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***Droit Administratif* Thai Style: A Comparative Analysis of the Administrative Courts in Thailand**

Peter Leyland*

A system of Administrative Courts was set up for the first time in Thailand as an important part of the new Thai Constitution of 1997. After dealing with issues raised in undertaking comparative analysis, this article traces the background to the introduction of the court, with particular reference to the strong influence of the French system of droit administratif in the development of the Council of State in Thailand, and in the conception of the current Thai system of administrative justice. The discussion proceeds to consider the institutional safeguards which were put in place to secure the independence of the Administrative Courts. The following sections deal with the characteristics of the court, which are mainly discussed in terms of its jurisdictional limits, the grounds set out for its intervention, the remedies it is able to award, and its work load. Finally, some of the court's significant judgments are considered in the context of the current constitutional situation in Thailand.

This article provides an assessment of the Thai Administrative Courts in light of recent Thai constitutional reform. In seeking to evaluate these characteristics of the new courts, comparisons are made with the administrative court systems in France and in England.

The first section refers to the methodological approach adopted in order to embark on a comparative enterprise. In particular, I briefly revisit debates concerning the 'transplantation' of systems of law between one nation and another, in order to see how such concepts might be relevant to the present discussion. In the following section, the ground is marked out by mentioning the Thai constitutional reform process, relating particularly to constitutional oversight and other 'watchdog' bodies. The next section seeks to trace the 'genealogy'¹ of the Administrative Courts by providing historical background for the introduction of administrative law in Thailand. The remaining sections examine the Administrative Courts themselves. I first consider the question of the independence of these courts by examining their institutional status under the Constitution and under the law. Next, the most significant characteristics of these courts are reviewed from a comparative perspective, before moving on in the following part of the discussion to assess their jurisdictional responsibility, including the grounds of review under which the Administrative Courts operate. The main concern here is to consider how well equipped the

Administrative Courts are to fulfil their constitutional role. This study mainly seeks to provide an analysis of what we might call the institutional framework relating to the Administrative Courts. However, although there has been no systematic evaluation of the decided case law, there is a provisional discussion of the court's effectiveness in the final section, which is based on the available statistical information and prominent reported cases.

Methods of Comparison

A study in comparative public law inevitably encounters practical and methodological problems. First, at a practical level there has been a heavy reliance on translated materials of variable accuracy and fluency. Further, the terminology particular to any legal system can present an additional obstacle. On occasion it is necessary to leave certain terms in their original form with some note or explanation, if no equivalent translation is possible (Legrand, 1996: 234). Second, the accepted definition of what a subject discipline involves may differ quite fundamentally from one nation to another. Comparatists need to start by asking whether they are actually comparing like with like. We will soon discover that there are separate genealogies which shape national administrative law traditions (Legrand, 1996: 148). For example, in England and Wales, the tradition of administrative law has often been defined under the influence of the Diceyan notion of the 'rule of law' as being mainly concerned with the control function of the courts.² By way of contrast, Thai administrative law has a very different history: it is derived from French administrative law. In turn, this connection has shaped its particular genealogy and its distinct form, function and jurisdictional scope.

Third, it can be claimed that developed and developing nations share many problems with respect to the question of how government can be controlled in the interests of both the state and its citizens (Brown and Bell, 1998: 1). Given the commonality of such problems,³ it would seem to follow that comparative analysis can shed much light on the respective merits and shortcomings of different constitutional and legal regimes from the technical standpoint of their design and their function. Perhaps the central question when considering the feasibility of comparative law might be to ask whether the technologies of law and constitutionalism are transferable at all? Of course, the idea of 'transplants' has been a recurring concept when looking at legal systems from a comparative perspective (Watson, 1976: 79–84). The applicability of transplants can be supported to some extent by the observation that one legal system may have been modelled on another. There is a clear connection between the common law system found in the United Kingdom and the ones that

operate in a number of Commonwealth Countries (Harding, 2004: 137–62). Equally, the Napoleonic Codes originating from France have found their way into much of continental Europe and former French colonies including Cambodia and Vietnam. Furthermore, as we shall see, the French system has provided the basis for Thai administrative law, as it did for Thai private law.

In the mid-18th century, Montesquieu considered that environmental difficulties stood in the way of transplantation from one system of law to another (Allison, 2000: 12ff). More recently, Otto Kahn-Freund developed the idea of transplants, and he recognised that the degrees of transferability varied with the type of law under consideration (that is, whether private or public) (Kahn-Freund, 1974: 6). His suggestion has been contested, namely that the problem with transplantation was more difficult at the public law end of a continuum, because of the proximity to the organic power structures which organise constitutional, legislative, administrative and judicial institutions and procedures. It has been pointed out that the complexity of these factors taken together do not necessarily form an impediment for the comparatist seeking to transplant ideas, and it has been argued:

The 1997 [Thai] Constitution is riddled with implied references to other constitutions. Discussions revolved around which of these suited Thai conditions and should be inserted in the new Constitution ... to confine constitutional debate in the way Kahn-Freund would demand would be to deny an opportunity to achieve the kind of legality and accountability Thailand desperately needs ... (Harding, 2000: 112)

Rather the point is that any such study needs to take account of many crucial variables in the form of similarities and differences in both the arrangements for the separation of powers between state institutions, and the distribution of power between organised groups at many different levels, including economic interests, consumers, trade unions and so on. Indeed, a discussion of any regime of public law must relate to the social, political, economic and historical context (Loughlin, 1992: 4). The task of comparative analysis is far from straightforward because of fundamental distinctions that have to be recognised, not only in respect to the tradition of law, but also concerning the nature of the state itself. Perhaps the most obvious problem for any discussion of aspects of the Thai Constitution from a comparative angle is that Thailand does not share the same culture and history as European nations, and although it might be broadly designated as having a constitutional monarchy with a democratically elected government, it has a radically different political tradition. For example, there were 16 different constitutions during the course of the 20th century, and the military forcibly took over control of government at

intervals following the Second World War. In consequence, the institutions of democratic government are not anchored in the same way as they are in some European nations with longer traditions of democracy.

For the study in hand, it will be suggested at a broad level of generality that a common concern can be identified, namely, the attempt to analyse the distribution, exercise and containment of state power, an objective that has been considered only attainable through the modification of state institutions and the introduction of regulatory mechanisms. This type of analysis has been recognised as a central concern of contemporary constitutionalism, although such analysis may be undertaken in different ways (see, eg, Morison and Livingstone, 1995). In view of so much evidence of the global interaction of ideas in an electronic age, it seems that the concept of 'transplants' needs to be revised and updated. Constitution-making should be seen rather as an eclectic process involving an importation of influences.⁴ Certainly in the field of public law, a more useful approach in considering the formulation and development of law and constitutions would be to identify an absorption of influences and a recognition that a 'process of cross-fertilisation' takes place and does so in a dynamic manner (Bell, 1998: 147; Oliver, 1999: 117ff; also Van Caenegem, 1995).

The Thai Constitutional Context

The Thai Constitution which came into force on 11 October 1997 is widely regarded as the most ambitious step so far in establishing the institutional basis for a democratic system of government in Thailand. As one commentator puts it: 'The 1997 constitution represents a revolution in Thai politics. It was a bold attempt at conferring greater power to the Thai people than had ever been granted before' (Chambers, 2002: 16). It was promulgated following a special process during which the Constitution Drafting Assembly conducted widespread consultation on a nationwide basis. The result was a Constitution that introduced sweeping changes which affected the main institutions ranging from parliament, government and the courts. For example, the Constitution modified the electoral system and the composition of both houses of the Thai parliament. The constitution also introduced greater transparency and established a reformulated Constitutional Court.

Apart from recasting the shape of the main institutions, a prime objective was to tackle corruption and to protect basic human rights more effectively. To achieve these ends, a new set of independent organisations were set up to oversee its operation. Indeed, the inclusion of mechanisms for monitoring and enforcing the main provisions is a distinctive characteristic of the 1997 Constitution. For example, the Election Commission,

the National Counter-Corruption Commission and the State Audit Commission have been designed to tackle abuses associated with the political process. In the field of citizen rights, the National Human Rights Commission and Ombudsman were designated to play important roles.

The 1997 Constitution includes the specially formulated features mentioned above to deal with a perceived democratic deficit in a number of areas, but an equally important characteristic of the new Constitution is the intention of establishing a clear separation of powers between the executive branch and the judicial branch. In general terms, the judiciary have been kept separate from, and independent of, the Ministry of Justice.

