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Working Paper Series

**No. 105
January 2010**



The Southeast Asia Research Centre (SEARC) of the City University of Hong Kong publishes SEARC Working Papers Series electronically

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CONSTITUTIONAL POLICYMAKING BY THE THAI ELITE: DESIGNING THE ELECTION SYSTEM FOR HOUSE AND SENATE IN THE 2007 CONSTITUTION¹

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Introduction

Processes of policymaking and their outcomes are a major field of political science and public administration.³ Regarding Thailand, recent work has covered policy areas such as poverty alleviation⁴, education combined with decentralization,⁵ the Internet and telecommunication,⁶ healthcare,⁷ tobacco control policy,⁸ foreign policy,⁹ abortion,¹⁰ forest policy,¹¹ and food standards.¹² A number of works have also dealt with specific conditions

¹ Paper presented at the International Convention of Asia Scholars 6 (ICAS 6), 6–9 August, 2009, Daejeon Convention Center, South Korea.

² I would like to thank Michael H. Nelson for his advice.

³ Standard sources are, for example, Thomas R. Dye (2008) *Understanding Public Policy*, 12th Edition, Upper Saddle River, N. J.: Pearson Prentice Hall; Frank Fischer, Gerald J. Miller, and Mara S. Sidney (eds) (2007) *Handbook of Public Policy Analysis: Theory, Politics, and Methods*. Boca Raton/ London/New York: CRC Press; B. Guy Peters and Jon Pierre (eds) (2006) *Handbook of Public Policy*. London/Thousand Oakes/New Delhi: Sage; or Michael Morau, Martin Rein, and Robert F. Goodin (eds) (2006) *The Oxford Handbook of Public Policy*, Oxford: Oxford University Press.

⁴ Amornsak Kitthananan (2007). “Governance and Policymaking in Thailand: A Study of Poverty Alleviation Policy since 1997”, Ph.D. thesis, University of Bristol.

⁵ Michelle Tan (2007) “The Politics of the Decentralisation of Basic Education in Thailand”, Ph.D. thesis, University of Leeds, School of Politics and International Studies (POLIS).

⁶ Busakorn Suriyasarn (2002) “Analysis of Thai Internet and Telecommunications Policy Formation During the Period 1992-2000”, Ph.D. thesis, Ohio University; and Sakkarin Niyomsilpa. 2000. *The Political Economy of Telecommunications Reforms in Thailand*. London and New York: Pinter.

⁷ Andrew Green (2000) “Reforming the Health Sector in Thailand: The Role of Policy Actors on the Policy Stage”, *International Journal of Health Planning and Management* 15 (1): 39-59.

⁸ Kanchana Wangkeo (2000) “Thailand’s Tobacco Control Policy: A Matter of Health or Trade?” *Chulalongkorn Journal of Economics* 12 (2):141-84.

⁹ Salinee Srivardhana (2003) “Responses to a Major Foreign Policy Change: The Case of Thailand’s Foreign Policy Towards the Conclusion of the Third Indochina Conflict During the Government of Chatichai Choonhavan (1988-1991)”, Ph.D. thesis, University of London. Andrea Whittacker (2004) *Abortion, Sin, and the State in Thailand*, London and New York, N.Y.: RoutledgeCurzon.

¹⁰ Andrea Whittacker (2004) *Abortion, Sin, and the State in Thailand*, London and New York, N.Y.: RoutledgeCurzon.

¹¹ Oliver Pye (2005) *นน Khor Jor Kor: Forest Politics in Thailand*, Bangkok: White Lotus Press (Studies in Contemporary Thailand No. 14).

¹² Noppadol Udomwisawakul (2005) “Agenda Setting and Policy Formulation: A Case of Agricultural Commodity and Food Standards Policy in Thailand”, *Journal of Social Science* (Bangkok) 36 (2): 143-73.

of policymaking, such as imagining the Thai process as chaos,¹³ gauging the impact of political parties and political institutions on policies,¹⁴ or the role of non-state knowledge actors on policy-level democratization.¹⁵

Unlike the aforementioned works on material policies, and some of its analytical aspects, constitutional policymaking has received little attention in Thailand. Most literature deals with the run-up, final product, or some of its political effects rather than with the policymaking process proper.¹⁶ Yet, Thailand is in a good position to produce such work, because it has undergone a number of constitution-making exercises, the latest in 1997 and, under dubious circumstances, in 2007. Researchers in Thailand should thus take seriously what one author in the field of policy analysis expressed in the following way.

Constitutions and rights comprise a basic field of policy attention, and this is clearly evident when new nations debate precisely what sort of constitution and what range of rights are appropriate for their circumstances. Older nations also revisit the policy design of constitutions and rights, often reforming either the explicit legal provisions or the spirit of the laws to bring out new policy possibilities from old legal instruments.¹⁷

Thailand certainly is no “new nation”,¹⁸ and neither is it an “older nation” in the sense of the quote. Such “older nations” might occasionally prompt great attention, such as when the Eu-

¹³ Robert A. Dayley (1997) “Modeling Chaos: Alternative Images of Policy Formation in Thailand”, Ph.D. dissertation, Northern Illinois University.

¹⁴ Allen Hicken (2002) “Party Systems, Political Institutions and Policy: Policymaking in Developing Democracies”, Ph.D. dissertation, University of California, San Diego.

¹⁵ Walaya Jariyadham (2003) “Thailand’s Non-State Knowledge Actors and Institutions: Roles in Policy-Level Democratization”, Ph.D. thesis, Australian National University.

