oppressed sexual minorities; drug addicts; those who suffer from AIDS or are HIV-positive; the disabled; the urban poor; impoverished farmers; villagers displaced by dam projects; the Muslims of the southern provinces; the indigenous hill tribes of the northern provinces; the refugees from Burma ... the list goes on. One should add that individuals too suffer human rights abuses. Alleged drug-traffickers and other alleged criminals have in recent years been killed in police action or in police custody during a 'campaign' against 'dark forces' in Thai society, and trade union and farmers' movement leaders have been mysteriously assassinated. Even the urban middle classes and university students have suffered oppression at the hands of brutal military dictatorships in 1973 and 1992, their rights to freedom of expression and personal security abused on a wide scale.

There is, however, an important point here: it is abuses of this kind that have sparked deep public frustration and have hastened the advent of the NHRC and the 1997 Constitution. The abuses of human rights run counter to all the aspirations of those reformist lawyers, academics and politicians who drafted the 1997 Constitution after substantial public consultation, and spurred the drafting of a document that attempts as far as any document can to 'change social facts by law'.⁸ Indeed, despite the frequency of human rights abuses, substantial progress has been made. Thailand does not, however, have a long human rights tradition, and although there has always been a concept of the just state, it has not been part of Thai culture, at least not until recently, to make legal claims on the state. The underlying question is, then, whether global doctrine is in this instance inconsistent with local knowledge.

HUMAN RIGHTS, BUDDHISM AND LEGAL CULTURE

It is, of course, fashionable to try to interpret different religious and cultural values as being consistent with international human rights. These attempts are often laudable and interesting. Applying this approach, one could advert to the profound respect paid by Buddhism to human and indeed all life, and the civility, harmony and public service to be found in everyday life in Thailand, which is also attributable to a Buddhist culture.⁹ One could point to the fact that, traditionally, a Siamese subject could toll a bell outside the palace and ask the King to hear a grievance. One could consider that the King was obliged to listen to the recitation of the Buddhist scriptures for several hours a day so that he would become a just ruler.¹⁰ But we have to beware of the danger in such analysis,

Droits de la Personne et du Developpement Democratique, Montreal.

⁸ Harding, A (2001) 'May there be Virtue; "New Asian Constitutionalism" in Thailand' (3) *Australian Journal of Asian Law* 24 at 25. Likit Dhiravegin (2003) *The Constitution – Political and Executive Reform* KPI, available at: <<http://www.kpi.ac.th/download/Reformed.pdf>>.

⁹ Jackson, PA (1989) *Buddhism, Legitimation, and Conflict: the Political Functions of Urban Thai Buddhism* ISEAS.

¹⁰ For Thai legal history, see Huxley, A (ed) (1996) *Thai Law: Buddhist Law: Essays on the Legal History of Thailand, Laos and Burma* White Lotus Press; Preedee Kasemsup (1986) 'Reception of Law in Thailand – a Buddhist Society' in Chiba, M (ed) *Asian Indigenous Law: in Interaction with Received Law* KPI chapter 6.

which is that of misinterpreting an entire culture and failing to take it seriously in its own terms. By forcing a rich tradition into a historicist construct reflecting a very recent stage of legal development elsewhere, we may do every bit as badly as rejecting the validity of that tradition: we may distort it and trivialise it. We may also underestimate the cultural adjustments that need to be made in order to develop a human rights tradition.

Human rights and Buddhism do have much in common, however, and there is much that can be compared and debated between the two. The National Human Rights Commission's president, Professor Saneh Chamarik, views Buddhism as an important tool in explaining human rights to a sceptical public in his ambitious programme of human rights education.¹¹ However, Buddhism also profoundly affects, in ways that contradict global doctrine, the concepts of justice and legal personality held by most of the Thai people, and this if anything has become even more true in the age of globalisation, in which the local values of village life and local dispute settlement have been dissipated.

