

# Constitutional Design in Thailand: the Management of Electoral Process in an Emergent Democracy

By Andrew Harding and Peter Leyland<sup>1</sup>

**Abstract:** This article focuses on the measures and organic laws that have been introduced in Thailand since 1997 to secure fair elections and effective parliamentary representation. The discussion involves a critical assessment of constitutional regulation of the electoral process and also of political parties, and in particular the role of the Election Commission of Thailand, which was set up under the provisions of the 1997 Constitution. The article also seeks to assess the effect of these measures in delivering a secure system of government and parliamentary democracy in Thailand during a turbulent and uncertain 12-year period, which as well as reform has witnessed a military coup and the drafting of a new Constitution.

## 1 Introduction

Since the inauguration of constitutional government and democratic elections with the overthrow of the absolute monarchy in 1932, Thailand's electoral politics has been tainted by corruption. Due to this and other causes the nation has suffered grievously from political instability, so much so that constitutional innovation has been regarded as a form of crisis management rather than a secure basis for reform.<sup>2</sup> In this way Thailand has been a source both of interesting and imaginative experimentation and of object lessons in constitutional failure. In all, including interim constitutions, Thailand has had 18 constitutions (the latest in 2007), and has suffered 17 military coups (the latest in 2006). The 1997 Constitution of Thailand ('CT 1997'), the outcome of Thailand's most participative and carefully considered constitutional reform process to date, was seen by many commentators as an important turning point.<sup>3</sup> First, this was because it resulted from genuine public consultation, in consequence of which it appeared to have wider support than previous constitutions: it was indeed dubbed 'the people's constitution'. Second, it was an impressive document in its own right with carefully conceived measures designed to tackle the endemic corruption and abuse of power that had been so prevalent and destabilising, especially during the mid-1970s and early 1990s. The Election Commission of Thailand ('ECT') was one of several new or newly reformed watchdog bodies<sup>5</sup>

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<sup>2</sup> Kuhonta, EM, 'The Paradox of Thailand's 1997 "People's Constitution": Be Careful What You Wish For' 48:3 *Asian Survey* 373-392 (2008). Ginsburg, T, 'Constitutional Afterlife: the Continuing Impact of Thailand's Postpolitical Constitution', 7(1) *International Journal of Constitutional Law* 83-105 (2009).

<sup>3</sup> Harding, AJ, 'May there be Virtue; "New Asian Constitutionalism" in Thailand', 3:1 *Australian Journal of Asian Law* 24 (2001); McCargo, D (ed), *Reforming Thai Politics* (NIAS, Copenhagen, 2002).

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<sup>5</sup> Leyland, P, 'Thailand's Constitutional Watchdogs: Dobermans, Bloodhounds or Lapdogs', 2:1

outlined in and mandated by the 1997 Constitution and supported by new organic laws; it also features in a revised form in the 2007 Constitution of Thailand ('CT 2007'). The ECT has combined responsibility for every aspect of electoral organisation with oversight of the electoral process and prosecution of electoral abuses. It might be observed at the outset that the potential incompatibility between these functions means that the ECT was conceived with a design flaw: the same body has on the one hand responsibility for every aspect of electoral organisation, but on the other hand, it has also to police the electoral process and, in doing so, it is required to exercise investigatory and judicial functions. In this respect it differs from many of its counterparts in other nations. For example, the Independent Election Commission set out under the South African Constitution shares many organisational functions with the ECT but is *only* responsible for managing elections and ensuring that they are free and fair: it is not charged with the task of investigating electoral malpractice.<sup>6</sup> However, in Thailand the fact that great reliance has been placed on a series of constitutional watchdogs stems, in part at least, from a lack of confidence in the capacity of the criminal justice system to police the behaviour of politicians and political parties. In itself, this difficulty does not justify the mixing of an executive managerial role with a judicial role. Nevertheless it will become increasingly apparent during the course of this discussion that the inclusion of these oversight bodies by the drafters of CT 1997 was a carefully calculated response to Thailand's own particular set of constitutional and political problems.<sup>7</sup>

This article examines critically the attempts made since 1997 to deal with the problem of electoral abuses in Thailand. We proceed to explain the historical and political background, the way in which the ECT is constituted and empowered, and the difficulties which have arisen in implementing the reforms. Finally we assess the performance of the post-1997 system so far as concerns the objectives of a fair<sup>8</sup> electoral system contributing to the stability and legitimacy of the political system, and the proper regulation of political parties. Although there are many features of

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Journal of Comparative Law 151-177 (2007). See also Leyland, P, 'The Genealogy of the Administrative Courts and the Consolidation of Administrative Justice in Thailand' in A. Harding and P. Nicholson (eds) *New Courts in Asia* (London, Routledge, 2009, forthcoming).

<sup>6</sup> Constitution of the Republic of South Africa, Chap 9, s.190(1). Under the Electoral Commission Act 51 of 1996, s.5(o), the Commission is only responsible for adjudicating disputes of an organisational or administrative nature. Indonesia goes so far as to have a General Election Supervisory Board, separate from the General Election Commission, which supervises the electoral process and the performance of the GEC: Suparman Marzuki, 'Roles of the General Election Commission and the General Election Supervisory Board for a Democratic Election' (no date), <http://journal.uui.ac.id/index.php/jurnal-fakultas-hukum/article/viewFile/535/448>.

<sup>7</sup> See, further, Harding, AJ, 'Thailand's Reforms: Human Rights and the National Commission' 1:1 *Journal of Comparative Law* (2006) 88-100; Harding, AJ, 'South East Asia 1997-2006: Two Case Studies on the Politics of Law and Development', ch.6 of Antons, C. and Gessmer, V. (ed), *Globalisation and Resistance: Law Reform in Asia after the Financial Crisis* (Oxford, Hart Publishing, 2007); Harding, AJ, 'A Turbulent Innovation: the Constitutional Court of Thailand, 1998-2006' in Harding, AJ and Nicholson, P (ed), *New Courts in Asia* (London, Routledge, 2009, forthcoming); Leyland, P, 'The Ombudsman Principle in Thailand', 1:1, *Journal of Comparative Law*, 137-151; Leyland, P, 'Droit Administratif' Thai Style: A Comparative Analysis of the Administrative Courts in Thailand', 8:2 *Australian Journal of Asian Law*, 121-154 (2006).

<sup>8</sup> The usual mantra is 'free and fair elections': here we are not concerned specifically with whether elections are 'free' in the sense of state providing a level playing field for political parties. Although there are issues in this area in Thailand, some of which are incidentally noted below, essentially elections are free in the sense that the press is largely free to advocate political positions and policies, and voters are not pressurised by the state to cast their votes in a particular way.

Thai constitutional reforms and constitution problems which are unique or uniquely challenged, the phenomena of electoral abuse and distrust of political parties as such are not of course confined to Thailand. Accordingly there might be general lessons for emergent democracies to be drawn from the Thai experience.