¹⁶ For examples, see มานิตย์ จุมปา. ๒๕๔๘. คำอธิบาย รัฐธรรมนูญแห่งราชอาณาจักรไทย (พ.ศ. ๒๕๔๐). พิมพ์ครั้งที่ ๗. กรุงเทพฯ: สำนักพิมพ์นิติธรรม; มานิตย์ จุมปา. ๒๕๕๑. ความรู้เบื้องต้นเกี่ยวกับ รัฐธรรมนูญแห่งราชอาณาจักรไทย (พ.ศ. ๒๕๕๐). กรุงเทพฯ: สำนักพิมพ์แห่งจุฬาลงกรณ์มหาวิทยาลัย; รั้งสวรรค์ ธนะพร พันธุ์. 2547. เศรษฐศาสตร์รัฐธรรมนูญ: บทวิเคราะห์รัฐธรรมนูญแห่งราชอาณาจักรไทย พ.ศ. 2540. กรุงเทพฯ: สำนักพิมพ์มติชน (three volumes); ปกรณ์ ปริชากร. ๒๕๔๑. “การพัฒนานโยบายการบริหารราชการแผ่นดินไปสู่การพัฒนาที่เน้นความสมดุล: การวิเคราะห์สาระสำคัญและเจตนารมณ์ของรัฐธรรมนูญพ.ศ. ๒๕๕๐.” กรุงเทพฯ: สถาบันบัณฑิตพัฒนบริหารศาสตร์; James Klein (1998) “The Constitution of the Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy”, Bangkok: Asia Foundation (Asia Foundation Working Paper No. 8); Andrew Harding (2001) “May there be Virtue: ‘New Asian Constitutionalism’ in Thailand”, *Australian Journal of Asian Law* 3 (3): 24-48; Michael Connors (2002.) “Framing the ‘People’s Constitution’”, in Duncan McCargo (ed.), *Reforming Thai Politics*, pp. 37-55, Copenhagen, Denmark: Nordic Institute of Asian Studies (NIAS); Allen Hicken (2006) “Party Fabrication: Constitutional Reform and the Rise of Thai Rak Thai.” *Journal of East Asian Studies* 6 (3):381-407; Prudhisana Jumbala (1998) “Thailand: Constitutional Reform Amidst Economic Crisis”, in *Southeast Asian Affairs*, pp. 265-91, Singapore: ISEAS.

¹⁷ John Uhr (2006) “Constitutions and Rights”, in B. Guy Peters and Jon Pierre (eds), *Handbook of Public Policy*, pp. 169-85 (quote on p. 171), London/Thousand Oakes/New Delhi: Sage.

¹⁸ This expression might be applied to newly independent nations or nations emerging from authoritarian rule, such as some southern European states (Greece, Spain, and Portugal), or countries of the previous Soviet bloc. For an example from Iraq after Saddam Hussein, see Jamal Benomar (2004). “Constitution-Making after Conflict: Lessons for Iraq”, *Journal of Democracy* 15 (2): 81-95.

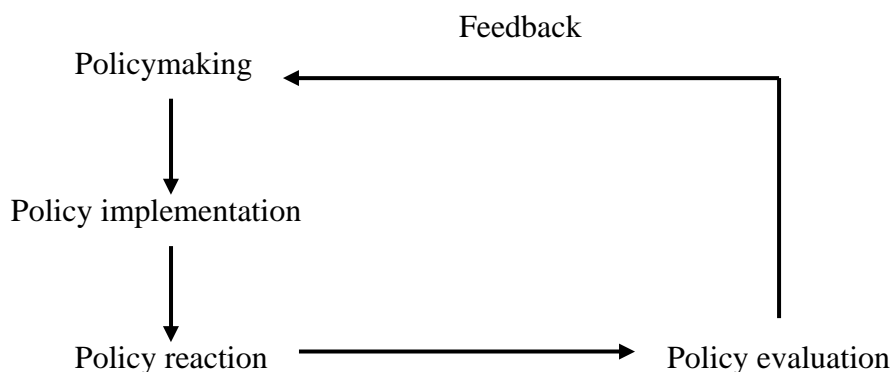
ropean Union started “one of the most important real scale policymaking processes of our time: the formation of positions on the [EU] constitution”, and many observers were interested in the question of “how this policymaking process has been carried out.”¹⁹ This article aims to provide some limited information on this question as far as the Thai constitution of 2007 is concerned, more precisely the redesign of its electoral systems for the House of Representatives and the Senate.

For matters of convenience and comparability with fields of material policy, we will adopt the usual model of the policymaking process for the presentation of our information. The model looks as follows (please note that we do not aim to discuss the merits and limitations of this model; for this, we refer to the footnote).²⁰

Policy Cycle

Problem definition

Agenda setting



¹⁹ Thomas König and Simon Hug (2006) “Introduction”, in Thomas König and Simon Hug (eds), *Policymaking Processes and the European Constitution: A Comparative Study of Member States and Accession Countries*, pp. 1-8 (quotes on p. 1), London and New York: Routledge. On constitution making in various contexts, see Jon Elster (1997) “Ways of Constitution-Making”, in Axel Hadenius (ed.), *Democracies Victory and Crisis*, pp. 123-42, Cambridge: Cambridge University Press; John Erik Fossum (2005) “Contemporary European Constitution-Making: Constrained or Reflexive?”, in Erik Oddenvar Eriksen (ed.), *Making the European Polity: Reflexive Integration in the EU*, pp. 143-66, London: Routledge; Vivien Hart (2003) “Democratic Constitution Making”, Washington, DC: United States Institute for Peace (Special Report 107).

²⁰ A standard source is Thomas R. Dye (2008) *Understanding Public Policy*, 12th Edition, Upper Saddle River, N. J.: Pearson Prentice Hall. For more discussion of the model, see Werner Jann and Kai Wegrich (2007) “Theories of the Policy Cycle”, in Frank Fischer, Gerald J. Miller, and Mara S. Sidney (eds), *Handbook of Public Policy Analysis: Theory, Politics, and Methods*, pp. 43-62, Boca Raton/London/New York: CRC Press, and Peter L. Hupe and Michael J. Hill (2006) “The Three Action Levels of Governance: Re-framing the Policy Process Beyond the Stages Model”, in B. Guy Peters and Jon Pierre (eds), *Handbook of Public Policy*, pp. 13-30, London, Thousand Oakes, New Delhi: Sage.

When readers replace the word “policy” with “constitution”, the model becomes almost self-explanatory. From this perspective, the implementation of the Thai constitution of 1997 led to assumptions about its effects on politics (policy reaction). A range of actors, including politicians, bureaucrats, journalists, academics, and so on, then developed opinions about these effects (policy evaluation). This was fed into a broader public discussion about what kinds of problems the 1997 constitution had caused.²¹ When the occasion arose with the coup of September 2006, an agenda was set²² in order to use these problem definitions selectively as inputs in the drafting of the 2007 Constitution. We can thus speak of a feedback process. That is, the lessons that people connected to the military coup-makers thought they had learned from the workings of the 1997 Constitution were channelled back into a new round of constitution making.

Thai Constitution Making: Elite Oriented and Incremental

Before we provide information on the process of constitutional policymaking regarding the Senate and the House, some brief notes should help us to characterize the process in Thailand. In order to help us understand how politics and policymaking works, Dye had suggested eight policymaking models, namely institutional, process, rational, incremental, group, elite, public choice, and game theory.²³ This is not the place to explain all these models in detail. However, two of them – elite and incremental – are obviously relevant to the situation of Thai constitutional policymaking. Thus, we will briefly describe them.