In delineating the position of the Administrative Courts it is important to be aware of their jurisdictional scope in relation to the Constitutional Court and other courts. With regard to constitutional issues, the 1997 Constitution established a Constitutional Court which consists of a President and 14 judges. Normally a quorum of nine judges presides over cases that come before it (Thai Constitution, s 255; Office of the Constitutional Court, 2003). The Constitutional Court is responsible for hearing challenges to draft legislation, statutes and regulations on the grounds of unconstitutionality (Thai Constitution, ss 262–263). The court also determines matters of overlapping authority between official bodies under s 266 and is designed to operate as a constitutional safeguard, particularly in relation to the protection of civil liberties and human rights.⁵ As a judicial body with jurisdiction over many constitutional issues it is vested with formidable powers,⁶ some of which are comparable to those exercised by the United States Supreme Court.⁷ In such a capacity, the Thai Constitutional Court is most exposed to political criticism and censure.⁸ Thailand has a system of criminal and civil courts operating in their respective fields and, further, the Administrative Courts have no jurisdiction over matters triable by other specialist courts,⁹ matters of military discipline and those falling under the remit of the Judicial Commission.¹⁰ Where there is a dispute as to the jurisdictional limits of the Administrative Court, the outcome is determined by a special committee comprising the President of the Supreme Court of Justice, the President of the Supreme Administrative Court and the President of the other court involved (Thai Constitution, s 248).

France, England and the Genealogy of the Thai Administrative Court

Thailand adopted a continental system of law inspired by France and Belgium as part of the programs of intense reform the nation experienced during the course of the 19th century (Wyatt, 1991: 192, 210). In consequence, it is not surprising that the French system of *droit*

administratif has served as the main model for the Thai Administrative Courts.¹¹ It can be argued that the character of the Administrative Court has been largely determined by this genealogy, although features relating to the English common law are also relevant to any analysis. Turning briefly to France first, it is important to remember that the *Conseil d'Etat*¹² is not really an ordinary court but the head of a separate hierarchy of special Administrative Courts (Brown and Bell, 1998: 6). These special Administrative Courts have a jurisdiction which overlaps with that of the civil courts and administrative tribunals in the United Kingdom. It is a body that originated from the administration because:

[T]here was no appeal against bad administrative decisions. Napoleon, who established the *Conseil d'Etat* under the Constitution of 1799 as a powerful administrative body ... gave to it, as one of its functions, the task of hearing administrative appeals. Since it was not technically a court, it could do so. (Burchett, 1995: 977)

The *Conseil d'Etat* in France as it developed demonstrated a capacity for judicial independence. And despite Dicey's assertions to the contrary (Burchett, 1995: 978), it managed to impose a principle of legality by assuming a role overseeing the administrative process. This role was all the more apparent because the ordinary courts were prevented from having jurisdiction in this area. It originated as a means for petitioning the Crown, but later (1872) acquired the power to issue unenforceable judgments:

In the second half of the nineteenth century and in the early twentieth century, reformist politicians, Conseillers d'Etat and doctrinal writers, ..., attributed to the state administrative qualities of potential irresponsibility and abusiveness that rendered legal controls justifiable ... they perceived a centralized and, therefore, distinct and identifiable administration that could be subject to a distinct body of law. (Allison, 2000: 55)

In turn, this led to the emergence of identifiable notions of public power and public service supported by an emergent regime of public law which could serve as a corrective to a potentially irresponsible and abusive administration.

The contrast has often been made between France and England, where the writings of AV Dicey were, and still are, very influential. Dicey's mission in developing his doctrine of parliamentary sovereignty and the rule of law was to enhance 'the peculiarities of the English' (Thompson, 1965) and to allow the English approach to be distinguished from, and propagated as being superior to, that of France (Taggart, 2003: 107). Dicey (in his early work particularly) was unjustifiably critical of the French system for incorporating the post-revolutionary Napoleonic Codes, creating what he claimed to be a relatively authoritarian centralised state,

together with what he regarded as a servile system of administrative law (the *droit administratif*) (Jowell, 2004), which he wrongly considered lacked any meaningful separation of powers (Allison, 2000: 19).

As Loughlin points out:

By administrative law Dicey meant a special body of rules, institutions and procedures ... inimical to the rule of law ... because it undermined the principles of equality and universality, it placed the state in a privileged position and would therefore threaten the historic achievement of bringing the crown under the rule of law and by establishing special courts it infringed the principle of separation of judicial and ministerial powers. (Loughlin, 1992: 145)

The idea of a self-correcting democracy recognised that Parliament sets a framework of general rules for society. The executive is required to govern within those rules while an independent judiciary resolve disputes over the meaning of the rules. In particular, the courts are charged with keeping the executive within the boundaries of the law (Craig, 1990: 15ff). These ideas were originally formulated before the introduction of universal suffrage and the pressure for social reform.

It is somewhat ironic that, despite the fact that Dicey was strongly opposed to the use of law as an instrument of social policy, the 20th century welfare state, erected, mainly between 1914 and 1951, largely depended on reforming statutes, administered by legions of officials populating government departments and overseen by a battery of administrative tribunals.¹³ A government with a majority in the House of Commons is invariably able to carry through its legislative objectives, with the result that concerns have been increasingly expressed over trends towards executive dominance, sometimes referred to as 'elective dictatorship'.

Of course, the expanded scope of judicial review, especially since the late 1960s, has been regarded as an emerging constraint on executive power (Jowell, 2003: 390ff). The fact that England and Wales (and also Scotland and Northern Ireland, as part of their distinct legal systems) have a system of administrative law with a dedicated court equipped with specially designed remedies to hear judicial review cases can be regarded as significant constitutional development (Cane, 2004; Leyland and Anthony, 2005; Craig, 2003; Wade and Forsyth, 2004). To some extent these courts have emerged as a counterweight to the burgeoning executive.¹⁴

During the course of the 19th century, under the rule of 'Mongkut' (King Rama IV: 1851–68) and 'Chulalongkorn' (King Rama V: 1868-1910), Thailand was subject to a program of modernisation and reform which touched many areas of Thai society, including politics and law. In

particular, King Rama V attempted to use the law as an instrument with which to oppose the personal influence and corruption which surrounded the court. He was far sighted enough to recognise that it was through the introduction of a 'Principle of Legality' comparable to that evolving in France under the *droit administratif* that this objective could be achieved. Such a principle had a role to play by bringing the performance of every duty under the law. To achieve this end, a Council of State was briefly established following a European visit by the Thai King in the 1870s. However, the Council was often circumvented, with the result that the new body rapidly became redundant, and so the King eventually commanded the repeal of the Act on the Council of State BE 2417 in 1893 (BE 2437).

The inspiration for the modern system of administrative law in Thailand is usually credited to Pridi Phanomyong, a Thai politician, professor and judge of exceptional ability and energy (see generally Baker and Phongpaichit, 2000). Pridi trained in Paris and then returned to Bangkok where he was instrumental in introducing the teaching of administrative law as part of the curriculum for lawyers at the Ministry of Justice Law School in the years following his return from France. In fact, the curriculum he introduced concentrated on constitutional matters such as the form of the state and the rights and liberties of individuals.¹⁵ Pridi was a major player at the point when absolute monarchy was replaced by early forms of constitutionalism (Baker and Phongpaichit, 2005: 121ff). The Council of State was re-established by the Act on the Council of State BE 2476 (CE 1933) and it was intended to perform the functions which had previously been exercised by the Advisory Agency of the State in the reign of King Rama V. The duties of the Law Drafting Department were transferred to the Council of State in CE 1933. The same body was also intended by Pridi to function as an Administrative Court to serve Thai citizens. Such a court could be petitioned to do justice against the government and state agencies (Bhalakula, 2001:14). However, the term 'administrative court' was not officially used.

At this point there were already certain options open to an aggrieved citizen. A case could be taken against an administrative official in the ordinary courts. A right of appeal to a court against the administrative act or order might be available. A petition could be issued against the superior of a administrative official if wrongdoing was suspected. Finally, it was possible to petition the King directly (Bhalakula, 2001: 9). The introduction of administrative law meant that, if an administrative order was wrong, a process of petitioning to the Council of State would become available. In order to perform these dual functions, the staff of the Council of State were divided into two categories: law councillors, whose primary

function was statutory drafting; and petition councillors, who were entrusted to adjudicate administrative cases as prescribed by law (Bhalakula, 2001: 13). From the 1930s, when this upheaval was taking place, until recently, it would have been costly to introduce an Administrative Court but, above all, there was well-orchestrated opposition from prominent judges to the introduction of a new administrative law jurisdiction.¹⁶ Accordingly, the existing system of administrative appeals was expanded into the Petition Council of the Office of State to deal with the administrative cases that arose.

The 1997 Constitution provided for the introduction of the system of Administrative Courts in addition to the ordinary courts.¹⁷ The Administrative Courts were designed to fill a particular gap in the grievance chain by offering full legal redress against official bodies. They were set up by statute in 1999 (*Act on the Establishment of Administrative Courts and Administrative Courts Procedure* BE 2542 (1999) (the 1999 Act) and began operating in 2001, replacing the Petition Council of the Council of State.¹⁸ The new courts are based on a two-tier system: the Supreme Administrative Court and Administrative Courts of First Instance, of which there are two – the Central Administrative Court (for Bangkok and provinces local to Bangkok) and the Regional Administrative Courts (1999 Act, s 7). However, the characteristics of the courts and the limits of their jurisdiction can be distinguished from the ordinary courts and from other means of redress that are available under the Constitution. The Supreme Administrative Court, apart from acting as an appellate court, by hearing appeals from judgments of the Administrative Court of first instance, also exercises a jurisdiction that is directed at issues relating to the operation of central government. For example, it has competence to try cases concerning the legality of Royal Decrees or by-laws issued by the Council of Ministers. It also tries cases involving disputes in relation to decisions of a quasi-judicial council (as prescribed by the general assembly of judges of the Supreme Court) (1999 Act, s 11).