These Buddhist concepts run counter to the whole idea of positive law as a means of resolving what can be termed 'situations of injustice'. What those in the West might call an act of injustice caused by an illegal action to be remedied or restored through a process involving attribution of liability, a Thai Buddhist might see as an adverse event which occurs in a context that includes the victim's actions in a previous life and his or her own fault in this life, as well as the fault of another individual and sheer bad luck, and is to be corrected by a virtuous action on the part of the victim rather than the tearing even further of the fabric of the universe by antagonistic gestures. The legal culture of the West, which has done much to advance human rights, has also resulted in every misfortune being regarded as inevitably the fault of another human being or institution. Is it possible that the Thai Buddhist has seen some things about justice and causation that some of us in the West have missed?

It is, of course, hard to see how the state figures in this mystical equation: is the state merely a form of political, administrative or judicial weather against which one tries to insulate oneself by avoiding it as much as possible, especially when it appears to offer a legal remedy? Or, does it represent a moral and inclusive community under the aegis of a virtuous Buddhist King who has kindly bestowed a modern, reformed constitution? Both of these attitudes seem to be held by Thai people who, with apparent consistency, distrust the 'people of colour' (that is, people in uniforms, or officials) and at the same time show complete trust in a virtuous Buddhist King if not perhaps the modern, reformed constitution.¹² The moral state is not generally viewed as being democratic or as a source of rights; but the dharmic notions of Thai Buddhism undoubtedly see the state as potentially capable of going beyond the limits of benevolence, as it did in the 1973 and 1992 suppressions of popular dissent against military dictatorship and as it also has appeared to do in recent months.¹³

¹¹ See the NHRC's website, accessed 30 May 2005, at: <www.nhrc.or.th/en/>.

¹² Any Thai citizen of 30 years or over, having endured the adoption of as many as 16 constitutions within a single human lifetime, could be excused for refusing to accept the last one as definitive or even as worthy of attention. For discussion of a previous constitutional reform effort, see McDorman, T (1995) 'The 1991 Constitution of Thailand' (3) *Pacific Rim Law and Policy Journal* 257.

¹³ Hewison, K (ed) (1997) *Political Change in Thailand: Democracy and Participation* Routledge; Nelson, MH (ed) (2001) *Thailand's New Politics: KPI Yearbook 2001* King Prajadhipok's Institute and White Lotus Press; Nelson, MH (ed) (2003) *Thai Politics: Local and Global Perspectives. KPI Yearbook No. 2 (2002/03)* King Prajadhipok's Institute; Phongachit, P and Piriyanangsan, S (1996) *Corruption and Democracy in Thailand* Silkworm Books.

'May there be virtue' are the first four words of the 1997 Constitution in its English translation; they seem to be almost a cry of desperation and a rallying call; they imply that the virtuous state can come about but it requires a huge commitment and a gargantuan effort at all levels of society. This effort can be seen in all of public life in Thailand in the post-1997 era, and is not necessarily doomed to failure. While it is true that previous attempts at constitutional reform have resulted in either failure or minimal progress, the conditions are very much more favourable when compared with those of previous decades. If one might use the analogy of a Thai kick-boxing match, in the eternal struggle between law and society, society usually, in the Thai context at least, lands the decisive hits,¹⁴ but sometimes law does prevail. Where public opinion is decisively in favour of reform, the conditions are inevitably improved.

HUMAN RIGHTS AND CONSTITUTIONAL DEVELOPMENT

Despite the existence of a bill of rights since 1932, it is only since 1997 that methods of enforcing human rights have become salient, and this is against the background of a *de facto* immunity generally enjoyed by the state military and security apparatus over many years, some evidence of which is provided in the first section of this article. This apparatus has now been banished from politics to the barracks by the 1997 reforms, which, for the first time have refused to recognise any legitimate place for the military as such in the legislature. The military is not yet fully or clearly accountable before the law: the 1992 perpetrators still walk the streets of Bangkok unpunished, having benefited from an amnesty. Whether this immunity will be effectively breached in the present circumstances relating to the Muslim south remains a major test for the reforms in the context of human rights and good governance.