Elite Model

The elite model suggests that the general population is indifferent and ill-informed about public policy. In fact, elites shape mass opinion on policy questions more than masses shape

²¹ The public has its own way of determining policy problems. For scholars, however, it is not always easy to determine the causes of problems. Regarding the 1997 constitution, for example, one might either argue that the institutional incentives set by the constitution caused certain problems, or one might say that the constitutional provisions were of little significance compared to the person of Thaksin Shinawatra. Moreover, one can argue that institutional factors were indeed important, but they did not relate to the 1997 constitution. For these divergent views, see the discussion between Allen Hicken (2006) “Party Fabrication: Constitutional Reform and the Rise of Thai Rak Thai”, *Journal of East Asian Studies* 6 (3):381-407, and Michael H. Nelson (2007) “Institutional Incentives and Informal Local Political Groups (Phuak) in Thailand: Comments on Allen Hicken and Paul Chambers”, *Journal of East Asian Studies* 7 (1):125-47.

²² On the issue of agenda setting, see Giandomenico Majone (2006) “Agenda Setting”, in Michael Morau, Martin Rein, and Robert F. Goodin (eds), *The Oxford Handbook of Public Policy*, pp. 228-250, Oxford: Oxford University Press, and Thomas A. Birkland (2007) “Agenda Setting in Public Policy,” in Frank Fischer, Gerald J. Miller, and Mara S. Sidney (eds), *Handbook of Public Policy Analysis: Theory, Politics, and Methods*, pp. 63-78, Boca Raton/London/New York: CRC Press.

²³ For details, see Thomas R. Dye (2008) *Understanding Public Policy*, 12th Edition, Upper Saddle River, N. J.: Pearson Prentice Hall, Chapter 2.

elite opinion. Therefore, public policy turns out to reflect the elite's preferences. Policies, as a result, flow downward from the elites to the masses, rather than arising from the demands of the masses.

Concerning Thailand, an old saying amongst academics working on Thai politics is, "The provincial population elects governments (that then draw up and implement policies), while people in Bangkok topple them." Thaksin Shinawatra was elected by the great majority of provincial – and even Bangkok – voters. However, members of the Bangkok elite spearheaded the protests against him. Moreover, the up-country masses had no part in planning and successfully executing the coup of September 2006, which was planned and executed by elite military commanders. Furthermore, unlike the 1997 CDA, whose 99 members included 76 delegates from the provinces, the 2007 CDA was an exclusive club of Bangkok-based members of the public, academic, and bureaucratic elite. Although the draft constitution was put through public hearings, organized by state agencies in the provinces and districts, the selection of participants and the quality of these hearings were very doubtful. Participants were paid for their efforts.²⁴ It is difficult to gauge how much of an impact opinions collected during these hearings had on the final content of the constitution. For example, that the format of the Senate was changed from an appointed organ to one comprising both appointed and elected members was probably due to the public outcry of members of the Bangkok elite rather than to opinions voiced in the hearings. Indeed, extra-elite members of the Thai population had their main role in the referendum, which was passed by a margin much smaller than the coup-makers and the CDA had hoped for. However even this was to a large extent based on a massive public relations campaign organized by the constitution-drafting elite and a variety of state agencies, while dissenting voices were systematically suppressed.²⁵

Incremental Model

The outcome of incremental policymaking represents "variations of the past". Incrementalism views public policy as a continuation of past government activities with only gradual modifications. Constraints of time, information, and cost prevent policymakers from identifying the full range of possible policy options, and their probable consequences.

²⁴ Michael H. Nelson (2007) "Public Hearings on Thailand's Draft Constitution: Impressions from Chachoengsao Province", KPI Thai Politics Update, No. 3 (14 August).

²⁵ See Michael H. Nelson (Forthcoming), "Democracy Restored? Thailand's Constitutional Referendum and Election of 2007", manuscript.

The constraints of politics prevent the establishment of clear-cut societal goals and the accurate calculation of costs and benefits. The incremental model recognizes the impractical nature of “rational-comprehensive” policymaking, thus assuming a more conservative process of political decision-making.²⁶

Obviously, neither the Thai House of Representatives nor the Senate – including their election/selection systems – had been new to the Thai constitutional order when the drafting of the 2007 constitution began. Therefore, it did not start from an institutional blank sheet. On the contrary, Thailand’s constitution makers – since the first document came into existence in the year 1932 – have experimented with the “supreme law of the country” many times, often after military coups had led to the abolishment of the previous constitution. This way, Thailand’s constitution of 2007 is the eighteenth document already (including a number of interim constitutions promulgated by coup-makers). Concerning the House, the CDA of 2007 did not introduce a new system – although they came close with the suggestion to try a German-style proportional voting system. Rather, they merely returned to the pre-1997 multi-member constituencies. They also did not abolish the party-list system (an innovation of the 1997 Constitution), but merely reduced it from 100 to 80 seats, and replaced the national party lists with eight regional party lists.

As for the Senate, the question whether its members should be appointed or elected has been in the constitutional discourse since at least 1946. When, after the putsch in 1991, a new constitution had to be drafted, the question of a selected Senate appeared again. Yet, the Senate remained an appointed body. Six years later, the CDA of 1997 was deeply divided over whether senators should be elected or appointed, or whether a mixed system should be used. The CDA of 2007 faced the same options, including the perennial question of whether the Senate was still needed in the Thai political system, and should not better be abolished.

Finally, the CDA had to work under severe time constraints and with limited expertise amongst its members on tackling the many constitutional questions raised. Thus, rather than looking at all possible institutional options and calculating their probable consequences, the CDA of 2007 chose to start with the 1997 constitution and merely introduce some changes thought to be necessary to prevent another Thaksin from occurring.

²⁶ This model derives from Charles E. Lindblom’s critique of the rational model of decision-making.

I will now move closer to the process of making constitutional amendments by giving some necessary information on its political context.

Political background

When Army Commander-in-Chief General Sonthi Boonyaratglin toppled the elected government headed by Thaksin Shinawatra in a military coup on 19 September 2006, he also abolished the “People’s Constitution” of 1997. This landmark document was designed, among other things, to give the prime minister more power, to improve the quality of cabinet members, to tackle “money politics”, and to better secure citizens from infringements on their rights by the state.²⁷ Importantly, the 1997 Constitution also included a redesign of the country’s representative system. First, the electoral model for the House of Representatives was changed from a primarily multi-member system to one comprising 400 single-member constituencies. Second, 100 seats of the parliament were distributed based on national-level party-lists with a five-percent threshold. Third, 200 elected – but supposedly non-partisan and non-political – senators replaced the appointed Senate.