The Independence of the Administrative Courts

An effective separation of powers between the executive and judicial branches depends on establishing a strong degree of judicial independence, and there has already been brief mention of the problems encountered by the Thai Constitutional Court in making decisions which carried far-reaching political consequences. In Thailand, judicial independence has been recognised as a constitutional imperative since the courts' structure was introduced in 1908, and public protest has resulted from attempts to undermine such independence, even during periods of military rule.¹⁹

What do I mean by judicial independence in this administrative law context? The originators of modern conceptualisations of separation of powers sought to conceive a system of checks that would ensure that power vested in governors cannot be turned to personal advantage and that the personalised rule by men would be replaced by the impersonal rule of rules (Loughlin, 2000: 183). It was further recognised that this required 'an independent judiciary ... acting as a bulwark against executive power. It is this aspect of the rule of law which is critical in distinguishing between liberal and despotic regimes'. In practical terms, the result is that the judiciary require first: 'a set of relatively clear and general rules which can establish an impartial system and, secondly, independence to apply the law without fear or favour' (Loughlin, 2000: 185). There are a number of ways in which judicial independence is relevant. In a macro-constitutional sense, this independence is most apparent when the judicial branch is seen to be separated from, and thus independent of, the executive branch. Since under most constitutional and legal provisions in most nations judicial appointments have to be approved by the executive branch at some point, and the judiciary are remunerated from public funds, it is obvious that completely isolating the judicial branch from political and economic considerations is never entirely straightforward.²⁰

The 1997 Thai Constitution, coupled with the legislation introducing the Administrative Courts, includes elaborate provisions to establish the independence of the court's judges (1999 Act, ss 12–30). The court administration is clearly separated from the executive and made independent of any government department (Thai Constitution, s 280). A Judicial Commission of the Administrative Courts is responsible for disciplinary matters and promotion. Any resolutions for dismissal, for malfeasance in office, gross disciplinary breach or imprisonment for a serious offence (s 23) can only go ahead after an investigation by a specially formed committee comprising, among others, four judges of the Supreme Administrative Court has been completed, and the committee has reported on the matter (1999 Act, s 23).

Important safeguards have been set in place in a number of ways to guarantee that the Administrative Courts are staffed by a cohort of professional judges. Judges are appointed to the Administrative Court by the Judicial Commission of the Administrative Courts until their retirement. The salaries of judges are protected (Thai Constitution, s 253, and 1999 Act, s 30). Judges cannot be taken off a case once they have been assigned to it. The requirements for appointment to the court are rigorous; in order to be nominated as an Administrative Court judge, candidates must be Thai nationals over 35 with 'appropriate academic qualifications'. In addition, they must, as in France, have 'relevant experience'.²¹ There

are complex procedures for the dismissal of judges which are placed in the hands of a judicial commission (1999 Act, s 24). For the Supreme Administrative Court, the age limit is 45 and candidates must have served as a law councillor, petition councillor or councillor of state.²² Conflicts of interest are prohibited under s 14.²³

These stringent requirements limit the pool of possible appointees to suitably qualified candidates. Furthermore, administrative judges are specialists who only hear cases in the Administrative Courts.

The system thus differs from the situation in England and Wales, where the panel of High Court judges who staff the Administrative Court have legal training and experience but are not specialists in public administration, and where these judges for part of the year will also hear a range of cases with entirely different subject-matter as part of their assigned workload.

In order to form a professional cadre of judges who are unlikely to be tempted into corrupt practices and, at the same time, attract candidates of sufficiently high calibre, it is essential that incumbents are adequately remunerated. The salary levels for Administrative Court judges at Bt 550,200 pa (£8500 sterling) and Supreme Court judges at Bt 709,080 pa (£11,000 sterling) may appear relatively modest by European standards, but these figures represent a substantial salary in terms of the cost of living and the levels paid in the public domain to high-ranking Thai officials.²⁴ Nevertheless, public sector salaries are a sensitive subject in Thailand and it should be stressed that the alleged 'self-award' of pay increases by independent watchdog bodies without obtaining parliamentary approval (including the Constitutional Court and the Administrative Courts) has been subject to far-reaching and continuing controversy and this has encouraged an emerging scepticism over the constitutional reform program (see, eg, *The Nation*, 25 October 2004).

Susceptibility to political interference crops up at a higher stage in the appointments process, because the appointment of President of the Supreme Administrative Court requires that a candidate be first nominated by the Commission, after which approval by the Senate is required before the name is submitted to the King for final approval (Thai Constitution, s 278). At this stage, interference might be possible in the form of opposition to particular candidates from private individuals or business interests exerting an influence. For example, a nominated candidate with a reputation for protecting the natural environment could find resistance from businesses which consider their interests might be affected by environmentally friendly judgments. Cases in the Administrative Courts of first instance are heard by a panel of three judges and in the Supreme Administrative Court by five judges (1999 Act, s 54).

Characteristics of the Thai Administrative Courts

It is commonly assumed that Administrative Courts are fundamentally concerned with the accountability of public bodies and the containment of public power, as well as having other responsibilities, for example, over administrative contracts and tort claims against public bodies. Given this assumption, the reach of any public law jurisdiction becomes a question of crucial importance (Hunt, 1997). A separate public law jurisdiction has been justified on the basis that the state should have a monopoly over the exercise of certain types of coercive power; in particular, the creation and enforcement of laws relating to the capacity of the state to act as an instrument of social regulation (Bamforth, 1997: 151). Thailand's French connection²⁵ has contributed to the local conceptualisation of a distinct public law which is associated with designing state organisations; ascribing varying degrees of importance to state agencies and state officials in regard to members of the public; and formulating criteria and measures for controlling the discharge of state organs and officials (Bhalakula, 2003: 19). In many European nations, it has been increasingly recognised that any public/private distinction is made more problematic with the emergence of a 'contracting state' in which there is expanding private sector involvement, for example, in the delivery of public services formerly provided by government and local government (Cane, 2003: 248). As well as the privatisation of formerly state-run industries, there is also a reliance on private companies to construct and manage many publicly financed enterprises (Harden, 1992). Thailand is a nation which has also seen trends towards a contracting state, and the Thai Administrative Courts have been introduced as the most potent constitutional mechanism designed to regulate the exercise of these aspects of public power. In consequence, a restricted definition of what constitutes 'public law matters' falling under the ambit of the Administrative Court would limit the application of public law remedies and exclude judicial supervision over functions formerly exercised by the state, which are now manifest in private form (Hunt, 1997: 23).

How then do the courts approach the task of determining their jurisdictional boundaries? In assessing a claim, the court must decide whether the contested matter has a sufficient public law dimension to fall under its jurisdiction.²⁶ In cases where this issue is contestable, the judge will consider: (1) whether the body/enterprise/individual is providing a public service; and (2) whether a public power is being exercised. The test employed seeks to ascertain if a power has been granted that would not be granted or exercised in the private sector; and (3) whether the body/enterprise or individual is exercising a public service function.²⁷ The reported case law suggests that the courts have defined public in a broad

sense. For example, the court has heard cases involving privatised state enterprises that provide a universal service and has ruled that the Telephone Organisation of Thailand remains an administrative agency subject to the jurisdiction of the Administrative Courts. The role of the *Tribunal des Conflits* in deciding contested matters of jurisdiction is closely replicated by the Thai Jurisdictional Conflict Tribunal, which adjudicates when such disputes arise in the Thai legal context (Red Case Nos 1733–1734/2002). By way of comparison, it is worth remembering that the major justification for the exclusivity principle as part of the modern law of judicial review in England and Wales was the introduction of both a special procedure and specially designed remedies.²⁸

Turning next to remedies, it is argued by Professors Harlow and Rawlings in their authoritative study that '[o]ne of the most important aspects of grievance machinery is that it should provide effective redress' (Harlow and Rawlings, 1997: 560). Although the granting of a remedy in judicial review proceedings is discretionary in England and Wales, the point to stress is that the system of judicial review has been constructed around the remedies that were available. In particular, the courts were equipped with the ancient prerogative orders which allowed unlawful decisions of public bodies to be quashed; prevented bodies from taking decisions which were deemed unlawful; or commanded them to act where they were neglecting to perform a lawful duty.²⁹ The Thai Administrative Court is in possession of formidable powers when it comes to granting remedies (1999 Act, s 72) and many of the remedies it is able to award are tailored to suit an administrative law context.

The court can issue a decree revoking a by-law or an order³⁰ and it can revoke an act in whole or part where it is alleged that an administrative agency or state official has done an unlawful act under s 9(1) of the 1999 Act. Furthermore, the court can direct whether any such decree will have retrospective or non-retrospective effect. In addition, the Administrative Courts have powers which roughly correspond to the mandatory orders and injunctive relief available to the English courts: they are granted powers to order the performance of a duty or order a person to act or to refrain from an act in compliance with the law. Additionally, the court has powers to order the payment of money or the delivery of property. The Thai system departs from the French most obviously in the way these far-reaching powers are set out. The decisions of the French administrative courts were normally obeyed without any need for enforcement but reforms were introduced to allow a follow up to judgments where a decision has not been implemented, for example, *astreinte*.³¹ The lack of remedy has been regarded as a perceived weakness (Brown and Bell, 1998: 114).