Thailand has had, under most of its constitutions, and more or less continuously in the post-war era, a two-chamber National Assembly; the lower house (or 'Parliament'), the House of Representatives, has presently 480 seats. CT 2007<sup>9</sup> provides for a mixed-member majoritarian system in which 400 members are directly elected for four years by a simple plurality 'first-past-the-post system'. The remaining 80 members are selected by party preference from 8 regional lists proportionally to the number of directly elected members from the party in question.<sup>10</sup> The upper house, the Senate, has 151 members; 75 senators are appointed for a three-year term; 75 are elected to a six-year term by a first-past-the-post system from each of Thailand's 75 provinces, and one is returned for the capital, Bangkok.<sup>11</sup>

The integrity of the electoral system can be regarded as being at the very core of Thai democratic and constitutional reform. In particular, the right of citizens to vote in free and fair elections might be regarded as *the* fundamental citizen right central to the democratic process because it is this right that allows full participation in the selection and formation of a government.<sup>12</sup> The choice which is exercised is central to what has been termed 'the physics of consent'.<sup>13</sup> Moreover, wider experience of constitutional practice demonstrates that the protection of individual human rights commonly flows from, and indeed depends upon, a guarantee by state action of the right to vote, without interference, which in practice 'requires a large state machinery to make [such a system] work'.<sup>14</sup> Under CT 1997 and CT 2007 there has been a strong commitment to democratic process in Thailand, even though the meaning of 'democratic' has proved to be highly contested during the tumultuous political events of 2005 to date.<sup>15</sup> Of course, in formal terms the constitution and related organic laws provide that all Thai nationals over the age of 18 have the right to vote; indeed since the 1940s the right to vote has not been circumscribed in any way by gender,<sup>16</sup> property or educational qualifications, and is now in fact stated as a *duty* to vote.<sup>17</sup>

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<sup>9</sup> At Part 2

<sup>10</sup> Under CT 1997 400 members were elected on a constituency basis and 100 chosen from national rather than regional party-lists. CT 1997 introduced what was an innovation in the Thai context by providing for single-member constituencies, but under CT 2007 has reverted to multi-member constituencies. The change in 1997 was designed to create a closer link between politicians and the electorate (see below for further discussion of this point); the prevailing opinion appears to be that this intention has not been fulfilled.

<sup>11</sup> CT 2007, Part 3. Again, this position under CT 2007 is different from that under CT 1997, where 200 Senators were elected in multi-member constituencies which were congruent with the *changwat* (provinces).

<sup>12</sup> Ewing, K and Gearty, C, *The Struggle for Civil Liberties* (Oxford, Oxford University Press, 2000), 3.

<sup>13</sup> Waldron, J, *The Dignity of Legislation* (Cambridge, Cambridge University Press, 1999), 156.

<sup>14</sup> Gearty, C, 'Civil Liberties and Human Rights' in Bamforth, N and Leyland, P (ed), *Public Law in a Multi-Layered Constitution* (Oxford, Hart Publishing, 2003), 372.

<sup>15</sup> The political polarisation of Thailand during this period between the so-called 'red shirts' and 'yellow shirts' (supporters and opponents, respectively, of former Prime Minister Thaksin Shinawatra) has resulted in both camps claiming to be truly 'democratic'. In both cases, however, this claim is suspect.

<sup>16</sup> In fact Thailand was one of the first countries to treat male and female citizens equally in this respect. In 1897 a Local Administration Act introduced by Prince Damrong provided for equality of men and women in voting: Subhatra Bhumiprabhas, 'The Feminist Prince', *The Nation*, Bangkok, 27

Notwithstanding these developments and the entrenchment in some form of the principle of democratic representation in virtually all of the various constitutions since 1932, there are strands of Thai society which have been and remain resistant to democracy. As Girling observes:

the Thai middle strata also fear the "turmoil" a more open society might lead to. And the experience of the democratic years, 1973 to 1976 reinforces this fear. Like the established members of the nineteenth century European middle classes, they believe that the "masses" are not ready for democracy; they are too ignorant, short-sighted and too easily swayed by emotions to obey its rules and make it work.<sup>18</sup>

A similar point is elaborated by Anek Laothamatas in a frequently-quoted piece proposing the idea of 'two democracies' in Thailand:<sup>19</sup>

voting in farming areas is not guided by political principles, policy issues, or what is perceived to be in the national interest, all of which is [regarded as] the only legitimate rationale for citizens casting their ballots in a democratic election. The ideal candidates for rural voters are those who visit them often, address their immediate grievances effectively, and bring numerous public works to their communities. [These candidates are however regarded by the middle classes as] parochial in outlook, boorish in manner, and too uneducated to be competent lawmakers or cabinet members ... Ideally, patron-client ties might be replaced by a more responsive and effective system of local government. On top of that, voters are [yet] to be convinced that principle-or-policy-oriented voting brings them greater benefits than what they may get from local patrons ...

In similar vein Logerfo in a study of rural northern Thai political attitudes, refers to 'a larger attitudinal complex that enables locally influential figures, often involved in illegal business activities, to win elections and engage in corruption of all kinds so long as they continue to deliver the goods to their constituencies'.<sup>20</sup> He goes on to show that in the rural north there is

more support for a more restricted, military-based model of democracy consisting of a political role for the armed forces,<sup>21</sup> limited participation for

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August 2009. Women were allowed to vote in Switzerland in 1971.

<sup>17</sup> CT 2007, s.72. Under the 1932 Constitution of the Kingdom of Siam members of the assembly were partly elected and partly appointed by the King, but this was expressed (s.65) to be a temporary measure until more than half the people had at least primary education or at any rate not longer than 10 years after the Constitution came into effect.

<sup>18</sup> Girling, J, Thailand: State and Society (Ithaca, Cornell University Press, 1981), 145.

<sup>19</sup> Anek Laothamatas, 'A Tale of Two Democracies: Conflicting Perceptions of elections and Democracy in Thailand', in Taylor RH (ed), *The Politics of Elections in South East Asia* (New York, Cambridge University Press, 1996). See also Logerfo, J, 'Attitudes Toward Democracy Among Rural Northern Thais', 36 *Asian Survey* 904-23 (1996); Chai-anan Samudavanija and Parichart Chotiya, 'Beyond Transition in Thailand' in Diamond, L and Plattner, M, (ed), *Democracy in East Asia* (Baltimore, Johns Hopkins University Press, 1998)

<sup>20</sup> See Logerfo above n20, and Nelson, M, *Central Authority and Local Democratization in Thailand* (White Lotus Press, Bangkok, 1998), 168.

<sup>21</sup> Of course this has changed in recent years as Thaksin emerged as the perceived champion of their

societal groups, a strong Senate, weak local government, and restrictions on press freedom... [and] because of their overwhelming numbers, rural Thais determine which party will control the government, but because of their economic weight and political importance, the urban middle classes have significant influence over the government's viability.

The two democracies can still be clearly discerned, but have taken on even more (and disturbing) significance during the current period of extreme political polarisation of Thailand following the military coup of September 2006. The coup ousted from government the allegedly corrupt Thai Rak Thai (TRT) Party of Thaksin Shinawatra (Prime Minister 2001-6), which had been met with huge and hostile demonstrations in Bangkok during 2005-6. A military-installed technocrat government supervised the drafting of a new constitution (CT 2007, approved by referendum in August 2007). A return to elected government in January 2008 saw the election of the People Power Party ('PPP') under Prime Minister Samak Sundaravej, which was close to Thaksin and this again prompted huge demonstrations by the People's Alliance for Democracy ('PAD' or 'yellow shirts') which effectively brought government and the economy to a standstill during most of 2008. Samak was forced to resign following an adverse Constitutional Court ruling in September 2008,<sup>22</sup> but his successor Somchai Wongsawat fared no better, being forced from office in December 2008 when his party was dissolved, again as a result of a ruling of the Constitutional Court.<sup>23</sup> Defections of members of parliament then enabled the Democrat Party under Prime Minister Abhisit Vejjajiva to take power without an election (December 2008); but the supporters (the 'red shirts') of the pro-Thaksin parties which are the time of writing (September 2009) in opposition have also mounted huge demonstrations against the government, demanding new elections. The red shirts rest their case on a clear electoral majority in the general elections of January 2008; the yellow shirts, identified with the so-called 'People's Alliance for Democracy', consistently with Girling's observation above, have stated a policy objective of *removing* the vote from the 70% rural voters who in their view are unready for democracy and whose votes, they allege, are simply bought.<sup>24</sup>

## 2 Vote-buying and funding of political parties

As a matter of law in Thailand at the present time, voting remains compulsory for all citizens, and measures may be taken against a person who fails to vote without good reason.<sup>25</sup> The purpose of this measure, introduced in 1997,<sup>26</sup> was to make vote-buying more difficult by increasing the numbers of votes that would need to be bought to make a difference to the result. The enduring problem however has been how to

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interests and was then ousted by the military.