In January 2001, Thaksin’s Thai Rak Thai party (TRT) convincingly won the first election after the promulgation of the 1997 Constitution. Since TRT lacked a majority of seats in the House, it still had to form a coalition government. Four years later, following the implementation of a raft of “populist policies” and the merger with smaller partners in the coalition, TRT formed the first elected single-party government in Thai political history. Surprisingly, only a few months after the election of February 2005, protests started that denied Thaksin the legitimacy to head the government. They intensified when he sold his company tax-free to the investment arm of the Singaporean government, Temasek. Thaksin’s attempt to demonstrate his continued legitimacy in a snap election in April 2006 failed, because the Democrat and Chart Thai parties boycotted them. This led to a state crisis, because neither could the House convene nor could a government be formed. The King’s intervention provided temporary relief by having the Constitutional Court nullify the election and by having the Election Commission of Thailand replaced, finally leading to the Royal Decree announcing fresh elections for 15 October 2006. The Democrat and Chart

²⁷The establishment of independent organizations, such as the National Counter Corruption Commission, the Election Commission, the Constitutional Court, the Ombudsmen, and the National Human Rights Commission, served these last two points.

Thai parties had both agreed to take part in this vote. With a re-election of Thaksin as the most probable outcome, Sonthi successfully led a coup d'état against his civilian superior, who was in New York to deliver a speech at the United Nations (this speech was later cancelled).

The main purpose of this tenth successful military coup since 1932 was to eliminate what critics had called the “Thaksin regime” and to make it impossible to reoccur.²⁸ Measures taken to this effect included the dissolution of TRT, including the banning its 111 executives from politics for five years, the establishment of the Asset Examination Commission to investigate and bring to court the supposedly widespread corruption by Thaksin and his associates, and the redrafting of the country’s constitution. This redrafting concerned many points. I have selected the redesign of the representative system as my case. Elections, after all, do not naturally transform votes into seats in parliament and a government. Rather, the outcome of elections heavily depends on the election system used.

Based on the Interim Constitution,²⁹ two collective decision-making bodies were set up to draft the new constitution: the Constitution Drafting Assembly (CDA)³⁰ and the Constitution Drafting Committee (CDC).³¹ Since they had only 180 days to complete their work, the complicated task of discussing and negotiating decisions about revisions of a complex document within those two groups had to be achieved under high time pressure. Regarding the electoral reform, given the purpose of the coup, it could have been assumed that a system would be introduced that minimized the chances of TRT (or its reincarnation as the People’s Power party, PPP) from regaining power in the elections following the coup. Such a system was indeed proposed and discussed after the first draft of the constitution had

²⁸ เจิมศักดิ์ ปิ่นทอง (*Chermsak Pinthong*). 2551. รู้ทันประเทศไทย [Knowing Thailand]. กรุงเทพฯ: สำนักพิมพ์ขอคิดด้วยตน, p. 19, defined the “Thaksin regime” as a “movement to capture state power, and use the power of the state to pursue the interests of one’s clique, while at the same time protecting and increasing one’s power, until it is like a dictatorship. Although it might outwardly look like a democracy, but in essence the chief executive has absolute power, without any real accountability according to the principle of balance of power.” Chermsak is an ideologue of the right wing People’s Alliance for Democracy (PAD). On the opposite side, a former minister in the Thaksin cabinet, จาตุรนต์ ฉายแสง (*Chaturon Chaisaeng*). 2552. ความจริงวิกฤตประชาธิปไตย: 27 ประเด็นที่สังคมไทยต้องการคำตอบ. กรุงเทพฯ: Institute of Democratization Studies, p. 28 ff., included a chapter headlined, “ระบอบทักษิณ: ไม่เคยมีอยู่จริงในประเทศไทย” (The Thaksin system has never really existed in Thailand). Chaturon is a former student activist who spent five years in the jungle after the military putsch of October 1976. His book was subsequently also published in an English translation, Chaturon Chaisaeng (2009) *Thai Democracy in Crisis: 27 Truths*, Bangkok: The Institute of Democratization Studies.

²⁹ Constitution of the Kingdom of Thailand (Interim). Buddhist Era 2549 (2006)”, Bangkok: Office of the Council of State’s Welfare Fund.

³⁰ สภาร่างรัฐธรรมนูญ (*sapha rang ratthathammanun*).

³¹ คณะกรรมาธิการยกร่างรัฐธรรมนูญ (*khanakammathikarn yok rang ratthathammanun*).

entered the phase of public hearings. Eventually, however, it was rejected. Had CDA and CDC adopted this model, Thailand would not have seen a PPP-led coalition government with Samak Sundaravej as prime minister and the Democrats as the sole opposition party. Rather, a Democrat-led coalition government under Abhisit Vejjajiva would probably have been formed, with PPP relegated to the opposition benches.³²

Problem Identification

Thaksin and his TRT won the 2001 election on promises to implement a raft of what critics had called “populist policies”, such as the village fund program, the 30-baht universal healthcare policy, or the debt moratorium. After being elected prime minister, Thaksin wasted no time implementing these promises, resulting in tangible benefits for a great number of people. “He had positioned himself as a charismatic leader who could pull the people out of the doldrums, where they had been since the financial crisis of 1997 and the subsequent Democrat-led government under Chuan Leekpai.”³³ Thaksin continued his unusually activist and leader-centred approach to government during his four years in office, the first time that an elected prime minister was able to serve his full term. A great majority of voters in 2005 thus approved of his performance in government by handing him an overwhelming victory and four more years in office. So impressive was TRT’s dominance at the polling booth that even the next two or three elections, barring unforeseen events, seemed to be sure to see Thaksin and TRT confirmed.

One can therefore certainly say that, to the majority of up-country (and often rural) voters in elections, Thaksin and TRT did not pose any problems, much to the contrary – they wanted them to continue with their governmental work. However, from the very beginning of Thaksin’s “reign”, he was subject to increasing criticism by the Bangkok-based elite public opinion.³⁴ From this perspective, Thaksin appeared as a brash authoritarian leader, who tried to apply the CEO model of business leadership that he was used to using in his company to governing the country, thereby turning citizens into subordinates. This approach did not tolerate criticism or areas of politics independent of Thaksin’s influence or control. Thus, the

³² Michael H. Nelson (forthcoming) “Democracy Restored? Thailand’s Constitutional Referendum and Election of 2007”, manuscript, p. 13.