In Thailand, as in France under *droit administratif*, there is an inquisitorial style of court procedure. It is specified that in the process of trial and adjudication, the court has the power to inquire into the facts as is appropriate (Rule of the General Assembly of the Judges of the Supreme Administrative Court on Administrative Court Procedure (2000), cl 50)). This procedure requires the judge to conduct investigations to ascertain the accuracy of the facts of the case (*inexactitude des fait*) and he or she is expected to draw the correct inferences from these facts.³² At a preliminary stage, a judge is put in charge of the case in order to consider any statements and documentary evidence submitted, the explanations of the parties and any other relevant facts. A memorandum is prepared with an opinion from the investigating judge; this is submitted to the division, who decide whether the matter can proceed further.³³ If the matter goes to trial, another judge is made responsible for managing the case, which then requires an exchange of evidence so that both parties have full knowledge of the contested facts. At this stage, the court has formidable powers it can use against public bodies which fail to respond when the judge is conducting his or her fact-finding role (1999 Act, s 57).³⁴ When a case finally goes to trial, the parties are allowed to make statements and call witnesses; however, this is done without incorporating the adversarial style of routine examination and cross-examination.³⁵

It has been emphasised that Thailand has a continental system based on legal codes, which means that case law has a different status in comparison with a common law system, where important decisions are reported in detail and the higher courts bind the lower courts on decided questions of law. In reaching a decision, judges in the Thai Administrative Courts are not bound by a doctrine of binding precedent; however, the judge is required to refer to any decided cases with similar facts. Any such decisions will be regarded as persuasive authority, but they are not binding. Moreover, the Administrative Court of first instance is not bound by the judgments of the appellate courts. A Supreme Court judgment can be disregarded in the Administrative Court, if the judge has reasons to disagree with the judgment reached in the superior court; however, again, the relevant precedent must be referred to in the course of arriving at the decision. Omission to make the appropriate reference would be a *prima facie* ground of appeal and would be regarded as a neglect of duty by the judge. Achieving consistency in decision-making may become an increasing problem in the absence of a settled doctrine of precedent: in France, for example, the reforms of 1953 required the decisions of the *Conseil d'Etat* to be circulated and for a system of inspection to be introduced to achieve greater uniformity (Brown and Bell, 1998: 124).

Jurisdiction and Grounds of Intervention

As we have already seen, the Thai Administrative Court and the Supreme Administrative Court have a wide jurisdiction over administrative matters. The 1999 Act states that the court can hear cases involving disputes in relation to the matters prescribed by the law to be under the jurisdiction of Administrative Courts (1999 Act, s 9(6)), and it also gives the court jurisdiction over administrative contracts (1999 Act, s 9(4)) (this is discussed further below). A substantial case load over the initial period indicates that there was a gap that needed to be filled by the new court.³⁶ However, the Thai Administrative Court has clearly circumscribed limits to its jurisdiction. But first we need to deal with the question of merits review. The connection with France is worth mentioning on this question before we proceed with more discussion of the grounds, since the *droit administratif* has recognised that decision-makers are frequently vested with discretionary powers in the public domain and, if such powers are exercised lawfully, there is no opportunity for judicial intervention. In other words, a principle has long been established that decisions cannot generally be challenged on merits grounds alone (*l'opportunité*). There is every indication that Thai Administrative Courts are very well aware of the dangers of stepping into the shoes of the executive and are unwilling to take decisions on a merits basis. Although the very general ground of 'bad faith' is mentioned, the Act itself contains no reference to a threshold equivalent to the Wednesbury/Irrationality test (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223) to be applied in order to determine when intervention is possible.

In regard to challenging administrative decisions, the Administrative Court may be regarded as a remedy of last resort that will only be available if other avenues of redress have been exhausted.³⁷ Following an application to the court, and before the matter proceeds to trial, there is judicial discretion in deciding whether to proceed with a case.³⁸ In order to establish whether the court is in a position to intervene, the concepts of objective legality and subjective legality are applied by the judge. Objective legality looks at whether the body concerned has a legal foundation for its actions. This approach has close parallels to the concept of illegality as part of the *ultra vires* principle, where attention is directed to the type of power in the hands of the decision-maker in order to see if the power has been exceeded. On the other hand, subjective illegality seeks to assess the situation by establishing whether the rights of the claimant/plaintiff have been directly impinged upon by the actions of an official or of a public authority.

It will be apparent from the discussion that follows that the Thai Administrative Courts are empowered to deal with comparable forms of

illegality on the part of administrative bodies or state officials,³⁹ but that the grounds for intervention in dealing with matters of illegality do not exactly mirror those under the *droit administratif* or those developed by the common law under the *ultra vires* principle.

Turning first to the grounds defined under the Act, we find that they have many elements in common. First, a challenge is possible against a public body for 'acting without or beyond the scope of its powers and duties'. This is a ground which almost corresponds under *droit administratif* to *incompetence*, in the sense that the decision-maker is acting without lawful authority.⁴⁰ It would seem to cover the ground of *l'inexistence* which is 'where a decision lacks an essential component' (Birkinshaw, 2003: 129). Exceeding the scope of powers and duties would constitute a form of 'illegality' under the common law categories identified by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 372 (GCHQ case) and it is broadly equivalent to what has been termed simple *ultra vires*. The basis for any such challenge is that a decision-maker has acted in excess of their powers or has exercised a power that they do not possess (*Attorney-General v Fulham Corporation* [1921] 1 Ch 440; *Congreve v Home Office* [1976] 1 All ER 697).

Second, the Act provides under the same sub-section that the courts may intervene if a public body behaves 'inconsistently with the law'. This might be understood in terms of acting at variance with a law or frustrating the legislative purpose. Although not expressed in quite the same terms, 'inconsistently with the law' could be equated under the common law with an implied duty recognised by the courts to promote the purpose under the Act.⁴¹ The purpose may be found to be improper because it fails to match the purpose set out under the law. Also, inconsistency with the law might be caused by the failure of a decision-maker exercising a discretion to take into account relevant considerations, or, alternatively, the fact that he or she has taken account of irrelevant considerations.

In a somewhat different sense, consistency is generally regarded as a principle of good administration (Steyn, 1977) and it clearly overlaps with the related principle of legitimate expectation, based on the idea of legal certainty. Among other things, legitimate expectation requires decision-makers to act in conformity with the procedures they set in place. Consistency has been interpreted to suggest equal treatment to all comers. Expressed in the words of Lord Donaldson, 'it is a cardinal principle of good administration that all persons who are in a similar position shall be treated similarly' (*R v Hertfordshire CC, ex p Cheung*, *The Times*, 4 April 1986). However, given the provisions of the 1997 Constitution, it is not surprising that 'unfair discrimination' is explicitly recognised as a self-standing ground of review in its own right that will be construed in

conjunction with art 30.⁴² We can see a parallel here as the Constitution becomes a point of reference in rather the same way as the European Community (EC) Treaty has become for member states. The principle of equality or non-discrimination is recognised as a principle of German administrative law,⁴³ and it has been developed by the European Court of Justice (ECJ) to fill gaps and aid interpretation with reference to the EC Treaty art 12 (prohibiting discrimination on the grounds of nationality) and art 13 (appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation) (Anthony, 2002: 106). The domestic courts of member states are required to adopt a stance that recognises the treaty obligations coupled with the jurisprudence of the ECJ when a discrimination issue comes before them. The capacity of the Thai Administrative courts to intervene to correct unfair discrimination represents a significant mechanism for the enforcement of the equivalent constitutional principle.⁴⁴

Third, the Thai Administrative Court is empowered to intervene where it is alleged there has been conduct 'amounting to undue exercise of discretion'. In regard to *droit administratif* it has been explained that the scope for intervention under this aspect of *violation de la loi*⁴⁵ will depend on whether the administrator under a statutory regime has no discretion, absolute discretion or limited discretion. This is where 'the administrative judge moves on to examine the actual contents of the administrative act itself in order to decide whether it conforms with the legal conditions set upon administrative action in a particular case'.⁴⁶ Under the common law there have been many judicial pronouncements asserting that discretion in an administrative law context is seldom, if ever, completely 'unfettered'⁴⁷ and that a discretion has to be construed within the statutory context. Moreover, it has been established under the common law that a decision-maker conferred with a wide discretionary power must demonstrate that such power has been exercised, even where the discretion is expressed in the broadest subjective language.⁴⁸

Fourth, actions of public bodies can be challenged on procedural, as well as substantive, grounds. Section 9(1) provides that inconsistency can be not only with the law but with 'the form, process or procedure which is a material requirement'. The 1999 Act thereby introduces a ground of review closely related under *droit administratif* to *vice de forme*, a ground of review which includes any breach of fair procedure. Under this head can be included a general right to a fair hearing, proper notice, adequate consultation and the right to representation.⁴⁹ An inconsistency judged in respect of form, process or procedure is a ground that has been recognised by the common law. 'Procedural impropriety', for example, was set out as one of the three main grounds of judicial review by Lord Diplock in the

GCHQ case. In the same case, Lord Roskill preferred to define the requirement as 'the duty to act fairly', rather than the term 'natural justice', a duty demanding fairness 'in all the circumstances'. It is worth noting that the common law rules of natural justice/fairness have developed to include the principle of legitimate expectation, both in terms of procedures and, in certain limited circumstances, substantive outcomes. This is a concept borrowed from German administrative law that has an established place in EU law, although the principle has not yet been recognised by the *Conseil D'Etat*.