Let us turn then to the 1997 Constitution itself, but place it in a historical context before dealing with its human rights provisions.

'May there be virtue': the remainder of this extensive, impressive and intelligent document is an unfolding of the meaning of these four words. The Constitution is an elaborate, almost baroque, instrument designed to prevent corruption and to create stable government. It rests on the rule of law, on human rights, and on the separation of powers, none of which have been entrenched in Thai public life despite a century of legal reform commenced by King Chulalongkorn in the 1890s.¹⁵

Chulalongkorn believed in modernisation and in extending and consolidating the reach of the state; he believed that modern law and a modern form of citizenship were needed to achieve these ends. He did not believe, however, that the time was ripe for either democracy or individual or human rights.¹⁶ His upstanding Siamese 'citizens' would also be obedient 'subjects', at least until they could learn how to be independent but responsible. Thus, the Siamese citizen came to be endowed with legal rights under the codes of law inspired by France,¹⁷ many of which could be called human rights in modern parlance, but they were the rights of citizens and had correlative duties, which

¹⁴ Klausner, W (1998-2000) 'Law and Society' (VII) *Chulalongkorn Law Review* 1.

¹⁵ Engel, DM (1979) *Law and Kingship in Thailand during the Reign of King Chulalongkorn* University of Michigan.

¹⁶ Id.

¹⁷ These codes are referred to by Vitit Muntarbhorn as 'a bastion untoppled by coups': Vitit Muntarbhorn and Taylor, *C Roads to Democracy* supra note 7 at 11.

have always been and are still found in Thai constitutionalism.¹⁸

Although he was an admirer of Western countries and their legal and political systems, Chulalongkorn was fully aware of their defects. Having twice visited London's East End incognito in the 1890s, he was fully acquainted with the poverty and desperation that existed alongside Britain's law, constitutional monarchy, public education, and technological know-how. To Chulalongkorn, democracy was a desirable condition, but could only come about under conditions of much improved education. In this policy, he may have been wise. Would he have said, a century after his reforms, that democracy's time had finally come? One suspects that he would. He might well have said that the 1997 Constitution is the keystone of the very arch he himself erected. He made his people equal to each other, but now they regard themselves as equal to their rulers and to the rest of the world. There are still, of course, important elements of status in Thai society, and these still affect the operation of law and politics, particularly in rural areas. But, Thais are also intensely nationalistic and see themselves as potential or indeed actual winners in the stakes of globalisation.

Since 1932, Chulalongkorn's successors as executive heads have been generals or politicians whose hold on power was either precarious or highly autocratic. Thailand has oscillated between weak coalition governments and military strong men, an oscillation which the 1997 reformers proposed to bring to an end. Just as the Thai state developed by Chulalongkorn reflected aspects of Victorian Britain in its constitutional monarchy or the French republic in its legal codes, so in later times it sometimes reflected aspects of German or Japanese fascism, European socialism, and American capitalism. In the 1940s, General Phibulsongkram forced the Chinese to wear distinguishing marks as though they were German Jews. Marxism was attractive to many radicals, not excluding those in the military, in the 1960s and 1970s, but also provoked a highly authoritarian form of nationalism. Even now, Thai officialdom has some difficulty in seeing equal citizenship as extending to indigenous hill tribes in the north or Muslims in the south. Thai nationhood has much to do with Thai ethnicity. The present prime minister, Thaksin Shinawatra, leads a party known as Thai Rak Thai ('Thai loves Thai'). Mass movements have not normally espoused 'human rights' as a concept until the present age of civil society and globalisation; indeed, the usual Thai term for human rights — '*Sithi-manusyachon*' — did not come into usage until after the Universal Declaration of 1948.¹⁹