<sup>22</sup> See <http://news.sky.com/skynews/Home/World-News/Thailand-Constitutional-Court-Tells-PM-Samak-Sundaravej-To-Step-Down-In-TV-Cooking-Show-Row/Article/200809215095879>.

<sup>23</sup> See <http://www.welt.de/english-news/article2816105/Court-rules-Somchai-Wongsawats-party-disbanded.html>. The decision disbanded Somchai's People Power Party. Somchai is Thaksin's brother-in-law and his tenure of the premiership provoked large protests by the yellow shirts.

<sup>24</sup> See discussion above.

<sup>25</sup> Organic Act on the Election of Members of the House of Representatives and Senators 2009, s.25. This recent Act replaced the Organic Act on the Election of Members of the House of Representatives and Senators 1998.

<sup>26</sup> CT 1997, s.68; and the Act of 1998, above n26.

ensure fair elections. 'Corruption riddles governance, business and elections, and corruption scandals define the entire political process'.<sup>27</sup> A fully independent electoral body was conceived as an essential weapon against abuse under CT 1997 and the verdict on the ECT's initial performance was positive. Connors commented as follows:

In the Senate Elections of 2000 and the House of Representative Elections of 2001 it is apparent that the new Election Commission of Thailand has provided unprecedented succour to the cause of reform. In punishing scores of recalcitrant and corrupt politicians by ordering new elections the EC is striking a blow against old style electioneering.<sup>28</sup>

This however was a provisional and optimistic assessment of its achievement.<sup>29</sup>

'At best, Thai electoral politics can qualify as democracy in form only. From the point of view of almost all Thai politicians involvement in politics is the best way to access wealth'.<sup>30</sup> Entry into politics has mainly provided already wealthy individuals the opportunity to gain election and thereby to obtain further enrichment. In order to secure votes election candidates in many parts of Thailand would expect to gain the vote of local constituents by offering individual electors a cash payment. The lack of truly representative parties in a society with a traditionally Buddhist social hierarchy poses deeper questions about the degree of genuine political participation. Moreover, the phenomenon of vote-buying is not universally regarded as wrongful conduct but as a reciprocal return of favours - your money accepted in return for my vote.<sup>31</sup>

Despite there being a secret ballot and explicit attempts to stamp out vote-buying, the practice has been pervasive and taken for granted. One influential commentator observed that:

Vote-buying, a longstanding Thai practice, was actually exacerbated by new legislation passed at the end of the 1970s, intended to clean up elections and restructure political parties. By the 1995 and 1996 elections it had reached epidemic proportions: to stand a serious chance of winning a typical up-country seat, a basic investment equivalent to nearly 1 million US dollars was required.<sup>32</sup>

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<sup>27</sup> Thornton, L, 'Combatting Corruption at the Grassroots: The Thailand Experience 1999-2000', National Democratic Institute for International Affairs, 2000, 7.

<sup>28</sup> Connors, M, 'Framing the People's Constitution', in McCargo, above n3., at 55. As an index of the ECT's 'zero tolerance' approach, in the province of Samut Prakan in the Senate elections of 2000 five elections had to be held before a winner was declared. Unfortunately in many cases the candidates found by the ECT to have cheated were actually finally elected, indicating that ECT intervention was not necessarily in practice a political setback for the candidates concerned. See, further, Thawilwadee Bureekul, *Citizen Participation in Politics: the Senate Elections 2000 Case* (KPI, Nonthaburi, 2002).

<sup>29</sup> Cf. Nogsuan, S, 'Party Elites in the Business of Conglomerate Model of Thai Political Parties', in Niyom Rathamarit (ed) *Eyes on Democracy: National and Local Issues* (KPI, Nonthaburi, 2006), 103; McCargo, D, and Ukrist Pathmanand, *The Thaksinisation of Thailand* (NIAS, Copenhagen, 2005), 99 ff.

<sup>30</sup> Phatharathananunth, S., 'Civil Society and Democratization in Thailand: A Critique of Elite Democracy', in McCargo, above n3, at 127.

<sup>31</sup> See notes 28, 30 and 31 above and 33 below.

<sup>32</sup> McCargo, D, 'Introduction: Understanding Political Reform in Thailand', in McCargo, above n3, at 7.

The ECT's attempts to eliminate the practice of vote-buying are discussed below.

Political parties themselves present further difficulties. The wider project to entrench democracy is not simply about granting citizens the right to vote. Unlike for example Malaysia and Singapore, Thailand has lacked an established political tradition in which political parties organise from the grass roots up to the national level on the basis of a consistent set of policies. Political parties tend to be many, and rather than representing clear ideological positions, they are more usually personal followings, or purely regional interests and electoral base. These parties also tend to be themselves coalitions of factions any of which might at any time switch party for some advantage. Changes in government due to no-confidence motions and military interventions have made even controlling the office of Prime Minister much less attractive as an object of party organisation than in most countries (most Prime Ministers have stayed in office only for one or two years and have had little impact on actual policy).<sup>33</sup> It was therefore one of the challenges of the 1997 drafting process to find means of ensuring that party politics would become less fissiparous and more centripetal, and that governments would be more likely to consist of one party, or at least a reasonably firm coalition of parties.<sup>34</sup> Hence restrictions on no-confidence motions were introduced, although these have been slightly watered down in CT 2007.<sup>35</sup> There remains a conviction that constitutional or legal engineering is required and will be effective to ensure that politicians will be 'good and capable',<sup>36</sup> and that national political parties will both become more viable and will be less corrupt and act more in the national interest. At this point of democratic development, while there seems to be agreement that in some sense political parties are quintessentially 'the problem', there seems to be little evidence to support the conviction that they can actually be 'improved' by legal engineering. This seems to be quintessentially the problem of Thai democracy at the beginning of the 21<sup>st</sup> century.

Tackling the issue of parties from a different perspective, an element of state funding was first established under CT 1997 to provide the seed-corn for the development of grass roots politics and to assist in the setting up of new political parties.<sup>37</sup> The ECT was granted responsibility for administering the funding scheme relating to expenses

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<sup>33</sup> At the time of writing (September 2009) there have been five Prime Ministers in the last three years and 27 altogether since 1932 (several held office more than once). See, further, Suchit Bunbongkarn, 'Political Institutions and Processes', in Somsakdi Xuto (ed), *Government and Politics of Thailand* (Singapore, Oxford University Press, 1987), 61.

<sup>34</sup> Ironically, the object of attaining one-party government for a full parliamentary term was achieved in 2001, but at the expense of entrenching a government (Thaksin's TRT) which would doubtless have horrified the constitution-makers of 1997 in every other respect, not least the fact that TRT was set up only weeks before the election. One longer term consequence of TRT's election and five years in office could be a greater concentration on policy in election campaigns. Thaksin was able successfully to 'market' policies such as the 30 baht health care scheme.

<sup>35</sup> For example, under Article 158 at least one fifth of the members of the House of Representatives are needed to submit a motion for the purpose of passing a vote of no confidence in the Prime Minister but members are restricted to presenting one motion per session. The alternative Prime Minister must be named in the motion and an allegation of corruption therein must be accompanied by an impeachment motion. Cf CT 1997, s.185, where two-fifths of MPs were required to submit a motion of no confidence.

<sup>36</sup> Nelson, M, 'A Proportional Election System for Thailand?' (KPI Politics Update No 2, KPI, Bangkok, 2007), 12.