³³ Nelson (forthcoming, p. 1).

³⁴ Two book-length critiques were published in English after Thaksin had been in power for three years, namely Pasuk Phongpaichit and Chris Baker (2004) *Thaksin: The Business of Politics in Thailand*, Chiang Mai: Silkworm (an updated version was published in 2009 by Silkworm with the title *Thaksin*), and Duncan McCargo and Ukrist Pathmanand (2005) *The Thaksinization of Thailand*, Copenhagen: NIAS Press.

print media,³⁵ critical academics, and non-governmental organizations came under constant pressure to toe his line, leading to a significant restriction of independent public political space. Moreover, this approach led to the violation of human rights, such as in the “war on drugs”, in which around 2,500 people died, most of them supposedly by the police carrying out extrajudicial killings.

At the same time, a number of “independent organizations”, established by the 1997 Constitution with the aim to act as counter-weights to the elected politicians, were subject to the exertion of political influence. This concerned the Election Commission of Thailand (ECT), the National Counter Corruption Commission (NCCC), and the Constitutional Court. An important element in this neutralization of forces, that might have had the power to negatively impact on Thaksin’s claim to power, was the Senate, first elected in the year 2000. Since it was designed as a non-partisan, and even non-political, representative chamber, the constitution entrusted it with the selection of members of the independent organizations. Thus, by pulling more and more senators into the government’s camp, its original role was subverted, and with it the balance of power between Executive (Thaksin) and Legislative (TRT) on the one side and Senate and the independent organizations on the other, as it was envisaged by the drafters of the 1997 Constitution.

All this was said to be part of a scheme at the heart of which was corruption. From this perspective, Thaksin consciously had bought off the rural voters with his “populist policies”, which concretely improved their livelihoods at the local level. In return, they gave him a free hand in enriching himself and his cronies in national politics. However, this was not mainly done, critiques claimed, by the previous direct way of siphoning off public funds. Rather, Thaksin and his people had invented a more sophisticated method, labelled “policy corruption”. This entailed that the prime minister and his ministers used the official policymaking process to reach policy decisions that benefited their varied and widespread business interests.

The ordinary Member of Parliament also entered into this critical identification of problems. Far from being democratic politicians, it was said that they were merely “electrocrats”, who

³⁵ The government controlled almost all electronic mass media.

used their elected office for enriching themselves.³⁶ This included quasi being bought by the highest bidder before elections – and TRT had had by far the biggest war chest for this kind of competition, Thaksin being the second-richest person in Thailand. Then, these candidates would not fairly campaign for votes in the open electoral market. Rather, they would use their personal informal local canvassing networks to persuade voters to cast their ballots for them, often by just buying their votes. Having made it to the House of Representatives, they would try to recoup their investments and make some additional profit. By contrast, serving their constituents or the country in solving their problems was not on their minds. From this point of view, elected governments had a fundamental problem of legitimacy from the very beginning because the constituent acts – elections – were corrupted, and thus illegal. The composition of parliament was therefore not regarded as a legitimate expression of the voters’ electoral choices, but reflected the “tyranny of the rural majority and urban uncivil society”. Thailand’s political system was not a democracy, but an “electocracy”.³⁷

It is not necessary in this context to decide whether the rural voters were right in having their political preferences and in voting for Thaksin and TRT, or whether the problem identification by the urban elite public was entirely correct. The decisive issue here is that the up-country rural voters had no means of bringing to bear their view, if they had any unified political model, to bear on the Bangkok-based public discourse. Therefore, the problem definition produced by the Bangkok-based public elite – expressed in the label “Thaksin regime” – could gain hegemony right near the centre of power.

However, as we know, grievances alone do not directly lead to social movements or protests. Rather, it was a chain of concrete events – that are not the subject of this case, but briefly touched upon in the introduction – which led to the conditions that made the military coup of 19 September 2006, possible and acceptable to Bangkok’s elite public. Yet, this coup had the effect of bringing the problem identification outlined above to the forefront of policymaking. The coup-plotters reflected some of the elements of the problem definition in the reasons they put forward for their act. They asserted,

³⁶ For an exemplary description by the inventor of this label, see Kasian Tejapira (2005) “Reform and Counter-Reform: Democratization and its Discontents in Post-May 1992 Thai Politics”, in *Towards Good Society: Civil Society Actors, the State, and the Business Class in Southeast Asia – Facilitators of or Impediments to a Strong, Democratic, and Fair Society?* Berlin: Heinrich Böll Foundation, pp. 125-46, and Kasian Tejapira (2006) “Toppling Thaksin”, *New Left Review* 39 (May/June): 5-37.

³⁷ Both quotes in Kasian (2005) p. 128.

that the administration of [Thaksin's] caretaker government has led to severe disunity among the Thai people unprecedented before in Thai society, that there were signs of rampant corruption, malfeasance and nepotism, that independent organizations had been interfered with, crippling their ability to perform their duties properly or to effectively resolve important problems faced by the nation, which if left unaddressed, would adversely affect the nation's security and overall economy situation. In addition, some political activities undertaken verged upon lèse-majesté against His Majesty the King who is highly respected and revered by the Thai people.³⁸

Since the coup plotters did not intend to stay in power indefinitely, it had to set an agenda of what they wanted to achieve in the following year or so.

Agenda Setting

Given that Gen. Sonthi's soldiers had abolished the constitution of 1997, partly based on the assumption that it had substantially contributed to give rise to the "Thaksin regime", writing a new one with "better" provisions had to be high on its agenda. However, before work on the new document could begin, the coup group had to set the legal-institutional framework by issuing an interim constitution. Amongst other things, it also predetermined what kind of people would make it to the constitution-drafting bodies, and thereby ensure – as much as possible – that the new document would turn out in accordance with what the elite discourse had identified as problems.

The Interim Constitution prescribed the following process.

- A National Council (*samatcha haeng chart*) consisting of not more than 2,000 people from public, private, social and academic sectors, supposedly by having consideration for the representations of Thailand's regions, would be appointed by the King (article 20, in conjunction with Article 5 III). In practice, a national selection committee chaired by a member of the National Security Council (NSC, the official name of the coup group), and provincial committees chaired by the governors solicited applications. The national committee, the provincial committees, the cabinet, and the coup group would then cut down the applications to the required number. The deadline for the acceptance of applications had to be extended, because, as one official pointed out, "Due to poor publicity not many people are aware that they can be nominated for the job of drafting

³⁸ "Statement by the Council for Democratic Reform by General Sonthi Boonyaratglin" (unofficial translation; 20 September 2006).

the new charter.”³⁹ The sole task of this National Council was to select among itself 200 members to be suggested to the NSC.