Thailand has avoided colonisation and its contemporary equivalents by following Chulalongkorn's example, bending with the prevailing wind but never snapping, always following its own agenda. In this process the Thai people did not develop the habit of mobilising themselves in such a way as to embrace human rights. There was no colonial master to oppose, only foreign powers to appease or manipulate. Authority did not always recognise that organising public opinion was legitimate: a farmers' movement in northern Thailand in the 1970s collapsed when some of its leaders were assassinated with official connivance; the military horribly slaughtered the students of Thammasat University on their own campus in 1973. It was only when military rule became intolerably harsh and self-serving that the Thai people stood up and demanded human rights and democracy, and only in the 1990s and 2000s have they achieved a democracy that is not simply an interlude between military coups, but has become, one

¹⁸ *Constitution of the Kingdom of Thailand* (1997) Council of State (trans) Government Printer chapter IV.

¹⁹ Prior to this, the main relevant term was '*Itsaraphap*', usually rendered as 'liberty'.

hopes, truly their natural system of government. If the 1997 Constitution survives, its importance will lie in its having brought to an end the cycle of military coups (16 since 1932, or 22 attempted coups), new constitutions (16 since 1932), and revolving-door coalition governments (there have been 55 governments since 1932). But whether the ambitions of the constitution-makers will be fulfilled in other respects, notably with regard to the entrenchment of legality and human rights, is another question. If, on the other hand, the 1997 Constitution ultimately fails, it will not be possible this time to blame an imperfect document and promise to do better next time: constitution-drafting has been taken as far as it can go, subject only to the point that even this constitution is expressed to be a work-in-progress and remains to be perfected in some respects, even by the standards of its makers.²⁰

Consideration of the 1997 Constitution and its implementation indicates strongly that Thailand's public law reform is highly significant in the context of the development of the new constitutionalism in Asia and in the developing world generally. In this context, perhaps it is only South Africa that has recently undertaken a comparable root-and-branch public law reform, and the Thai effort, it should be recalled, has not been motivated or propelled by a political revolution or axial event such as the end of apartheid: there is no Thai Nelson Mandela, there are just Thai activists, politicians, academics, lawyers and ordinary people, workers, peasants, students and noodle-sellers who passionately want things to improve.

THE 1997 REFORMS

What, then, led to the 1997 reforms?

The 1980s were marked by the collapse of support for the communists and the re-integration of communist supporters in Thai society following the turbulent events in mainland Southeast Asia during the 1960s and 1970s. This was a striking act of tolerant and forward-looking statesmanship by Prime Minister General Prem Tinsulanond, which probably prepared the ground socially and psychologically for the emergence of the new Asian constitutionalism in Thailand in the 1990s. The earlier part of the 1990s was marked by a breakdown of political order following the period of stability under General Prem. A military coup in 1991 was rejected in street demonstrations, which were brutally suppressed in 1992. This was followed by a mass demonstration resulting in the resignation of the coup leader, Prime Minister General Suchinda, and a distinct shift in the balance of power between the people and the military. Three short-lived coalition governments followed, fuelling activists' demands for fundamental political reform and an end to the political oscillation.

The Constitution was drafted by a Constitution Drafting Assembly (CDA) consisting of 99 members. Electoral process was used in the choice of members representing the provinces, numbering 76 (one for each province); the balance of 23 members consisted of lawyers, political scientists, civil servants and politicians. Its remit was expressed in the Preamble to the resulting Constitution, and embraced everything, including human rights, except the constitutional nature of the monarchy and the system of democracy. The Constitution was drafted and brought into effect during the first ten months of 1997,

²⁰ In May 2005, the Senate was considering a raft of proposed constitutional amendments, some of which arose from practical difficulties encountered in appointing watchdog bodies such as the National Counter-Corruption Commission.

during which time the Asian currency crisis, commencing with the flotation of the *baht* in June 1997, convulsed the country and then the entire East Asian region.