<sup>37</sup> Organic Act on Political Parties 2007, ss.55-72..

in subsidising political parties and other activities with respect to the development of political parties. A special committee determines the allocation of this fund chaired by the Political Party Registrar who acts as chair. The committee secretary is the ECT's Secretary-General. The committee must consist of an Election Commissioner selected by the ECT, a representative each of the Ministry of Finance and the Bureau of the Budget; three representatives from political parties who are represented in the House of Representatives, plus one representative from political parties without members in the House of Representatives. In practice the rules allowing for state funding have been cynically exploited by political parties. Political parties responded to recognition that their eligibility for this funding would be increased by swelling their numbers. TRT, for example, claimed to have a membership of 15 million in 2003, but 2.3 million of TRT's members were also found to be members of other political parties. Instead of 15 million members the real figure was more like 8.5 million.<sup>38</sup> The requirement that parliamentary candidates must be educated at least to bachelor's degree level<sup>39</sup> was another strategy employed to improve the calibre of individuals entering politics. This was of course controversial in view of its discriminatory effects and the fact that only a small percentage of the population could satisfy this criterion,<sup>40</sup> but is a reflection on elite opinion discussed above as to the type of politician it was thought needed to be discouraged, as well as probably a political attitude on the part of many voters that a member of parliament is analogous to one's legal or other professional representative, who, in one's own interest, should be well qualified for the task.<sup>41</sup>

Although created as a coalition of business interests itself and also having a reputation for corruption Thaksin's TRT Party bucked the trend by operating on a nationwide basis, making astute use of the media, by appealing to nationalist sentiments, and by having a 'National Agenda' comprising an 11-point popular manifesto of policies.<sup>42</sup> In other words this party, conceived as a vehicle for its leader's own advancement, at the same time assumed the guise of a 'modern' national political party. To win elections politicians have continued to spend money on vote-buying. In this sense the mechanisms intended to create a more honest political class oriented to the national interest seems to have failed.

### 3 The Regulation of Political Parties

As with many other emergent democracies, in Thailand the principle of freedom of association applies, while there is also an attempt to control the behaviour of political

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<sup>38</sup> McCargo and Phathmanand, above n30, at 86.

<sup>39</sup> CT 1997, s.107; CT 2007, s.174.

<sup>40</sup> Harding, above n2. In Thailand literacy rates and current tertiary education participation rates are high and increasing rapidly. In 2007 there were more than 2m students in HE out of a total population of 64m. See [http://www.eastwestcenter.org/fileadmin/resources/education/ed2020\\_docs/Thailand.ppt#337,24](http://www.eastwestcenter.org/fileadmin/resources/education/ed2020_docs/Thailand.ppt#337,24), Quality System of HE National Education Act (1999).

<sup>41</sup> See however, the views of a former Speaker of the House of Representatives, Uthal Pimjaichon, in 'Democratic Path to People-Based Society: Experience, Perspectives and Criticism', in Rathmarit, above n30, at 305.

<sup>42</sup> Phongpaichit, P, and Baker, C, *Thaksin: The Business of Politics in Thailand*, (Chiang Mai, Silkworm Books, 2004), 81.



parties in line with the provisions of the constitution and electoral law. Under CT 2007, reflecting a similar provision in CT 1997<sup>43</sup>

A person shall enjoy the liberty to unite and form a political party for the purpose of making the political will of the people and carrying out political activities in fulfilment of such will through the democratic regime of government with the King as Head of the State .... The internal organisation, management and regulations of a political party shall be consistent with fundamental principles of the democratic regime ...

In addition CT 1997 and CT 2007<sup>44</sup> have prohibited discrimination (inter alia) on grounds of 'constitutionally political view'. As these provisions imply, freedom of political association is not absolute, and political parties are regulated by the Organic Law on Political Parties, the latest version of which was enacted in 2007. The principle of consistency with fundamental principles may be enforced in a number of ways. A prescribed number of members of a political party may refer a party resolution or regulation to the Constitutional Court, which can nullify it. Another provision<sup>45</sup> imposes more specific and drastic penalties, prohibiting any exercise of constitutional rights to overthrow the democratic regime or to acquire the power to rule the country by any means which is not in accordance with the modes provided in the constitution. Where such acts are performed by a political party any person may request the Prosecutor-General to bring a motion before the Constitutional Court ordering cessation of the acts, which may also (as with other violations of the law) result in the party being dissolved. A new provision added under CT 2007 adds the further penalty of depriving the president and executive board of the dissolved party of the right to vote for five years, which also entails that they cannot stand for election during that time.<sup>46</sup>

The powers of the Constitutional Court, in particular the power to dissolve political parties, has proved very controversial and has been exercised drastically and with profound effects on Thai politics in recent years. Critically, a decision of the Election Commission of Thailand (ECT) to allow the general election held on 2 April 2006 was challenged successfully in the Constitutional Court, which held the election invalid in May 2006.<sup>47</sup> During the election itself, there were many allegations of widespread vote-buying.<sup>48</sup> The ECT failed to uphold objections to the results and the Constitutional Court initially confirmed individual results which had been called into question.<sup>49</sup> Although TRT won the election, following street demonstrations Thaksin announced that he would only serve as a caretaker Prime Minister until a new government was formed; but after taking a short vacation he showed no signs of going. In an unprecedented move the King intervened on 26 April 2006 by addressing the judges of the Constitutional and Administrative Courts directly. He suggested in typically oblique royal language that they should assert their authority

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<sup>43</sup> Ss.65 and 47 respectively.

<sup>44</sup> S.30 in both cases.

<sup>45</sup> CT 2007, s.63.

<sup>46</sup> See CT 2007, ss.100(2) and 102.(3).

<sup>47</sup> 'Constitution Court Invalidates the April Election and Orders New Election' *The Nation*, Bangkok, 9 May 2006; 'Thai Court Rules Election Invalid' BBC News, 8 May 8, 2006.

<sup>48</sup> These led to the Constitutional Tribunal's decisions of 30 May 2007 dissolving the Thai Rak Thai Party: see below.

<sup>49</sup> See 'End of the Beginning in Thailand's Crisis', *Bangkok Post*, Bangkok, 19 May 2006.

under the constitution to invalidate the election, which had been boycotted by opposition parties.<sup>50</sup> Further investigation of the conduct of the political parties (TRT and the Democrat Parties) in the election was expedited by the military government after the September 2006 coup, resulting in the dissolution of TRT, but not the Democrat Party, as a result of a decision by the Constitutional Tribunal under the 2006 Interim Constitution.<sup>51</sup>

Another method of controlling political parties was the ‘ninety-day rule’ which, having been included in CT 1997,<sup>52</sup> survived the 2007 drafting process in modified form. Under this rule a candidate for election to the House of Representatives must be a member of any and only one political party, for a consecutive period of not less than ninety days, up to the date of applying for candidacy in an election; but under the 2007 Constitution the period drops to thirty days should the lower house be dissolved.<sup>53</sup> The point of this provision is to prevent opportunistic party-hopping prior to an election. Although this can be seen as controlling the behaviour of individual politicians, it also tends to encourage a tendency for parties to hold together (we have noted above the fissiparous nature of Thai political parties).

Constitutional provisions also require candidates to have a solid connection with the *changwat* in which they stand for election (i.e, being born in it, having lived in it for five years immediately before the candidacy, or having held public office in it or studied in it for five years). The connection of the candidate with the constituency is indeed a matter fraught with difficulty. The paucity of funding for parties means that parties tend to go in search of wealthy candidates with local influence rather than vice versa; or that wealthy individuals set up their own parties. It is thus local networks of influence that ultimately matter rather than the courting of individual voters. Indeed it is often reported that members display little interest in their constituencies after being elected,<sup>54</sup> preferring advancement through Thailand’s complex factional parliamentary politics.

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<sup>50</sup> See ‘April 2 Election: Charter Court to Examine the Legality of Poll’, *The Nation*, Bangkok, 1 May 2006.

<sup>51</sup> See The Constitutional Court, ‘Summary of the Decision of the Constitutional Tribunal Case Group 1’, <http://www.concourt.or.th/download/news/Party1.pdf>; The Constitutional Court, ‘Summary of the Decision of the Constitutional Tribunal Case Group 2’, The Constitutional Tribunal replaced the Constitutional Court, which was abolished by the 2006 Interim Constitution; however, existing cases were transferred to the Constitutional Tribunal. TRT was unanimously found guilty on all charges, together with three minor parties which were also dissolved. In particular, the verdict was based on the fact that a few high-ranking party members were directly involved in bribing several small parties into competing in constituencies that were bases of the former opposition parties, in order to ensure that the minimum 20% turnout requirement was met; the Tribunal dissolved TRT and banned 111 members of its executive committee, including Thaksin himself, from politics for a period of five years. It was also ruled that there was inadequate evidence supporting the charge that the Democrats bribed small parties into exposing some high-profile TRT party members’ involvement in election fraud in a series of by-elections in April 2006; and that the Democrat Party did not defame Thaksin or urge voters to cast a ‘no’ vote in the election. Accordingly this party avoided dissolution.