- The coup plotters (NSC) would then, according to article 23 of the interim charter, cut down this number to 100 in order to form the Constitution Drafting Assembly (CDA). The CDA would appoint 25 people, members of the CDA or outsiders, to form the Constitution Drafting Committee (CDC). In doing this, the CDA had to follow very strict guidelines drawn up by the Council of State, the government’s unit of legal experts. In the event, it turned out that these guidelines were too strict to allow the CDA a reasonable selection process, since it would have only allowed to appoint people of the rank of full professor or director-general of a department to the CDC. Thus, the CDA used some discretion in including people of lesser ranks. As if this highly selective process was not sufficiently secure, the NSC separately appointed ten members in who the coup plotters had confidence (Article 25).
- Yet, all these precautions apparently were not yet enough to satisfy the NSC’s need to make sure that the new constitution would turn out as it wished. One of its appointees was “former spymaster”, a staunch critic of Thaksin, and supporter of Sondhi Limthongkul’s anti-Thaksin protests from the very beginning, Prasong Soonsiri. Not surprisingly, in a move thought “to set the agenda for charter writing”,⁴⁰ he was elected – although by merely one vote and “amid intense lobbying by people close to the CNS”⁴¹ – by his fellow CDC members to chair this body. This move led to suspicion that the constitution-drafting process may not be free from military interference.

Notwithstanding this somewhat complicated selection process, this exercise in “putting the right people in the right jobs” turned out to have a rather predictable outcome. Almost all of the CDC members belonged to the Bangkok-based legal, bureaucratic, and academic elite. A whopping 15 members were high-level legal bureaucrats and judges, supplemented by four lecturers of law. In addition, there were four more bureaucrats and four more lecturers from a variety of fields. Notwithstanding the fact that a constitution is about the formal political order of a country and the interplay of its institutions, there was only one political scientist

³⁹ *The Nation*, 2 November 2006.

⁴⁰ Both quotes from the *Bangkok Post* (29 January 2007).

⁴¹ *Bangkok Post* (4 February 2007).

among these academics. The remaining members comprised one technocrat, one journalist, and one member of the private sector, one soldier, and a women's rights activist, who was only the second woman on the CDC.

Thus, drafting a new constitution was obviously seen as a mainly technical-legal enterprise. Alternatively, the coup plotters might have seen the conservative nature of most high-level legal experts as an insurance that the outcome would be as expected by them. After all, there is no reason to assume that a constitution needed the most input from legal experts, all the more since legal-technical aspects of the drafting of articles was taken care of by experts from the Council of State. The absence of politicians from CDA and CDC should not be surprising – as with the 1997 Constitution, the latest version was written with the intention to impose a political order on them so that their behavior identified as problematic would improve.

Rangsun Thanapornpun, a respected professor of economics from Thammasat University, who had previously written about the economics of Thai constitutions, criticized the CDA selection process by saying that it did not support the direct participation of Thai people. Rather, since the coup group had a vital role in the selection, the “preference functions of the CDA reflected the preference function of the CNS and not that of the people”.⁴² In any case, this way of setting the agenda by determining who would perform the crucial task of producing the draft constitution serves to confirm that this case of constitutional policymaking fits into Dye's elite model. Moreover, since the drafting followed from what had been stipulated in the 1997 Constitution, rather than starting with a clean sheet, this case also fits into the incremental model of policymaking.

This is not the place to describe this process in detail. Suffice to say that it consisted of five main steps. First, the CDC prepared the draft. Second, twelve national-level elite bodies commented on the draft, the CDA conducted public hearings countrywide, and the CDA members formulated motions. Third, the CDC considered the recommendations generated in step two, and prepared the final draft. Fourth, the CDA considered the draft constitution in its entirety, and those provisions that were raised in the motions. Fifth, the entire draft was

⁴² Rangsun Thanapornpun, “Analysis of new constitution drafting process,” (in Thai). http://www.prachathai.com/05web/th/home/psge2.php?mod=mod_ptcms&ContentID=5392&SystemModuleKey+HilightNews&SystemLanguage=Thai; retrieved on 10 June 2008.

put to a referendum. This last step is what in the model of the policymaking process mentioned above was called “policy legitimation”.

Policy Formulation

Since this latest instance of constitution drafting – the constitution of 2007 is the country’s eighteenth version of its highest law – was an example of incremental policy formulation, what were the starting points? This question concerns the House of Representatives and the Senate.

House of Representatives

The constitution of 1997 had changed the previous 156 multi-member constituencies with altogether 393 MPs (plurality system with multiple votes)⁴³ to 400 single-member constituencies. One reason might have been to forge closer ties between candidates and voters so that vote buying might be reduced. Moreover, 100 national-level party-list MPs were introduced with the aim of recruiting more capable people, who would not want to run in constituency contests, into parliament and then draw the members of the cabinet from this group. The party list also – for the first time – enabled voters to express their national-level political preferences, while the previous system had only allowed them to choose between local candidates.

The members of the CDC collectively had to decide whether they wanted to keep the system introduced by the 1997 Constitution or to change it, and if the latter, they had to decide in which way and for what reasons the system should be changed. From early on in the CDC’s work, both the single-member constituency (SMC) and the party list came under strong attack. On 3 February 2007, the newspaper *Matichon* reported the view of CDC member Krirkkiat Phipatseritham, a retired Professor of accountancy. He wanted the party list abolished; no reasons were given. He also wanted to return to the multi-member constituency system (MMC). First, this would reduce vote buying. SMCs had had the opposite of the intended effect, since they had made vote buying easier (due to the more limited area of the SMC and the smaller numbers of voters to be targeted). Second, SMC contradicted Thai customs, since they necessitated a clear winner/loser situation. As a result, candidates would do everything to win.

⁴³ To be precise, there were seven single-member and 61 two-member, and 88 three-member constituencies.