The Thai Administrative Court has jurisdiction allowing it to oversee the proper functioning of the administration (Brown and Bell, 1998: 56, 82).⁵⁰ An application can be made to the court over an alleged neglect of duty or unreasonable delay.⁵¹ Equally, the court can be required to adjudicate over a 'wrongful act or other liability'⁵² associated with the administration or state official in the discharge of legal duties.⁵³ In this sense the Administrative Court has a jurisdiction which potentially overlaps with that of the Ombudsman. Indeed, the ombudsman is specifically empowered to refer matters to the court if, in the course of an investigation, he believes that any by-law or act of an administrative agency is unlawful.⁵⁴ Moreover, an official of the Office of the Ombudsman may take up a case on his own behalf in the Administrative Courts. In this sense, the Administrative Court can be regarded as a body which lines up alongside the other organs of the state designed to act as watchdog bodies at a number of different levels. Causing unnecessary process or excessive burden to the public is recognised as a ground of review in its own right. Additionally, a matter can be referred to the court by an administrative agency or state official to force a person or body to do a particular act prescribed by law or to prevent them from acting contrary to the law.⁵⁵

Having looked briefly at the grounds of review I end this section by noting that the English Administrative Court deals only with judicial review and, as a result, polices rather different territory. It has no competence concerning 'wrongful acts' in general. Perhaps the nearest equivalent is the tort of misfeasance in public office (which comes under the jurisdiction of the ordinary courts),⁵⁶ but cases in this area are extremely rare.⁵⁷

Administrative Contracts

The Thai Administrative Courts took over the jurisdiction previously exercised by the Court of Justice and the Petition Council for disputes relating to administrative contracts.⁵⁸ The introduction of the Administrative Court has established a system of parallel courts, thus providing further evidence of French influence (Bhalakula, 2003). This jurisdiction

incorporates a public–private law distinction that extends to contracting with the public sector.

In essence, Thai law has moved towards a French definition of an administrative contract⁵⁹ as an agreement ‘that relates to the public service and that reserves exceptional powers to the administration’ (Brown and Bell, 1998: 202). The Supreme Administrative court in Thailand has defined such a contract as where:

[A]n administrative agency or the person authorised by the state agrees with the other party undertaking or participating in the undertaking of public services, or it must be a contract containing peculiar provisions demonstrating the privilege of the state so that the exercise of administrative powers or the carrying out of administrative activities – public services – can achieve their purposes. (Resolution of the General Assembly of Judges of the Supreme Administrative Court, 6/2544, 10 October 2001: 32)

In many cases contracts will be administrative in character, that is, concerned with the management of public services or to do with public construction projects.⁶⁰ However, another key characteristic is that such agreements are reached between ‘unequal parties’. Often a special feature of administrative contracts is the power resting with public bodies to vary contractual terms unilaterally, subject to certain conditions. The restricted right afforded to administrative agencies to enter into contracts is normally dictated by primary or secondary legislation. This is a factor which has to be taken into account when looking at the formation of administrative contracts. For example, in Thailand many government procurement contracts require certain procedures to be followed, which vary in accordance with the sums involved. The state, in the form of the administrative agency, is often granted special powers to supervise the performance of the contract (Bhalakula, 2003: 12). The determination of whether a matter falls under the definition of an administrative contract is of considerable importance, as the extent of the liabilities of the parties will often be greater under a private civil contract than under an administrative contract. A civil claim under private law would normally permit recovery in full, whereas under an administrative contract adjustment may be made in accordance with the detailed circumstances of the case.⁶¹

An additional important point to note is that the jurisdiction over administrative contracts overlaps to some extent with other levels of dispute resolution (Okanurak and Yiamsamatha, 2004). In Thailand the Civil Procedure Code (Chapter 3, ss 210–222)⁶² allows a dispute over an administrative contract to be settled by means of arbitration. This constitutes a significant divergence from the French position, where recourse to arbitration is specifically prohibited. However, it has been held by the

Thai Administrative Court that, in situations where an administrative contract provides for settlement by arbitration, a case will not be heard until the arbitration process has been exhausted (Case No Red 1454/2001 and Case No 1799/2001).

Provisional Assessment of the Performance of the Administrative Courts

Since its inception in 2001, the impact of the court can be assessed in two ways. First, there are some statistics available relating to the work load. Second, it is possible to highlight particular cases with political, constitutional or legal significance that have tested the independence of a court faced with external pressures and which demonstrate whether an effective remedy is provided for the citizen. Turning first to throughput, the figures which are available reveal a significant case load.⁶³ Between March 2000 and November 2005 a total of 21,251 cases were referred to the courts of first instance, out of which 15,891 had been determined. There were 5360 cases waiting to be heard, while a further 5610 cases had been referred to the Supreme Administrative Court over the same period; of these, 3702 had been determined, with 1908 cases still outstanding.

The table opposite shows the distribution of cases commenced against the various government departments and public bodies. The figures reveal that a total of 1879 cases have been initiated against the National Police Bureau. Not far behind is the Bangkok Metropolitan Administration, with 1690 cases, and the Land Bureau, with 1514 cases. Highways and Local Administration feature next with around 1000 cases each, while it may appear surprising that only 184 cases have been filed against the Office of Public Health. However, these statistics do not indicate the subject-matter of these actions. So, for example, it is not possible to discover what proportion of the case load concerns issues relating to administrative contracts of public employees, as opposed to issues to do with legality, or cases seeking damages against governmental bodies. Furthermore, in some fields there may be overlapping jurisdictions and alternative remedies available. Nevertheless, from these statistics it is apparent that the Administrative Courts have an important role in hearing a substantial number of cases that fall within its jurisdiction.

Turning next to consider a small sample of significant but diverse cases, it becomes clear that the Administrative Courts not only provide remedial action but also have proved resistant to external influence, so that the institution has gained a reputation for independence (*The Nation*, 30 December 2005).

**Ministerial departments attacked in administrative cases at the
Central Administrative Court (as of 31 October 2005)**

No	Department	Ministry	Vol of cases					
			2001	2002	2003	2004	2005	Total
1	National Police Bureau	Prime Minister Office	648	391	306	295	239	1879
2	Bangkok Metropolitan Administration		368	241	398	408	275	1690
3	Land Department	Ministry of Interior	675	301	221	154	163	1514
4	Highways Department	Ministry of Transports	446	190	166	81	52	935
5	Department of Local Administration	Ministry of Interior	528	184	86	66	49	913
6	Office of the Secretary to the Minister	Ministry of Transports	255	97	194	114	170	830
7	Tambol Administration	Local Government	386	132	92	87	62	759
8	Office of the Permanent Secretary for Interior	Ministry of Interior	359	153	92	83	67	754
9	Office of the Commission for Higher Education	Ministry of Education	200	125	113	107	131	676
10	Office of the Secretary to the Minister	Ministry of Interior	137	121	157	127	95	637
11	Office of the Commission for Fundamental Education	Ministry of Education	263	103	83	22	39	510
12	The Royal Irrigation Department	Ministry of Agriculture	214	141	38	56	29	478
13	Tambol Municipality	Local Government	171	73	47	34	33	358
14	Department of Town and Country Planning	Ministry of Interior	141	114	32	8	10	305
15	Office of the Secretary to the Minister	Ministry of Education	63	42	58	56	119	338
16	Agricultural Land Reform Office	Ministry of Agriculture	80	164	20	9	9	282
17	Office of the Secretary to the Minister	Ministry of Finance	86	32	17	28	75	238
18	Office of the Secretary to the Minister	Ministry of Public Health	42	49	49	46	14	200
19	Revenue Department	Ministry of Finance	81	33	45	29	10	198
20	Office of the Permanent Secretary for Public Health	Ministry of Public Health	88	27	23	30	16	184

To date, the most prominent decision has been in the *Egat* case, in which the Supreme Administrative Court ruled against the government (*The Nation*, 16 November 2005a; Arnold, 2005). In this case, the Thai Government was proposing to privatise the Electricity Generating Authority of Thailand (Egat) Egat Plc. A combination of 11 civic pressure groups, including the Campaign for Popular Democracy, the Consumer Protection Foundation, the Federation of Consumer Organisations, and representatives from the Egat labour unions, with the support of opposition parties, contested the government's privatisation plans. The objectors argued that the proposals were likely to result in greatly increased electricity prices for electricity consumers, while giving disproportionate financial rewards to a small group of investors, including politicians with an interest in the scheme who stood to gain directly from the privatisation. The Prime Minister, Thaksin Shinawatra, and Energy Minister, Viset Choopiban, were among the five named defendants. It was alleged that there had been an abuse of power because the government was proceeding with the privatisation without any form of public consultation, that is, despite the fact that mandatory hearings were required before implementing such a proposal. Further, it was argued that the sale of Egat shares violated the Constitution,⁶⁴ because the government had illegally used two royal decrees to appoint a panel to oversee electricity generation. It was also argued that there were inadequate safeguards for consumers with regard to pricing levels and standards of service. The court found in favour of the objectors and issued an injunction which prevented the privatisation from going ahead before hearings had taken place. The decision had far-reaching ramifications. In economic terms, the interruption of the schedule for flotation in a market-sensitive area dependent on investor confidence called into question the financial viability of the entire scheme. At a political level, the anti-privatisation campaign had developed into a personal campaign against the Prime Minister. Indeed, the court's decision was a serious blow to a central plank of government policy. The fact that fundamental principles of legality were upheld by the court, especially given the extremely sensitive issues at stake in the case, provides a clear demonstration that, in this area at least, the new Constitution has managed to establish a powerfully independent watchdog body capable of checking abuses of power (*The Nation*, 17 November 2005).