<sup>52</sup> S.107(4). For a discussion of the unintended impact of this rule see Kuhonta, above n3, at 381, 383.

<sup>53</sup> CT 2007 s.101(3). See Kuhonta, above n3, at 390 and *World of Parliaments Quarterly Review*, Web Version, Issue No 27, October 2007. Reducing the period to 30 days in the event of a dissolution would appear to defeat the purpose of the original rule, namely, to prevent the formation of new parties at short notice from existing MPs tempted by short term inducements. The decision to slash the period to 30 days appears to have been a compromise reached as part of the constitutional drafting process.

<sup>54</sup> Logerfo, above n30.

One possible remedy to several of the problems here outlined is of course to have party-list elections in addition to or instead of constituency elections.<sup>55</sup> CT 1997 provided for party lists for the first time, but they were designed to fill only 100 of the 500 parliamentary seats. The main purpose of this was not simply to consolidate national parties but to ensure that the best people could be appointed to the Cabinet without the need for a by-election in each case; this would otherwise be needed given the required separation of the executive from the legislature after a general election, under which members of the government had to resign their parliamentary seats. This proved one of the problematical issues in the 2007 drafting process. One group wanted a 400-seat house equally divided between constituency and party-list seats. Another wanted a house comprising entirely of constituency-elected members. The result was a compromise: 320 constituency and 80 party-list seats, with the nuance that the latter is to consist of eight lists of 10 based on eight regions of Thailand, thus maintaining some local connection even for the party-list members.

During 2008, as discussed in outline above, the Constitutional Court's powers became even more controversial than previously. In 2001 following Thaksin's survival of corruption charges by an 8-7 vote in the Constitutional Court he expressed the view that a few unelected judges should not be able to dismiss someone elected by 12 million people. In 2008 the Court first ruled against Prime Minister Samak Sundaravej in a matter of conflict of interest which appeared to many quite trivial: he had taken money for appearing in a regular TV cookery programme. This ruling precipitated the PM's resignation. More drastically, in December 2008 the Court dissolved the People Power Party (PPP), the 'successor' party to TRT and closely associated with Thaksin and the 'red shirt' cause. As in 2007 a major party was dissolved and its leadership 'red-carded', so that they could not stand for election within five years. The basis of this decision was electoral irregularities in the previous election of January 2008. The 'yellow shirts' (PAD) had taken their case to the streets and occupied public buildings including Bangkok's Suvarnabhumi international airport and the Prime Minister's own office during 2008; now it was the turn of the 'red shirts' to take their cause to the streets. Such decisions by the Constitutional Court are in fact easily circumvented: in the case of PPP it was well known that they had another party already set up in anticipation of the Court's decision. The 'nuclear' option of dissolution is in fact counter-productive; it manages to be both drastic and ineffective at the same time. It raises the *political* stakes, but does not really *in practice* dissolve parties; it fails the test of legitimacy, and spawns extra-constitutional political methods.<sup>56</sup> Nonetheless it did in this case result in a change in government when sufficient Thaksin-supporting MPs changed sides as to enable the Democrats to take power under Prime Minister Abhisit Vejjajiva in December 2008.

A new Organic Law on Political Parties in 2007 made further provision for regulating parties, replacing an equivalent Act of 1998. Provision is made for applying to form a political party and the system is overseen by the Registrar of Political Parties. The overarching principles are that there is freedom of association but parties must have regulations which are consistent with the fundamental principles of a democratic

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<sup>55</sup> See, further, Nelson above n37.

<sup>56</sup> Nonetheless, following referral to the Constitution Court by the ECT for irregularities a total of 88 parties in existence in 1997 had been dissolved by 2003. Clearly the dissolution option does serve some purposes.

regime of government with the King as Head of the State, with the performance of duties of members of the House of Representatives, and that disciplinary regulations must conform with the right of an accused person to be heard. The ECT is now empowered to veto registration of a political party. The law also regulates the similarity of party names. The party's executive committee is under a duty to operate the party according to the Constitution and the law, 'circumspectly, carefully, and honestly, for the benefit of the country and the people, and must promote democracy in the political party' (s.17). Interestingly enough, under a new provision of the law (s.17(4)), which makes concession to those aggrieved by the punishment of all members of the TRT Executive Committee in the 2007 Constitutional Tribunal, members of the executive committee shall not be responsible for party actions if they can prove that they were not involved in the action and objected to it at the meeting of the executive committee or within seven days after the meeting. However the committee also has a duty to ensure that party members and candidates do not break the law. It is forbidden to bribe anyone (or to be bribed) to become a member of a party (s.22). In an attempt to encourage genuinely national parties, it is required that a party have members and branches in all provinces (s.27). The law contains many provisions regulating the internal procedures of parties such as meetings, branches, choosing a leader and candidates, financial accountability, donations, state funding, and so on. The most important provisions for present purposes relate to the procedure for dissolution of a political party. This is done by the Registrar with the approval of the ECT, and the Registrar is required to send the case with the evidence to the Prosecutor-General who takes the matter to the Constitutional Court. The applicable grounds under s.93 are, in summary form, that the party does an act to terminate or contradict the democratic regime with the King as head of state; or contrary to the law or a regulation or decision of the ECT; or harmful to national security.

#### **4 The Composition and Selection of the Thai Election Commission**

The ECT was first established in 1992. Its constitutional role was defined under both CT 1997 and CT 2007. Under CT 2007 the ECT as presently constituted is described as one of the 'independent organs under the constitution'. It comprises a President and four associate commissioners appointed for a non-renewable term of seven years.<sup>57</sup> The Secretary to the Commission is the administrative head. The present Commissioners were all appointed under the 2006 Interim Constitution in September 2006. The responsibilities are divided into central administration, election administration, political party regulation, and participation.

##### *(a) Selection Process*

In terms of the creation of institutional architecture the introduction of the ECT has been recognised as a stride towards democratic credibility: 'In order to build a system that allows clean elections to take place, an independent election commission was

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<sup>57</sup> CT 2007, s.229.

formed: gone were the days when the administration and supervision of local and general elections were undertaken by the powerful minister of the interior'.<sup>58</sup> The status of this body remains crucial and, given the extreme political sensitivity of its role, the appointment process for the ECT was and still is of great importance. In order to appoint the ECT under CT 1997 a more broadly representative selection committee of ten members needed to be set up.<sup>59</sup> The committee had to include: the President of the Constitutional Court as Chairman and the President of the Supreme Administrative Court, four Rectors of state higher education institutions; and four representatives of political parties from the House of Representatives. Five qualified and suitable names approved by at least three quarters of the members of this committee were submitted to the President of the Senate. Also, at this preliminary stage the Supreme Court was required to put another five names of suitably qualified candidates forward to the President of the Senate. For the next stage, as presiding officer he or she was required to hold a secret ballot in the Senate to choose five Election Commissioners from among these ten nominated candidates.<sup>60</sup> Their election would then be formally confirmed by the King.<sup>61</sup>

The elaborate selection process under CT 1997 failed to prevent controversy over actual appointments. In particular, under Thaksin's premiership 2001-6 there was evidence that the process was manipulated to produce candidates favouring the government, thereby neutralising the effectiveness of this key watchdog body.<sup>62</sup> The Senate turned out to be the weak link. Although it had been designed as a non-partisan body, it was, in effect, captured in the sense that the political allegiance of senators was courted by government and opposition. The result was that when ECT vacancies arose in 2001 pressure was covertly exerted on senators to ensure the confirmation of nominees acceptable to the government, even if they were clearly unsuitable. In May 2001 the Senate opted for a former general whose own Senate election had been declared invalid as result of his own actions. He briefly became Chairman but was later removed by the Constitutional Court on the grounds that his selection had been technically incorrect. In addition, a judge was nominated but withdrew because the King was unwilling to confirm his appointment. Two other nominees included a civil servant who was under investigation for corruption, and another civil servant who faced accusations of having printed fake ballot papers.<sup>63</sup> The stewardship of this body was frequently contested.