The CDA debates and their outcome were an education in constitutional law to the entire political class and the public. Many innovations were adopted. Many existing institutions were reformed. Naturally not everyone was happy with the result, as in some respects compromises had to be made. But, on the whole, it has to be said that in terms of fulfilling its objectives, the CDA adopted what amounts to a 'zero tolerance' approach towards corruption and the abuse of power. Considering that the country passed through a cataclysmic economic crisis during precisely the period of enactment and implementation of the Constitution (1997-99),²¹ one might be forgiven for asking if this was indeed the right time for such endeavours, and whether the gargantuan efforts involved would not have been better directed to more immediate, that is, economic, problems. Thai opinion, on the contrary, has generally regarded the economic and constitutional issues as inextricably linked, and views both as coming down to the problem of good governance.

HUMAN RIGHTS UNDER THE 1997 CONSTITUTION

How, then, did the reform process deal with human rights?

Human rights proved in the event to be by far the most controversial and problematical aspect of the reform process. This was not a debate about 'Asian values'.²² It was a debate about how and to what extent human rights could be enforced as a fundamental feature of the Thai polity, and the fixing of an appropriate role for the NHRC.

The Constitution (Chapter III) sets out an extensive litany of fundamental rights, supplemented by provisions (ss 236-47) dealing with the rights of accused persons in the criminal process, and others (ss 199-200) providing for investigation by the NHRC.

The fundamental rights are expressed, for the first time, to belong to persons in general, even though Chapter III is entitled 'Fundamental Rights and Liberties of the Thai people'. All state organs are obliged to observe fundamental rights and liberties in applying and interpreting laws, and an individual is able to enforce his or her rights either actively by bringing a lawsuit, or passively by invoking the Constitution in defending him or herself in court (ss 27-28). There is no right of direct fundamental rights petition to the Constitutional Court. The court having jurisdiction over the case stays the proceedings and submits its opinion to the Constitutional Court for decision, with which the lower court then complies. The absence of any right of direct petition and the possibility of delay or eventual circumvention of the decision of the Constitutional Court makes the enforcement of fundamental rights a somewhat hazardous enterprise.²³ Nonetheless, several attempts, some of them successful, have been made to invoke this procedure. For example, a mother aggrieved by her child's failure to obtain a place at a desirable school used new legislation on freedom of information²⁴ to access the admission scores,

²¹ Jumbala, P (1989) 'Thailand: Constitutional Reform Amidst Economic Crisis,' in *Southeast Asian Affairs 1998* ISEAS.

²² See, further, Thio, Li-ann (1999) 'Implementing Human Rights in ASEAN Countries: "Promises to Keep and Miles to Go before I Sleep"' (2) *Yale Human Rights and Development Law Journal* 1.

²³ Klein, J (2001) 'The Battle for Rule of Law in Thailand: The Constitutional Court of Thailand' in Raksasataya, A and Klein, JR (ed) *The Constitutional Court of Thailand: The Provisions and The Working of the Court Constitution for the People Society*.

²⁴ See *Official Information Act BE2540* (1997) Council of State (trans) Government Printer.

which revealed a 'VIP quota', and equality provisions in the Constitution to secure the overruling of the school's decision.

Space precludes any detailed attention to the very extensive provisions on fundamental rights, but a few points will illustrate their general character.

There is no attempt to construct a notion of rights based on Asian values; indeed none of the rights would be out of place in a European or North American constitution, and no significant right generally enshrined in such a constitution seems to be missing — some of the rights are decidedly 'third-generation' in nature. Most of the rights are based on familiar concepts, but have been carefully and broadly drafted. For example, the right to equality before the law, used by the mother in the case just mentioned, prevents discrimination on grounds of difference in origin, race, language, sex, age, physical or health condition, personal status, economic or social standing, religious belief, education or constitutionally political view. Thus, disabled persons, for example, would enjoy constitutional protection in the same way as members of ethnic minorities. This provision (s 30) does not, however, prevent affirmative action measures 'to eliminate obstacle to or to promote persons' ability to exercise their rights and liberties as other persons'.