A few days later, *The Nation* (9 February 2007) headlined an article, “Party list, single-MP electorates to be axed”. No reasons were provided about why SMC would be axed. As for the axing of the party list, two reasons were reported. First, “the system allows capitalists to rise to power through money politics.” Second, “it could lead to a presidential system”. Indeed, Charan Phakdithanakun, the chairperson of the CDC’s sub-committee on political institutions, perceived that if the party-list votes were interpreted as having been given to a particular party leader, as in the case of TRT’s Thaksin Shinawatra, then this “severely contradicts the parliamentary democratic regime of government that has the king as head of state.”⁴⁴ That is, a prime minister who could derive his legitimacy directly from a popular vote via the party list, as Thaksin had repeatedly done, was seen as endangering the position of the King as head of state. Moreover, a few days earlier, Charan had already said, with obvious reference to Thaksin, that the party list “makes some people too power crazy. They think that they had received 19 million votes and therefore cannot do any wrong. This thinking is totally wrong”.⁴⁵

Initially, the return to MMC included a reduction of the number of constituency MPs to 320. This measure would have increased the constituencies and thus the MMC-induced distance between MP and voters even further. In this context, a longstanding view of the Bangkok-based technocratic elite was reproduced. Again, it was Charan, whose main position at that time was permanent secretary at the Ministry of Justice, who gave voice to it. Asked why the MP constituencies should be enlarged, he responded, “From the beginning, we have had the idea that *we wanted* the MPs to have their main task in the House of Representatives, that is, concern themselves with matters of law and the control of the executive. They should not get involved with the wellbeing [of the people] since this is the task of local government politicians.”⁴⁶ Obviously, the official constitutional position of MPs is that of legislators in the House of Representatives. Unfortunately, few voters would elect them for their invisible performance in the House. Rather, Thai MPs’ election is secured by their performance in their constituencies. Somsak Pritsanananthakul, the deputy chairperson of the Chart Thai party, expressed the experience-based contradictory view of politicians when he criticized Charan’s narrow legalistic approach. He warned that ideas about the role of representatives

⁴⁴ *Matichon* (5 February 2007). See also Nelson (forthcoming, p. 12f.).

⁴⁵ *Matichon* (31 January 2007; website version). See also Nelson (forthcoming, p. 12f.).

⁴⁶ *Matichon* (1 May 2007; italics added).

as they work in the US or Japan should not be applied to Thailand. “Those who say that attending ordinations, funerals, and weddings does not belong to the tasks of representatives show that they do not understand ... that this is to meet the people and learn about the villagers’ problems in order to solve them ... These [MPs] are what we call true representatives of the people.”⁴⁷

On 26 April 2007, the CDC published, as prescribed in the interim constitution, a comparison between the constitution of 1997 and its draft, including the reasons for changes made.⁴⁸ According to this document, the House was to have 320 MPs elected in MMC. The party-list system was not abolished altogether. Rather, there should be 80 “proportional” MPs elected not from national party lists but from four regional lists.⁴⁹

Regarding the return to MMC, three reasons were given. First, it would be easier for “good and capable people to compete with candidates who have money”.⁵⁰ Second, bigger constituencies would make vote buying more difficult. Third, in MMC, votes would have more meaning, because, in SMC, all votes not cast for the winner would be lost. Unfortunately, all three reasons that the CDC put forward in support of its switch from SMC to MMC seemed to be faulty.⁵¹

- First, the reference to “good and capable people” merely is a longstanding cliché of the elite discourse on Thai representative politics. More importantly, it was not said how such people, supposedly without the use of money, could make themselves popular with the voters, and even to a higher degree than that those competitors had already achieved, supposedly only by using the power of money. Finally, it was unclear whether the CDC thought that traditional MPs were automatically worse than those potential candidates who had neither money nor popularity, but were “good and capable”.

⁴⁷ *Krungthep Thurakit* (4 May 2007). This paragraph draws on Michael H. Nelson (2007), “A Proportional Election System for Thailand?” KPI Thai Politics Update No. 2 (6 June), p. 19. This paper was printed (slightly corrected) in 2008 in การเมืองการปกครองไทย 2550: *Thai Politics Forum 2007*, pp. 21-43. นนทบุรี: สถาบันพระปกเกล้า.

⁴⁸ คณะกรรมการยกร่างรัฐธรรมนูญ สภาร่างรัฐธรรมนูญ สำนักกรรมการ ๑ ตำแหน่งเลขที่การสภาผู้แทนราษฎร. สารสำคัญของร่างรัฐธรรมนูญฉบับใหม่ พร้อมตารางเปรียบเทียบรัฐธรรมนูญฯ พุทธศักราช ๒๕๕๐ ฉบับรับฟังความคิดเห็น, 26 April 2007 [Important points of the new draft constitution, together with a table comparing it with the constitution of 1997.].

⁴⁹ *Ibid.*, p. 58.

⁵⁰ Quoted from the CDC’s document selling their first draft as published in *Post Today* (18 April 2007) and *Matichon* (19 April 2007).

⁵¹ คณะกรรมการยกร่างรัฐธรรมนูญ (2007, p. 59).

- Second, concerning the intended target group of moneyed candidates, vote buying would hardly become more difficult in bigger constituencies. Such candidates merely had to spend more of their money for that purpose. According to the underlying logic, this would become even more necessary, since candidates had to try to gain sufficient votes for being elected. One might thus say that the return to MMC could not help but encourage vote buying – quite contrary to its intended purpose. After all, SMC had been introduced partly to overcome the vote buying that was said to be a widespread problem in pre-2001 MMC-based elections.
- Third, votes are lost in both SMC and MMC systems. For example, turning two SMC with four candidates each into one MMC with eight candidates would still leave us with six losers whose votes are “lost”. For the same reason, Krirkiat’s claim mentioned above that winner/loser situations contradict Thai custom cannot be avoided by introducing MMC. Candidates still have to try everything to beat their competitors by coming at least second or third, depending on whether a constituency has two or three MPs.⁵²

The final draft constitution presented to the people for a referendum provided for 400 MPs elected in MMC, and 80 MPs proportionally elected from eight regional party lists.

Regarding the latter element of the election system, a highly interesting proposal was made by a number of CDC members, among them Krirkkiat Phipatseritham, Chuchai Supawong, and Komsan Phokong. After the first draft had been distributed for public hearings, they presented a radically new option for the CDC’s decision-making, namely the German system of proportional representation. This would have meant to replace the time-honoured Thai plurality system with multiple votes and the experiment with a first-past-the-post system (2001 and 2005) with a proportional one.⁵³

⁵² This paragraph partly draws on Nelson (forthcoming, p. 11f.).

⁵³ The proposal was promoted in a number of articles; see *The Nation* (30 April, 2007), Krungthep Thurakit (May 2, 2007), *Matichon* (May 6, 2007; 5 June 2007), and ปริญญา เทวานฤมิตรกุล. “การนำระบบเลือกตั้งแบบสัดส่วนมาใช้ในประเทศไทย” (published on the Prachatai website on 5 May 2007). See also Nelson (2007), and, based on an initial analysis of the CDC meeting records, Michael H. Nelson (2009) “Electoral Rules Concerning the House of Representatives in the 2007 Thai Constitution.” Hong Kong: City University of Hong Kong, Southeast Asia Research Center (Working Paper 104).