Furthermore, it is of enormous constitutional significance that the conduct of the Thai Election Commission (EC) in relation to the election held on 2 April 2006 and by-elections scheduled for 29 April 2006 were subject to judicial challenges in the Constitutional Court and the Supreme Administrative Court. The main opposition parties in Thailand boycotted the 2006 election but, at the same time, they contested the legality of the

poll on the grounds that there had been a breach of electoral laws, and that the Election Commission had failed to discharge its constitutional duty when overseeing the electoral process.⁶⁵ In an unprecedented response, King Bhumibol intervened personally to defuse an escalating political crisis.⁶⁶ In recognition of the fact that the immediate issues regarding the election required judicial resolution, he addressed all the judges of the Constitutional Court⁶⁷ and Administrative Courts directly (*The Observer*, 30 April 2006), urging them to assert their authority under the Constitution, and in particular to do so by invalidating the 2006 election (*BBC News Website*, 28 April 2006; *The Nation*, 1 May 2006). Subsequently, the Constitutional Court ruled on 8 May 2006 that the general election was void and that it would have to be held again (*BBC News Website*, 8 May 2006; *The Guardian*, 8 May 2006).

There have been other notable decisions where the court has taken a robust stance in relation to the functioning of public bodies. For example, in March 2003, the Supreme Administrative Court upheld an earlier ruling by the Administrative Court regarding the selection process for the National Broadcasting Commission (NBC). The selection of 14 candidates for the NBC was nullified by court order on the grounds that the selection committee had been partisan and not independent as required under the administrative code (*The Nation*, 5 March 2003). The court ruled that as the selection committee had been set up under the National Broadcasting Act it was a government agency, and therefore bound to comply with the Administrative Code, which prohibits conflicts of interest. This decision of the court resulted in a re-run of the selection process. However, despite the earlier ruling, many of the same figures with alleged conflicts of interest appeared on the revised list (McCargo and Pathmanand, 2005: 46). There was an unsatisfactory outcome in this instance, which permitted a continued conflict of interests, because in setting up this public body the other constitutional players responsible for appointing the selection committee chose to ignore the rules that had been set out through the earlier judicial intervention, and so the names of disqualified candidates re-appeared (Phongpaicit and Baker, 2005: 151, 207).

Likewise, the Administrative Courts may be routinely called upon to rule on the extent of the legal powers of other constitutional organs that themselves have an oversight function. For example, in 2002 the Administrative Court held that another watchdog body, the Anti-Money Laundering Office, had acted unlawfully by inquiring into the bank transactions of journalists who had been critical of the Thaksin Government. This later resulted in the journalists filing a compensation claim with the court (*The Nation*, 11 March 2003).

In an entirely different context, the Administrative Courts have been called upon to determine the legality of revocations of citizenship. For

example, following a decision by the Local Administration Department (LAD) to remove the citizenship of 1243 villagers in the Mae Ai district, the individuals concerned became ineligible to receive services from state agencies, including the Bt 30 universal healthcare scheme, or to apply for loans from state financial institutions. Deprived of their citizenship, some students were forced to leave school. In April 2002, the Chiang Mai Administrative Court found that the LAD had acted unlawfully when it revoked the citizenship of these villagers. After the LAD appealed, the Supreme Administrative Court in September 2005 confirmed the original decision of the Chiang Mai Administrative Court, resulting in the villagers enjoying automatic reinstatement of their Thai nationality, and the bringing to a close a three-year legal ordeal for the villagers (*The Nation*, 11 September, 2005). In yet another field, the Central Administrative Court has dealt with negligence claims taken out against public authorities. For example, in a widely publicised case, after a judge found that the Office of Atomic Energy for Peace had been negligent in not strictly enforcing safety regulations in the storage of radioactive materials, the court awarded compensation of Bt 5.2 million to 12 victims of a Cobalt-60 radiation leak (*The Nation*, 28 September 2002). Last, from the earlier discussion of grounds of review, it will already be apparent that the Administrative Courts can dispose of procedural matters concerning unlawful discrimination and unfair treatment at the hands of public bodies.⁶⁸

Conclusion

The Administrative Courts in Thailand comprise an important part of the new grievance machinery introduced under the 1997 Constitution. These courts have been assigned a distinct administrative law jurisdiction, to ensure that the rules of the game are complied with and that the various constitutional players perform their duties as intended. In terms of their conception, the model for these Administrative Courts has been strongly influenced by the French *droit administratif* and the *Conseil d'Etat* and the courts have many exemplary features. There has, for example, been a genuine attempt to give them independence. They are staffed by professional judges with experience of law and administration. In the main, they have construed their jurisdiction widely, to take account of the contracting state and the interplay of public and private involvement in service delivery (more widely than the administrative court in the United Kingdom). Further, they have at their disposal a formidable set of remedies capable of coping with the diverse forms of administrative abuse and allowing the courts to provide compensation for breach of contract and other forms of wrongdoing.

However, although these positive features have allowed the Administrative Courts to make an active contribution by providing redress, it should be recognised that the 1997 Constitution has been beset with deep-seated problems. In a practical sense, the Administrative Courts are intended to work in harness with a battery of other independent watchdog bodies⁶⁹ to eliminate the abuses that plagued the Thai system of government. The loosely defined remit of such bodies means they are prone to overlap, with turf wars resulting. At the formal level, there needs to be a rationalisation of functions and a clearer delineation of respective jurisdictions to achieve greater clarity. At the informal level, conventions need to develop to allow the division of responsibilities to fall into place.

More fundamentally, there are signs that the constitutional reform process itself is being undermined, because the players are not conforming to the rules. It should be remembered that the severe economic slump of the 1990s provided the impetus for the introduction of the 1997 Constitution. The Thai nation was confronted with a grave economic crisis. An important aspect of the response was a widely shared recognition among politicians and other elite groups of the need to follow an entirely new path, in order to eliminate the endemic corruption associated with the past. Sufficient consensus emerged to allow the introduction of a constitution with custom-designed bodies directed at achieving this task (McCargo, 2002: 6). In consequence, the political game had a revised set of rules. It also had the new complement of (in relative terms) independent referees, including, at a judicial level, a Constitutional Court and the Administrative Courts, to ensure that the new rules would be adequately enforced.

Two further aspects in particular can be singled out, however, where there is evidence of a regression to previous habits. The first concerns the constantly recurring issue of conflicts of interest, particularly relating to the system of appointments to public bodies and the awarding of concessions and contracts. For example, the case concerning appointments to the NBC has illustrated the limits of the system in circumstances when the participants operating in an administrative context choose to ignore the requirements of the law as set out in a judgment. The constitutional watchdog bodies have yet to intervene decisively to remove conflicts of interest where suspicion has arisen, and this failure has led to a continuing perception that corrupt practices are able to continue. The second issue concerns the conduct of the watchdog bodies themselves in relation to the salaries they receive. On the one hand, to attract qualified candidates, and place the judges and officials above temptation, a relatively high rate of remuneration is justified. On the other hand, if these bodies are seen to be feathering their own nest, it does terrific damage to the credibility of the Constitution.

I believe that, to achieve substantial progress, the consensus which led to the introduction of the reforms in the first place needs to be revived. Strong political leadership is required to reiterate the genuine values on which reform was originally based. The written constitutional and administrative law framework is already in place; what is needed now is a strong convention of compliance that is accepted by all the main participants in the constitutional game.

Postscript

As this article was about to go to press in September 2006, Thailand experienced a military coup which has removed the Prime Minister and placed the nation under military control after a period of political turmoil. The politicians were evidently not adhering to the rules of the game and the generals, with the apparent approval of the King, have finally tipped over the board bringing the present game to an end.

However, this is not likely to result in a re-imposition of military dictatorship. An imminent return to civilian rule has been promised within a year, along with new elections and a revised constitution. Despite obvious shortcomings relating to conflicts of interest, the 1997 Constitution with its battery of watchdog bodies was a significant attempt to entrench the rule of law and to establish principles of liberal democracy. In the coming months as further constitutional modifications are discussed, it will be important to address previous deficiencies as well as building on the foundations which have been laid. The system of administrative courts discussed in this article (and the Thai ombudsman) will almost certainly survive as important legacies of the latest Thai constitutional episode.