By way of contrast, the system for making appointments to the ECT under CT 2007 places greater reliance on the judicial branch, but the selection committee is less inclusive as it is confined to senior judges, judges collectively and holders of political

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<sup>58</sup> Sombat Chantornvong, 'The 1997 Constitution and the Politics of Electoral Reform', in McCargo, above n3, at 204.

<sup>59</sup> CT 1997, s.138.

<sup>60</sup> Ibid, s.138(4) '... the first five persons who receive the highest votes which are more than half of the total number of existing senators shall be elected ...'

<sup>61</sup> . CT 1997, s.138.

<sup>62</sup> Jansen, J, 'Thailand Court Rejects Election Commission Nominees in Latest Ouster Bid', *Jurist Legal News and Research*, Bangkok, 31 May 2006. In its quest to get the commissioners to resign the entire Supreme Court judiciary voted 72-4 in a sitting of the entire court to reject two nominees.

<sup>63</sup> Pasuk Phongpaichit and Baker, C, *Thaksin: The Business of Politics in Thailand* (Chiang Mai, Silkworm Books, 2004), 175; Vitit Muntarbhorn, 'Human Rights in the era of "Thailand Inc"', in Peerenboom, R, Petersen, C and Chen, A (eds) *Human Rights in Asia: A Comparative Legal Study of Twelve Asian Jurisdictions* (London, Routledge, 2006), 327.

office.<sup>64</sup> As the most trusted of Thailand's institutions the judiciary and the most senior judges in particular have a finger in many constitutional pies, which now exposes them to political influence.<sup>65</sup> In order to appoint three of the commissioners there is a selection committee of only seven members, including the President of the Supreme Court, the President of the Constitutional Court and the President of the Supreme Administrative Court. There are two further judicial members, one selected at a general meeting of the Supreme Court of Justice, the other selected at the General Assembly of Judges of the Supreme Administrative Court.<sup>66</sup> In place of rectors of state universities the other members of the selection committee are the President of the House of Representatives and the Leader of the Opposition in the House of Representatives. It is the task of the committee to forward nominations to the President of the Senate by a 66% majority for three suitably qualified candidates (rather than 75% under CT 1997). The Supreme Court of Justice at its general meeting is responsible for nominating two further suitably qualified candidates to the President of the Senate, who arranges a secret ballot of senators to approve these nominations. If all or any of the nominations is rejected, the Senate is not allowed to insert its own candidates, but the matter is referred back to the respective selecting body. If the latter votes unanimously, or the General Meeting of the Supreme Court votes by a two thirds majority (as the case may be), to affirm its original selection the candidates will be sent for formal royal approval. If agreement is not possible the selection process will begin again. The change from CT 1997 is that the senators are not able to express their own preferences but merely confirm the choices of the selecting bodies.<sup>67</sup>

Election Commissioners were intended to enjoy a high level of security of tenure. Once appointed a petition for removal can be filed to the President of the National Assembly for referral to the Constitutional Court for determination provided it is signed by at least 10% of the existing members of the two houses. The grounds for such a petition are restricted to allegations that the candidate fails to meet the appointment criteria or that there is a fundamental conflict of interest because the commissioner is already an official in some other capacity, engages in a profession or holds a commercial position.<sup>68</sup> Under the Organic Law of 2007 the commissioners are required to declare their assets, including those of their spouse and children, and assets held in the name of others (s.7).

The Constitutional Court held that the results of the elections in April 2006 were invalid partly on the grounds that the scheduling by the ECT was unconstitutional. This was because the length of the electoral campaign was too short, leaving insufficient time for candidates to prepare.<sup>69</sup> The insulation of the position was well illustrated when three commissioners, all appointed during Thaksin's premiership under CT 1997, were successfully prosecuted and sentenced to four years'

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<sup>64</sup> Vitit Muntarbhorn, 'Deconstructing Thailand's (New) Eighteenth Constitution', 12:1 *Thailand Law Journal* 2009: <http://www.thailawforum.com/articles/Thailand-Eighteenth-Constitution.html>.

<sup>65</sup> Harding, AJ and Leyland, P, 'The Constitutional Courts of Thailand and Indonesia: Two Case Studies from South East Asia', 3:2 *Journal of Comparative Law* (2008) 118, at 142.

<sup>66</sup> CT 2007, s.231.

<sup>67</sup> This brings to mind the example of the US Constitution, Article II, Section 2: 'He shall nominate, and by and with the Advice and Consent of the Senate shall appoint ...'

<sup>68</sup> CT 2007, ss.233, 207.

<sup>69</sup> Henry, T, 'Thailand Courts to Supervise New Elections after Constitutional Court Voids Results', *Jurist Legal News and Research*, Bangkok, 9 May 2006.

imprisonment for dereliction of duty. However, they refused to resign and continued to serve for several weeks.<sup>70</sup> On the day following the military coup of September 19 2006 five new Election Commissioners were confirmed in office. The judicial profile of the reformed commission is highly significant. Four of the appointees were former judges of high to middle-ranking seniority and the fifth commissioner is a former official from the Attorney-General's office.

*(b) Powers and Duties of the ECT*

The ECT is responsible for running the electoral process in Thailand at both national and local levels and for setting out the rules necessary for the running of elections and now also referenda, including the conduct of the election campaign, and party funding and expenses.<sup>71</sup> It also determines cessation of membership of the National Assembly and determines issues of voters' rights. Under CT 2007 it also has functions relating to the appointment process for half the members of the Senate. The task of organising elections had previously been in the hands of the Ministry of Interior. In performing its many functions the ECT is granted administrative, investigative and quasi-judicial powers. At one level this is a body charged with undertaking an organisational task of considerable magnitude. It has to draw up constituency boundaries,<sup>72</sup> enact rules governing the election campaign, prepare the electoral register,<sup>73</sup> get ballot papers printed, set up polling stations and voting and counting procedures, appoint election officials, and oversee the entire electoral process including resolving disputes that arise during the process, making provision for facilitating the process of voting (for example access for disabled voters), determining the qualification of individual candidates, and even determining inquiries concerning the election. At an altogether different level the ECT under the two most recent constitutions has been fashioned to tackle electoral malpractice, and, to this end, it is equipped with real teeth.<sup>74</sup> The prospect of heavy punishment for contravention of electoral laws was intended to deter potential perpetrators. Where it finds serious wrongdoing the ECT is empowered to issue a 'red card' banning a candidate from engaging in politics for five years (which effectively rules the person out for two parliamentary terms).<sup>75</sup> An equally formidable power is the ECT's capacity to order an election for any member of the House of Representatives or Senate to be re-run where there is proof of malpractice.<sup>76</sup> However, any such decision requires a motion to be put before the Supreme Court, which must decide whether to ratify the motion for it to come into effect.<sup>77</sup> Furthermore, if it observes improper practices the ECT is able to order a person to refrain from any conduct tending to undermine the integrity of an election.

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<sup>70</sup> Jansen, J, 'Thailand Election Commissioners get Jail Time for Abuse of Power in April Poll', *Jurist Legal News and Research*, 25 July 2006.

<sup>71</sup> CT 2007, s.236: 'To notify and set out rules governing the holding of elections and referendums'. See also Organic Act on the Election Commission 2009, s.10.

<sup>72</sup> *Ibid*, s.18.

<sup>73</sup> *Ibid*, s.17.