The usual 'due process' rights are all guaranteed: the right to life and liberty (though the death penalty is permitted); the right not to be subjected to cruel or inhumane punishment or torture; the right not to be subjected to arbitrary arrest, detention, or search (ss 31, 35, 237-38); the right to counsel and to habeas corpus, to bail, legal aid, and to a speedy, continuous and fair trial in a criminal case (ss 239-42); the right against retrospective penalties (s 32); the presumption of innocence (s 33); family rights, the right to dignity, privacy, and reputation (s 34), and the rights of peaceful habitation (s 35); liberty of travel and choice of residence and property and competition rights (ss 36, 48-50); liberty of communication (s 37), freedom of religion (s 38), expression and assembly, association and to form a political party (ss 39, 44-47). The Constitution goes to some lengths to ensure that the freedom of expression without censorship is real, and the media are protected from political interference (ss 39-41): closure of presses and television and radio stations is prohibited; independence of journalists is guaranteed; even academic freedom is guaranteed (s 42). There are also guarantees against *ad hominem* legislation (ss 234-35). There are also a number of social and economic rights: a right to education for 12 years at public expense (s 43); to medical care and old-age pension (ss 52, 54); and special rights for the disabled (s 55).

Some of the rights are of great interest. Environmental rights include a right to participation in decision-making in issues affecting the quality of a person's environment, and to environmental impact assessment (ss 56, 59). There is also a right of access to information (s 58); a right to present a petition (s 61); a right to sue state agencies (s 62); and a right to natural justice in administrative decisions ('the right to participate in the decision-making process [...] in the performance of administrative functions which affect or may affect his or her rights and liberties as provided by law' (s 60)). A right clearly based on historical experience is the right of peaceful resistance to any act committed for the unconstitutional acquisition of power (s 65).

THE GENESIS OF THE NATIONAL HUMAN RIGHTS COMMISSION

In the reform process, separate debates on the Constitution and on the National Human Rights Commission (the latter debate having continued throughout the 1990s) became

joined during the constitution-drafting process.²⁵ The transitional provisions of the Constitution (s 334(1)) required an organic law to be passed within two years to set up the National Human Rights Commission, and this obligation was fulfilled with the enactment of its organic law in 1999. The law went through no less than 17 drafts over seven years (1992-99) since its original conception long before the 1997 Constitution itself was conceived. The drafting process was longer than that leading to the Constitution itself, disagreements surfacing over almost every aspect of the NHRC, from its powers and organisation to its composition and its selection process. The main issue was whether the NHRC would or would not be an independent body. The story of how the debate unfolded is an extraordinary saga of unexpected sudden reversals, false dawns and last-minute compromises. Suffice it to say, the NHRC became a battleground between those who wanted to see a strong and independent NHRC, which they saw as the very foundation of human rights, and those who saw its role as limited and who emphasised national security and the efficacy of Thai traditions. The human rights movement was probably too ambitious in expecting that the NHRC could be a kind of human-rights czar with powers to enforce human rights over the jurisdiction of other bodies.

The result was a compromise, but one with which Anand Panyarachun, who was instrumental in laying its foundations during his two terms as prime minister, might well have felt satisfied.