Notes

- * Professor of Law, London Metropolitan University. I would like to express my sincere thanks to his Honour Judge Dr Vishnu Varunyou, Professor Andrew Harding and Professor John Bell for their very helpful comments on earlier drafts of this article.
- 1 The term 'genealogy' is deliberately used here in the Foucauldian sense:
What [genealogy] really does is to entertain the claims to attention of local, discontinuous, disqualified, illegitimate knowledges against the claims of a unitary body of theory which would filter, hierarchise and order them in the name of some true knowledge and some arbitrary idea of what constitutes science and its objects': Foucault, 1980: 83.
Or in other words, 'the sociology of law as governance involves the compilation of social facts in order not to make sense of the present, but as a constant demonstration that the present is nothing special, that it is what it is, a collection of contingencies, in some ways unique, in some ways as other eras': Hunt and Wickham, 1994: 119.
 - 2 See Wade and Forsyth, 2004 as an exemplar of the UK court-centred approach; for example, '[t]he primary purpose of administrative law ... is to keep the powers of the government within their legal bounds': Wade and Forsyth, 2004: 5.
 - 3 For example, a principle of legality for administrators and the need for fair procedures.

- 4 For example, there was an awareness of the recently adopted South African Constitution during the drafting process of the Thai Constitution but any common features were adopted on a 'pick and mix' basis.
- 5 The Constitutional Court rules on the constitutionality of organic laws, laws, regulations, draft laws and regulations, resolutions made by political parties, status of the members of the House of Representatives and the Senate, actions of governmental organisations which may infringe upon basic rights and freedoms of the people, legal cases referred to by the courts of justice as provided under s 264 of the Constitution, status of Cabinet members and members of the Election Commission, conflicting jurisdiction of conflicting Constitutional bodies and questions referred to it by the National Counter Corruption Commission and the Ombudsman.
- 6 Under s 268 of the Thai Constitution: 'The decision of the Constitutional Court shall be deemed final and binding on the National Assembly, Council of Ministers, Courts and other State organs'.
- 7 Since the limits of its authority are not clearly defined in the Constitution it is unclear whether the Constitutional Court is at the pinnacle of a hierarchy of jurisdictions or merely one jurisdiction amongst others. This has become a matter of important debate in Thailand because it has a direct bearing on the limits of other jurisdictions. Although the majority of jurists do not see the Constitutional Court as having higher authority, the Constitutional Court has recently agreed to hear a case brought by the Electoral Commission contesting a decision by the Supreme Administrative Court.
- 8 For example, Sanan Kachonprasot brought a case against the Prime Minister, Thaksin Shinawatra, before the National Counter Corruption Commission alleging a concealment of assets. The Anti-Corruption Commission upheld the allegations which left a 15-member panel of the Constitutional Court to finally decide whether he was guilty as charged. It decided on 3 August 2001 to acquit on a decision split 8-7. The Prime Minister subsequently criticised the Constitutional Court and declared that the independent bodies should have their powers curtailed. Moreover, a petition was later filed demanding the removal of four Constitutional Court judges. It appears that the due process required under the Constitution had been tested to breaking point and was not able to withstand a judgment by the Constitutional Court that would have disqualified an elected leader: Chambers, 2002: 28ff.
- 9 Section 9(6) of the 1999 Act provides that the following matters are not within the jurisdiction of the Administrative Courts:
 - (i) action concerning military discipline;
 - (ii) action of the Judicial Commission under the law on judicial service;
 - (iii) cases within the jurisdiction of the Juvenile and Family Courts, Labour Courts, Tax Courts, Intellectual Property and International Trade Courts, Bankruptcy Courts or other specialised courts.
- 10 The Judicial Commission is an organisation established by the Law of Judicial Organisation which deals with administration relating to the judges of the civil and criminal courts.
- 11 While in France the *droit administratif* evolved according to its own rules, in Germany administrative law emanates from the Constitution itself. There is a basic assumption under the principle of *Rechtstaat* that the exercise of all state authority must have a legal basis.
- 12 The French Council of State (*Conseil D'Etat*) originated from the *Conseil du Roi* or Curia Regis which was well established in customary law countries in continental Europe. See Brown and Bell, 1998: 5.
- 13 Following the Franks Report the *Tribunals and Inquiries Act* 1958 set in place principles under which tribunals operated and allowed appeals from tribunals to courts on points of law.
- 14 In *R v Inland Revenue Commissioners, ex p National Federation for the Self Employed* [1982] AC 617 at 641, Lord Diplock famously remarked: 'The progress towards a comprehensive system of administrative law ... I regard as having been the greatest achievement of the English courts in my judicial lifetime'.

- 15 The use of the term 'administrative law' instead of 'constitutional law' was more acceptable during the period of absolute monarchy.
- 16 There were attempts by judges to influence the drafting commission of the present constitution to prevent the creation of a separate Administrative Court.
- 17 It should be noted that Jean-Michel Galabert, former Président de la section du Rapport et des Études au Conseil d'Etat, played a part in the introduction of the Thai Administrative Courts. See Galabert, 2000: 700.
- 18 See Thai Constitution Part 4, s 276 which provides that:

Administrative Courts have the powers to try and adjudicate cases of dispute between a State agency, State enterprise, local government organisation, or State official under the superintendence or supervision of the Government on one part and a private individual on the other part, or between State agency, State enterprise, local government organisation, or State official under the superintendence or supervision of the Government on one part and another agency, enterprise, organisation or official on the other part, which is the dispute as a consequence of the act or omission of the act that must be, according to the law, performed by such State agency, State enterprise, local government organisation, or State official, or as a consequence of the act or omission of the act under the responsibility of such State Agency, State Enterprise, local government organisation or State official in the performance of duties under the law, as provided by law. There shall be the Supreme Administrative Court and Administrative Courts of First Instance, and there may also be the Appellate Administrative Court.
- 19 In 1972 a decree that the Minister for Justice would become involved in the administration of the judiciary was withdrawn following protests. The 1991 Constitution, apart from explicitly requiring that judges shall be independent in their judicial capacity, safeguards judicial independence by disqualifying political official from becoming judges, prohibiting the establishment of special courts to replace existing courts and preventing the enactment of any law taking away the jurisdiction of a court in relation to any case (see ss 188–191). See McDorman, 1995: 257–98.
- 20 See the United Kingdom *Constitutional Reform Act 2005* which sets up a Judicial Appointments Commission for England and Wales whose recommendations must then be approved by the Minister of Constitutional Affairs; and see arts 64, 65 and 66 of the French Constitution in regard to judges but the *Conseil D'Etat* consists of what are really special civil servants schooled in administration and recruited by examination or experience.
- 21 To qualify, a candidate must show service for at least three years as: petition commissioner or secretary to law councillors in the Office of the Council of State; Administrative Court official; judge of the civil court, criminal court or central military court; provincial public prosecutor; level-8 government official; associate professor in higher education in law, political science, public administration or social science. Also Masters graduates with 10 years' public service and doctoral graduates with six years' public service and attorneys with 12 years' experience are eligible as candidates.
- 22 In France judges of the administrative courts are recruited in two ways, the predominant method is from the National School of Administration which has acted as a training ground but they are also recruited from *le tour exterieure*. These are judges that have distinguished themselves as administrators and latterly by competitive examination
- 23 Judges cannot be permanent government officials; employees of a state agency; holders of political position, directors of a state enterprise or state agency; director, manager or consultant with a partnership or company; acting as attorney or other professional capacity. However, it should be noted that in France the secondment into the administrative courts and to the administrative courts of appeal applies to civil servants recruited through L'ENA (*Ecole Nationale d'Administration*). See <<http://www.ena.fr/index.php?page=formation/initiale/metiers/juridictions>>.
- 24 Salary levels for judges are openly published. See the English version of the 1999 Act.