<sup>74</sup> Leyland, above n4.

<sup>75</sup> CT 2007, s.237. Under several provisions of the Organic Act maximum penalties are imprisonment for a term of 10 years or a fine of 200,000 baht, and a court call order disfranchisement for 10 years.

<sup>76</sup> Elections have occasionally been run as many as five times. Under the Organic Law 2009, s.113 rerun elections are now held at the expense of the candidate whose actions caused the election to be rerun.

<sup>77</sup> CT 2007, s.239.

The ECT is granted far-reaching investigatory powers.<sup>78</sup> It is required to initiate an investigation and inquiry for finding facts in a case where there was an objection lodged or ‘convincing evidence’ of an impropriety or any violation of election laws.<sup>79</sup> What constitutes convincing evidence is an obvious hurdle to overcome when there are accusations of vote-buying, because cash changes hands in private and witnesses will be reluctant to come forward.<sup>80</sup> In conducting its affairs and investigations the ECT has the power to summon documents and/or persons before it.<sup>81</sup> Since investigation of financial fraud can involve untold technical complexity, the ECT can recruit the assistance of other agencies (ss.11,53) such as the National Audit Commission, the Anti-Money Laundering Office, and the National Counter-Corruption Commission in its investigation of electoral malpractice. It is also assisted by an electoral commission for each *changwat*. Although the ECT has been granted these formidable powers it has not been easy to exercise them; this is mainly because of certain procedures which were intended as safeguards. For example, the commissioners’ decision had to be unanimous before a red card or other penalty could be imposed. Assuming that such a decision was made, before it took effect, the ECT were required to notify a special committee made up of the chairpersons of each committee of the Council of State<sup>82</sup> to confirm the legality of the suspension. In the case of evidence of abuse which was discovered after the result of an election had been announced, the ECT was empowered to nullify the outcome of the election in that constituency (or throughout the region or nation) within 30 days of the election (s.8) and order a rerun.<sup>83</sup> Under CT 2007 the ECT can suspend the candidate’s right to vote and therefore also to stand for election. Also, the candidate could be subjected to prosecution under the criminal code.<sup>84</sup>

The ECT has the responsibility as indicated earlier of determining the financial parameters of electoral spending. For elections to be perceived as a fair contest there needs to be financial regulation of the expenditure that contestants can devote to their campaigns. CT 1997 did not directly deal with the crucial issue of setting financial limits on election spending. Rather, it was the organic law that empowered the ECT to determine the amount of expenditure per candidate and for each party at elections.<sup>85</sup> It also provided that if these limits were violated the ECT had the power to seize cash and/or property belonging to the perpetrator.<sup>86</sup> However, CT 2007 sets out explicitly as one of the ECT’s main duties the control of financial contributions to political

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<sup>78</sup> CT 2007, s.236; Organic Act on the Election of Members of the House of Representatives and Senators 2009, ss. 49-50. The ECT conducts investigations where disputes arise over anything to do with the electoral process. An investigation can be triggered by an objection from a voter, candidate, senator, member of the national assembly, or local assembly.

<sup>79</sup> It has power to form a committee to look into any such allegations comprising public prosecutors, state officials, or former judges.

<sup>80</sup> The requirement for convincing evidence is problematic if the complainant is expected to have it since the point of any investigation should be to unearth such evidence.

<sup>81</sup> CT 2007, s.236; Organic Act on the Election Commission 2007, s.26.

<sup>82</sup> The Council of State is the body responsible for drafting laws and acting as legal agent for the government.

<sup>83</sup> Any such decisions were first subject to the scrutiny from senior officials of the Council of State.

<sup>84</sup> CT 2007, s.237; See Organic Act on the Election of Members of the House of Representative and Senators 2007, ch.3.

<sup>85</sup> Organic Act on the Election of Members of the House of Representatives and Senators 1998, ss.40-41.

<sup>86</sup> *Ibid*, s.43.



parties and the auditing of the accounts of political parties.<sup>87</sup> This addition is not surprising given the opposition from individual MPs and Senators to measures designed to tighten up the organic law when it was amended in 2000.<sup>88</sup>

Finally, the ECT has an educational function relating to the wider dissemination of democratic participation.<sup>89</sup> In fulfilling this part of its brief the ECT targets for particular attention pre-voters and new voters. It runs programmes to promote knowledge about democratic regimes and elections. It allows ECT visitors to experience simulations of elections so that potential voters understand the process more than they would by simply reading about elections or by classroom learning. At the same time it has extra-curricular learning materials, drawing upon multi-media and hi-tech resources which it makes available to schools and other educational institutions. However, the repeated blemishes to the ECT's reputation as an independent watchdog body obviously undermine its credibility to fulfil this aspect of its mission. It will be evident by now that the ECT was given ample powers. In practice, as we will shortly observe, the question has been whether these powers have been exercised with sufficient rigour.

## 5 Performance of the ECT

This section provides a selective overview of the performance of the ECT up to the military coup in 2006. Turning first to the electoral process, it has already been observed that the ECT was placed under a duty to oversee the conduct of elections at local and national level and it had formidable powers. First, it is worth stressing again that, under CT 1997, to minimise the potential for vote-buying Thai citizens were specifically required to vote and an electoral system partly based on party lists had been adopted.<sup>90</sup> As a result, recent elections have witnessed exceptionally high turnouts and the party-list method has placed more focus on the party than on the personality of candidates. Secondly, we have seen that the ECT began its work by taking decisive action where it found evidence of abuse. In the elections held in March 2000 78 candidates were alleged to have cheated in the senatorial contest. They were issued with 'red cards' and disqualified. However, at the general election which was held the following year there was evidence of more extensive malpractice. McCargo states that 'widespread challenges to electoral outcomes testified to a new spirit of civic consciousness. Yet vote-buying and electoral manipulation were more rampant than ever, and the credibility of the monitoring agencies such as the Election Commission was greatly undermined in the ensuing furore'.<sup>91</sup> It appeared that 'the amount of money used by [TRT] for advertising, persuading politicians with local bases to defect from other parties and for buying votes in the run up to the election was probably unprecedented'. It was offering 300 baht per vote, 100 baht more than any other party. TRT beat the opposition by outspending it.<sup>92</sup> In addition, there were

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<sup>87</sup> CT 2007, s.236 (3).

<sup>88</sup> Chantornvong, s, 'The 1997 Constitution and the Politics of Electoral Reform', in McCargo, above n4, at 206.

<sup>89</sup> CT 2007, s.236(8); Organic Act on the Election Commission 2007, s.10.

<sup>90</sup> Chantornvong, above n92, at 211.

<sup>91</sup> McCargo, above n4, at 17.

<sup>92</sup> McCargo, D, 'Thailand's 2001 General Elections: Vindicating Reform' in McCargo, above n4, at 252. See the discussion of vote buying in Sangwon Suh and Gearing, J, 'Democracy at a Price: the Dirtiest Election Campaign in 20 Years', *Asiaweek*, 1996.

many reports of MPs being offered huge sums to defect to TRT.<sup>93</sup> After the 2001 general election 30 candidates were summoned before the ECT and there were complaints lodged to it in 312 constituencies.