As with all the other 'watchdog' bodies under the 1997 Constitution, the selection process (NHRC Act s 8) involved the Senate appointing a Selection Committee, in this case comprising 27 members, who were to choose 22 candidates from whom the 11 commissioners were to be chosen by the Senate. The 27 were to comprise the presidents of the Supreme Court and the Supreme Administrative Court, the attorney-general, the chairman of the Law Society of Thailand, all ex officio; and the following members elected by the representatives of the relevant bodies from amongst their own number: ten from registered human rights NGOs; five from the political parties;²⁶ five from the academic institutions; and three from the media. In the event, the commissioners selected are a fairly representative bunch of highly respectable individuals. There are five women and six men. Three are NGO activists, three are academics, three are lawyers (one judge, one government lawyer, one private human rights lawyer), one educationalist, and one journalist. Their expertise covers human rights, freedom of information, legal aid and family law, economic and political development, women's and children's rights, housing, welfare, public and mental health, environment, and management. Their average age is 61, with only one member under the age of 53. The NHRC commenced its duties in mid-2002.

The NHRC is genuinely independent and has charge of the execution of its own enabling act.²⁷ Active bureaucrats and politicians are excluded from membership; the commissioners are full-time and salaried. Its functions include promoting respect for human rights, education, research, appraisal and dissemination; examining and

²⁵ For discussion of the fascinating if somewhat tortuous details of this process, see Klein, J (2001) 'The Evolution of Thailand's National Human Rights Commission, 1992-2001' in Nelson, MH (ed) *Thailand's New Politics: KPI Yearbook 2001* King Prajadhipok's Institute and White Lotus Press.

²⁶ Following the parliamentary elections of January 2005, there are in fact now only four political parties in parliament, which means that this process will have to be altered by constitutional amendment before the terms of the present commissioners expire.

²⁷ In Thailand great importance is attached to responsibility for implementation, as the department implementing will be able to a large extent to decide matters of personnel, procedure and budget.

reporting violations; making proposals in respect of law, policy and international treaties regarding human rights; promoting co-ordination among public and private agencies.

The NHRC Act emphasises the role of the NHRC in dealing with allegations of human rights violations. These allegations may be received directly from a member of the public or via a human rights organisation. The NHRC may investigate the facts relating to such allegations and must allow an opportunity for the relevant agencies to respond. It can mediate and secure compromise solutions; it can report that a violation has occurred, indicating remedial action; it can refer elsewhere matters not within its powers. In the event of an agency refusing to comply with the NHRC's report, it can refer the matter to the prime minister to order implementation of the remedial measures within 60 days. It can also publicise the refusal to comply where it considers it in the public interest to do so. It can even set out remedial action where no human rights violation has occurred, but there is an unjust practice in respect of which an aggrieved person deserves a remedy. It does not have power to bring proceedings in court on behalf of aggrieved parties, as is the case in some other countries.

CONCLUSIONS

The NHRC has been active for only about three years. During this time it has made some steady progress in human rights education. It has also reported trenchantly on the situation in the south of Thailand. It is important to understand that a human rights commission does not have sole responsibility for rectifying human rights violations. It has a duty to investigate where appropriate, but other bodies, including executive, legislative and judicial organs, have direct responsibility for enforcing and supporting human rights. Professor Saneh, a spirited and active 75-year old with long experience of community development issues, as president of the NHRC has emphasised its educational function. For him, human rights are a matter of hearts and minds, and Buddhism is an important way in which human rights can be explained and the gap between law and culture can be bridged. Human rights are global doctrine, but they are also local knowledge in that they provide hope and support for community development, not just for individual liberty. For Professor Saneh, human rights are capable of embracing Asian values as far as those values are good ones. Or, as Professor Vitit Muntabhorn has put it, 'uprooting of [...] deep images of moral order from a people is not offering them a human fate [...] what we ought to hope for is that indigenous images can evolve in a way which will provide a holding environment for democracy and human rights'.²⁸ If this can be achieved there will indeed be virtue. However, the gap between constitutional aspirations and the actual delivery of human rights is extremely hard to bridge. Only the commitment of all state and civil society organisations in a common effort will produce the desired result.

²⁸ Vitit Muntarbhorn and Taylor, *C Roads to Democracy* supra note 7; see also Haller, KJ and Siroros, P (ed) (2003) *Legal Foundations for Public Consultation in Government Decision-Making* Executive Public Administration Foundation.