- 25 The acceptance of a separate public jurisdiction based on the recognition of the distinct objectives of public law has been integral to the French system. See, for example, Auby and Ducos-Ader, 1966: 1–7 in Rudden, 1991: 14.
- 26 It has been pointed out that, in France, '[t]he key decision of the French Tribunal des Conflits in *Blanco* (1873) established the function criterion of service publique to define the boundary between the administrative jurisdiction and regular jurisdiction'. See Cane, 2003: 253.
- 27 I am very grateful to his honour Judge Dr Vishnu Varunyou for clarifying these and other matters during a meeting in Bangkok, 5 January 2005.
- 28 See Lord Diplock's discussion of these issues in *O'Reilly v Mackman* [1983] 2 AC 237.
- 29 In 2000 as part of the reforms to civil procedure the prerogative remedies were renamed to clarify their function. Certiorari is a quashing order, prohibition becomes a prohibiting order and mandamus is called a mandating order.
- 30 For example, in March 2003, the Office of Consumer Protection Board issued regulations banning the sale of high-pressure water guns which, following commercial pressure, were considered to be unlawful by the Administrative Court but remained in operation pending an appeal. See *The Nation*, April 13, 2004.
- 31 Enforcement through *astreinte* is a comparatively recent development in France, first introduced by the law of 16 July 1980 and it became available to the *Cours Administratives d'Appel* and the *Tribunaux Administratifs* from 1995 (see Brown and Bell, 1998: 116). *Astreinte* is a court order requiring a person in breach of an obligation to pay a sum of money to an innocent party: Rudden 1991: 507.
- 32 The ground of *qualification juridique des faits* requires that proper inferences have been drawn from the facts.
- 33 This approximates to the permission stage in an application for judicial review, which is usually a form-filling exercise to allow a judge to consider: first, whether the procedural requirements relating to time limits, *locus standi* and public as opposed to private issues are satisfied; and, second, to assess whether there is an arguable case based on the alleged grounds.
- 34 1999 Act, s 57. 'In the case where an administrative agency or State official fails to take action within the time specified or shows such conduct as indicative of prolonging the case, the Administrative Court shall report to the superior, superintendent, supervisor or Prime Minister for proceeding with corrective action, giving directions or taking a disciplinary action, without prejudice to the power of the Court to inflict a punishment by reason of a contempt of court'.
- 35 In France, there is a heavy reliance on documents. Witnesses only give evidence in a separate procedure in advance of the final hearing.
- 36 In 2001 and 2002, the Central Administrative Court dealt with a total of 3933 cases and the Supreme Administrative Court with 642 cases. See table in Bureekul and Thananithichut, 2004: 14.
- 37 For example, it is provided in respect of administrative contracts that where arbitration is part of the contract this option has to be exhausted before recourse to the Administrative Court.
- 38 Rule of the General Assembly of Judges of the Supreme Administrative Court on Administrative Procedure BE 2543 (2000), cl 37.
- 39 See s 9(1) 'in relation to an unlawful act by an administrative agency or State official, whether in connection with the issuance of a by-law or order or in connection with other act, by reason of acting without or beyond the scope of the powers and duties or inconsistently with the law or the form, process or procedure which is the material requirement for such act or in bad faith or in a manner indicating unfair discrimination or causing unnecessary process or excessive burden to the public or amounting to under exercise of discretion'.
- 40 For example, in a ruling on 15 February 2005 the Administrative Court criticised the Anti-Money Laundering Office for launching an unlawful investigation into five political activists in 2001. 'This court finds that AMLO exercised its discretion to launch the

investigation without allowing due process'. No financial penalty was granted against AMLO because the wrongdoing was detected and cancelled before any damage has been caused. See *The Nation*, 19 February 2005.

- 41 See *Padfield v Minister of Agriculture Fisheries and Food* [1968] AC 997 at 1030 where Lord Reid that 'the policy and objects of the Act must be determined by construing the Act as a whole and the construction is always a matter of law for the court'.
- 42 Article 30 of the Constitution provides: 'All persons are equal before the law and shall enjoy equal protection under the law. Men and women shall enjoy equal rights. Unjust discrimination against a person on the grounds of the difference in origin, race, language, sex, age, physical or health condition, personal status, economic or social standing, religious belief, education or constitutionally political view, shall not be permitted'.
- 43 Article 3 of the German Constitution. See Foster, 1996: 160–1: where it is noted that 'a number of general principles have been derived from the equality principle, such as equal access to public benefits, especially in the field of education, the principle of tax equity ..., and the equality of arms in legal procedure ...'.
- 44 For example, Sirit Boon-mul, a physically challenged lawyer, successfully appealed to the Supreme Administrative Court after the State Attorney Commission rejected a job application in 2001 on the grounds that he was incapable of performing the job due to a physical impairment. The decision of the court gave him the right to reapply for a job as a state attorney. See *The Nation*, 15 February 2005.
- 45 *Violation de la loi* as a ground also includes errors of law, using the wrong text, or misinterpretation of the law.
- 46 The concept of *competence liée* is explained further in Brown and Bell, 1998: 244ff, 253ff.
- 47 Although it has also been acknowledged under the common law that there are occasions where a statutory discretion is so widely drawn that it might only be challenged if exercised irrationally or in bad faith. See *Padfield v Minister of Agriculture Fisheries and Food* [1968] AC 997.
- 48 See Wade and Forsyth, 2004: 356. In *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030, Lord Reid rejected the all-or-nothing approach to the exercise of unfettered discretion and commented: 'Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the act'.
- 49 For example, it was reported in *The Nation*, 1 June 2004, that the Khon Kaen Administrative Court heard the case of a Loei hospital director, Dr Kriengsak Vacharanukkiete, who was removed for criticising his superiors at the Public Health Ministry. It was argued that an order for his removal to take effect within seven days was unfair.
- 50 The *Conseil d'Etat* exercises an advisory function for the administration as well as acting in a separate capacity in a role where it adjudicates over the administration. This aspect is referred to as the *section contentieux*. It is worth remembering the Diceyan critique of the *droit administratif* which concentrated on the fact that the administrative court was part of the administration.
- 51 Under 9(2) 'involving a dispute in relation to an administrative agency or State official neglecting official duties required by the law to be performed or performing such duties with unreasonable delay'.
- 52 For example, the Office of Atomic Energy for Peace (OAEP). OAEP was found negligent in the storage of spent isotopes around the country and was ordered by the Central Administrative Court in 2002 to pay Bt 5.2 million to 12 survivors of the radiation leak: see *The Nation*, 10 August 2004.
- 53 Under 9(3) 'involving a dispute in relation to a wrongful act or other liability of an administrative agency or State official arising from the exercise of power under the law or from a by-law, administrative order or other order, or from neglect of official duties required by the law to be performed or the performance of such duties with unreasonable delay'.

- 54 Rule of the General Assembly of Judges of the Supreme Administrative Court on Administrative Court Procedure BE 2543 (2000), cl 28: 'The referral by an Ombudsman of a matter, together with the opinions thereon, to the Court in the case where the Ombudsman is of the opinion that any by-law or act of an administrative agency or State official is unlawful ...'. For further discussion of the role of the Thai Ombudsmen, see generally Leyland, 2006.
- 55 Section 9(5) provides: 'The case prescribed by law to be submitted to the Court by an administrative agency or State official for mandating a person to do a particular act or refraining therefrom'.
- 56 Misfeasance in public office can be defined as: 'even where there is no ministerial duty ... and even where no recognised tort such as trespass, nuisance or negligence is committed, public authorities may be liable in damages for malicious, deliberate or injurious wrong-doing': Wade and Forsyth, 2004 : 781.
- 57 In respect of the conduct of local government under the fiduciary principle, a local authority is regarded as a trustee of money it receives from local taxpayers. The District Auditor used to be vested with special powers of surcharging to deal with wrongdoing associated with local councils and local councillors, but there are no sanctions available under the *Local Government Act 2000*. Surcharging was abolished under the *Local Government Act 2000* s 90: see Leigh, 2000: 121.
- 58 Section 9(4). It should also be noted that under s 9(3) the Administrative Court is granted jurisdiction over 'wrongful acts' which can be understood in common law terms as for cases concerning public bodies which concern tort liability. See generally Bhalakula, 2003.
- 59 The French jurisdiction has required a distinction to be made between *actes d'autorité* and *acte de gestion*. The jurisdiction of the administrative court only extends to *actes de gestion*. Contracts made by the state with private individuals were considered *actes de gestion*. A recent innovation in France has been to introduce a procurement code and to consider any contracts made in accordance with the code administrative contracts.
- 60 In Thailand there are five principal procedures of government procurement: price agreement; price inquiry; invitation for bidding; special procedure; and special case procedure. See Rule of the Office of the Prime Minister on Procurement 1992 and Act on Private Participation in State Undertakings 1992.
- 61 Petition Council No 70/1992 is cited as an example by Bhalakula, 2003: 24.
- 62 See further s 15 of *Thai Arbitration Act* BE 2545 (2002) which specifically provides that in an agreement between a governmental agency and a private party, the parties may agree to resolve any disputes pertaining to the agreement by means of arbitration, and that such arbitration agreement shall be binding on the parties.
- 63 These figures were supplied by the Thai Administrative Court.
- 64 The Ombudsman stated that he would forward the matter to the Constitution Court if he had grounds for believing the scheme was unconstitutional: *The Nation*, 16 November 2005b.
- 65 The Thai electoral law provides that contestants in single candidate seats must win 20 per cent of eligible votes to get elected and that all seats must be filled for parliament to meet. Thirty-eight seats were unfilled following the April 2006 election and, after further by-elections, 14 remained vacant.
- 66 The occasional previous political interventions by the King have not been in relation to the judiciary. Despite the fact that he is a constitutional monarch his involvement has not attracted criticism within Thailand.
- 67 The Constitutional Court failed to uphold the clear finding of wrongdoing against the Prime Minister after investigations by the National Counter Corruption Commission in 2001, which led to allegations that the impartiality of some of the judges on the Constitutional Court had been compromised. See n 8 above.
- 68 See text at nn 44–49 above.
- 69 These include the Constitutional Court, National Counter Corruption Commission, Election Commission, Anti-Money Laundering Office, Parliament Ombudsman and National Human Rights Commission.

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