Nevertheless, it was somewhat ironic that TRT managed to construct a manifesto which brought together an unlikely alliance of varying factions, including ex-left-wing activists and ex-right-wing thugs. In consequence, the new coalition was often victorious and so many of the blatantly corrupt mafia-like incumbent politicians failed to get re-elected in 2001.<sup>94</sup> After their election MPs were routinely bankrolled by TRT, receiving up to 200,000 baht per month.<sup>95</sup> It had been suggested that of the total of 312 sitting MPs that were investigated by the ECT as many as 66 would be disqualified. However, when the results of the investigations were announced in January 2002 only two MPs received red cards resulting in immediate disqualification while a further 12 received warnings in the form of yellow cards. It has been claimed that the failure to elect impartial commissioners has clouded the outcome of painstaking investigations.<sup>96</sup> Although the proceedings of the ECT were conducted in secret and put beyond the reach of freedom of information laws, it later emerged that the problem had been a failure by the commissioners to reach unanimous agreement as required by law. As a result of the indecision most of the perpetrators of malpractice escaped any punishment.<sup>98</sup>

The overwhelming win by Prime Minister Thaksin in the January 2005 election, in which the Prime Minister and his party took 370 of the 500 seats in parliament, was equally unsatisfactory. It led to concerns over the further erosion of democracy. It was being claimed by the opposition that Thailand was on the path to becoming a one-party state.<sup>99</sup> The collapse of support for the opposition Democratic Party was greatly assisted by Thaksin's control over a substantial section of the media and by blatant vote-buying. It has been estimated that some 10 billion baht or \$US260 million was spent in bribes to voters during the campaign.<sup>100</sup> The performance of the ECT chaired by Wassana Phermlarp fell a long way short of the previously high expectations. 'Some observers accused the commission of laziness and inefficiency, while others went so far as to imply that the commission was biased in favour of Thai Rak Thai ... The chairman of Poll Watch Foundation, General Saiyud Kerpol asserted that the election was plagued by violence and intimidation of voters and candidates'.<sup>101</sup> In response to claims of malpractice, there was very little evidence of positive intervention in the form of full investigations followed by firm action to eliminate continuing abuse.<sup>102</sup> The degree of exasperation felt by many observers at the ECT's perceived impotence was encapsulated in an article published in *The Nation*

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<sup>93</sup> As was pointed out above this practice is now unlawful.

<sup>94</sup> Giles Ungpakorn, 'From Tragedy to Comedy: Political Reform in Thailand' 32: 2 *Journal of Contemporary Asia* 191-205, at 202ff (2002).

<sup>95</sup> See Chantornvong, above n92.

<sup>96</sup> Katerenchuk, W, 'Thai Politics Monitor: Thai Politics Chronology November 2001- July 2003', in Nelson, M, (ed) *KPI Yearbook No.2 (2002/03)* (KPI, Nonthaburi, 2004), 510

<sup>98</sup> *Ibid.*

<sup>99</sup> 'An Occasional Democrat', Editorial, *The Guardian*, Manchester, 8 February 2005.

<sup>100</sup> 'Thailand's Right-wing Populist Wins National Elections' *World Socialist Website*, 10 February 2005.

<sup>101</sup> Katerenchuk, W, 'Thai Politics 2005: a Year in Review', in Niyom Rathamarit (ed) *Eyes on Democracy: National and Local Issues, KPI Yearbook 3 (2004-2005)* (KPI, Nonthaburi, 2006), 206.

<sup>102</sup> 'Role of the Thai Election Commission', 21 January 2005, Radio Singapore International.

(Bangkok): 'Following its final ruling on malpractice at the February 2005 polls, a monument should be erected in memory of the Election Commission. The monument might show a man with a stack of money in one hand, a gun in the other and a big smile on his face'.<sup>103</sup>

Controversy continued to surround the ECT. As was discussed above, its decision to allow the election which was held on 2 April 2006 was challenged in the courts. During the election itself, there were, once again, many allegations that votes were being bought on a widespread basis. The ECT failed to uphold objections to the results, and it required the King's intervention before the Constitutional Court eventually held the election invalid, having initially confirmed individual results which had been called into question. Further investigation of the conduct of the political parties (TRT and the Democrat Parties) in the elections of 2 April 2006 were expedited by the military government after the September 2006 coup. Although the complaint had originally been made to the ECT under CT 1997, the Constitutional Tribunal was granted responsibility for hearing the electoral fraud trial which commenced in mid-January 2007. The court's decision in May 2007 to disqualify the former PM and 110 officials of TRT is discussed above. In addition, there was also considerable criticism following the failure of the ECT to disqualify candidates for the senatorial elections having suspected party affiliations<sup>104</sup> and for the ECT's failure to prevent vote-buying in the elections for the upper house.<sup>105</sup> In July 2006 three election commissioners were sentenced to four years imprisonment for mishandling the elections which were held earlier in the year.<sup>106</sup>

Following the coup of 19 September 2006 CT 2007 was drafted and then brought into force following a referendum in August 2007. Further elections were held in December 2007, resulting in the now familiar scenario of a victory for the party supporting Thaksin amid widespread allegations of vote-buying. ECT investigated 83 candidates for electoral fraud, and six candidates were handed red cards. Three rounds of by-elections were held as a result of ETC intervention. Electoral fraud findings also led to the disqualification of the speaker of the House of Representatives in February 2008 and to the dissolution of the PPP in December 2008. Currently (September 2009) it is now the turn of the Democrat Party to be investigated in respect of allegedly illegal donations.<sup>107</sup> The local elections of September 2009 also evidenced 'rampant' vote-buying according to the ECT, with votes being bought for 100-500 baht or 2000 baht in tightly fought districts.<sup>108</sup>

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<sup>103</sup> 'Two Fingers from the Election Commission', *The Nation*, Bangkok, 19 September 2005.

<sup>104</sup> 'Democrats Mull Suit against EC', *The Nation*, Bangkok, 7 April 2006.

<sup>105</sup> 'EC's Conduct Panned as 'Inefficient, Incompetent'', *The Nation*, Bangkok, 20 April 2006; 'Major Party is 'Buying' Likely Vote Winner', *The Nation*, Bangkok, 9 April 2006.

<sup>106</sup> 'Thai Court Convicts 3 for Election Missteps', *International Herald Tribune*, 26 July 2006. The main charge was allowing unqualified candidates to run. The three were also disqualified from politics for 10 years as well as losing the right to vote.

<sup>107</sup> 'EC Extends Democrat Funds Probe', *Bangkok Post*, Bangkok, 25 August 2009. 13 Democrat MPs lost their seats in Parliament as a result of ECT findings in July 2009: see [http://www.thaindian.com/newsportal/politics/thai-election-commission-disqualifies-13-lawmakers\\_100218870.html](http://www.thaindian.com/newsportal/politics/thai-election-commission-disqualifies-13-lawmakers_100218870.html)

<sup>108</sup> *The Nation*, Bangkok, 7 September 2009. One candidate was said to have borrowed 500,000 baht from a loan shark.

## 6 Conclusion

The complexity and sheer size of the problem of attaining fairness in all respects at all levels in elections in Thailand has been elaborated upon here at some length. As with many other aspects of Thai constitutionalism the conclusion is necessarily a disappointing one, but one which offers some crumbs of comfort. It seems apparent that attempts to regulate electoral malpractice out of existence are doomed to failure, at least until such time as the political economy and legal culture of Thailand change dramatically. In this sense the resolution of the problem of electoral fairness is a function of the resolution of the large political problem that now confronts the country, which would appear to require some kind of a political rapprochement between the two sides and agreement to proceed strictly according to agreed rules to be observed to the letter, including perhaps particularly electoral rules. This in itself looks like a hugely problematical undertaking. However, it can also be seen that the period 1997 to date has been one of experimentation in which many lessons have been learned and useful laws, structures, practices, experiences and precedents have been established or undergone. A question remains as to whether the same body should be exercising what is essentially an organisational function and an investigatory function. It may be that the tasks of administering and then retrospectively investigating malpractice relating to the electoral process should be separated and placed in different hands, the point being that watchdog bodies ideally oversee a process rather than operate as an integral part of that process. It can of course be argued that Thailand has already very many independent agencies and creating even more and staffing them with reliable and professional people in itself constitutes a formidable challenge given the relatively small number of Thai citizens competent and willing to undertake such duties. However, there seems to be an arguable case for revising the jurisdictional remit of the ECT and redistributing its investigatory powers, together with the officials with this expertise, to the National Counter Corruption Commission or alternatively to form a specialist branch of the police service to undertake this task.

Finally, we stress again that in a political system which has accepted vote buying by all parties as the norm there needs to be a fundamental shift towards constitutionalism by the main protagonists to coincide with these institutional modifications.