The proposal suggested a system in which 200 MPs would be elected from SMC and 200 from party lists, while the overall composition of parliament would be solely determined by the number of votes political parties received for their party lists. These lists were envisaged to be sub-divided into a number of regional lists, rather than each party having merely one national list. Obviously, this proposal implied a greatly reduced importance of localized constituency candidates and a simultaneous increase in the importance of political parties, even though this might have been somewhat weakened by the regional character of the party lists. Komsan argued in *The Nation* (30 April 2007) that the plurality system did not reflect the intention of the voters. Apparently, this was seen to be the case because, in the previous two systems, seats in parliament were not allocated based on the national vote total of political parties, but on whom of their localized candidates won in the constituencies. Thus, in the 2005 election Thaksin's Thai Rak Thai had received 377 seats in parliament. This was 75 percent, although the party had received only 61 percent on the party-list ballot (Democrats: 23 percent), and thus should have received only about 306 seats.⁵⁴

Had the CDC adopted this system, the main purpose of the coup – keeping Thaksin-related politicians out of power and have the Democrat party form the core of a coalition government – could well have succeeded. This would have been possible because the Democrat party received almost as big a share on the party lists (40.4 percent) in the election of 2007 as did TRT's successor, the People's Power party (41.1 percent). Consequently, the distribution of seats in the House would have been as follows: People's Power party: 205; Democrats 202; Phuea Phaendin 27; Chart Thai 33; Ruam Jai Thai Chart Pattana 12; Matchimathipattai 7; and Pracharaj 7.⁵⁵ Therefore, the Democrats could have joined its allies Chart Thai and Phuea Phaendin in forming a coalition government under Abhisit Vejjajiva as prime minister with a majority of 262 seats.

One can only speculate about the reasons why the CDC did not adopt the proportional election system, an act that would have represented a true initiative of “political reform”. Certainly, it would have greatly deviated from the previous systems, thus representing a big leap into uncharted territory – with an uncertain public response that might not have been easy to counter with good enough reasons. This might have been too much for a group of

⁵⁴ For more accurate calculations, see Nelson (2007, Tables 2 to 6).

⁵⁵ Since there would have been 13 surplus seats, the House would have had 493 MPs. This would have resulted from the fact that Chart Thai party's share of proportional seats (20) was lower than the number of constituency seats the party had won (33). On these calculations, see Nelson (forthcoming, p. 13).

incrementally inclined elite constitution drafters. In addition, the CDC and CDA members' technical knowledge about various elections systems and their different effects on election results might have been rather limited. Since this constitution drafting took place under strict time pressure, there was little time to discuss such things in detail. After all, the constitution contained a great number of other issues that competed for the members' attention. Furthermore, already the much more limited party-list system of the 1997 Constitution had come under attack for allowing a political leader to claim a degree of personal legitimacy that was seen in negative light, as mentioned above. Critics might have perceived the proportional system as potentially prolonging this "problem". Finally, there might not have been a great sense of urgency on the CDC. Much later, in July 2008, one promoter of the proportional system, Chuchai Supawong, said that nobody knew that the PPP would lead the new elected government. On the contrary – perhaps displaying a certain lack of political judgment – the CDC assumed that the Democrat party would form the core of a coalition government.⁵⁶

The preceding paragraph indicates that there might not have been a clear conscious decision against the proportional election system. Rather, the circumstances might not have allowed its serious consideration.

The Senate

The Senate symbolizes the military-bureaucratic elite's mistrust of the new kids on the political bloc – the elected politicians. When the latter group gradually gained access to political decision-making via the House, the established elite thought that it needed an upper house from which they could balance, if not control, the elected representatives.⁵⁷ This construction came under pressure in the democratic climate in which the 1997 Constitution was drafted. Of the two main competing proposals – a mixed Senate with elected and appointed members vs. a completely elected Senate – the latter finally won approval. Critics had warned that this "will allow political parties to gain control of the Upper House".⁵⁸

This was a particularly important issue because the Senate was entrusted with selecting the members of independent bodies designed to control the elected politicians. Thus, the Senate

⁵⁶ *Krungthep Thurakit* (22 July 2008).

⁵⁷ Senators were handpicked by the prime minister and appointed by the King.

⁵⁸ Rath, as excerpted in the *Bangkok Post* (15 March 1997).

was formally designed as a politically neutral body. However, critics assumed that the electoral realities in the provinces would easily undermine this intention. After the Constitution Drafting Assembly of 1997, with a narrow majority, had voted for the introduction of a 200-strong Senate elected from provincial constituencies, one of Thailand's foremost conservative public law experts, then-Senate Speaker Meechai Ruchuphan, warned, "The CDA empowers the Senate to appoint key monitoring agencies, but if we don't get neutral senators, the whole system may collapse."⁵⁹

As has been pointed out in the section on problem identification, this is what critical observers assumed had happened. In March 2003, senators elected a deputy speaker who openly acted out his ties to a certain faction of TRT, "reinforcing a widely held belief that most senators side with the government".⁶⁰ In the *Post Today* (8 November 2005), the Senate was called the "'Yes, master' Senate" – the "master" being Prime Minister Thaksin Shinawatra. Regarding the Senate election in 2006, a prominent Bangkok senator anticipated that about 70 percent of the new senators would have close connections with party politicians.⁶¹ Indeed, the newly elected Senate became labelled by critics as the "*sapha phua mia*" ("chamber of husbands and wives"), indicating that MPs in the House had nominated their husbands, wives, and other relatives and friends to run for the Senate.⁶² Since this strategy to gain political control of the Senate had largely been successful, the neutral non-political role, and thus the functioning, of the upper house had fundamentally been compromised.

Against this background of institutional development and practical experience, the CDA and CDC of 2007 had four main options to decide about: abolishment of the Senate; return to a fully appointed Senate; keeping of the elected Senate; introducing a Senate with both elected and appointed members.

When the first draft of the constitution was published, it contained an entirely appointed Senate of 160 members. The draft provided for a selection committee comprising seven members, namely the chairpersons of the Constitutional Court, the Election Commission, the Ombudsmen, the National Counter Corruption Commission, the National Audit

⁵⁹ *The Nation* (30 July 1997).

⁶⁰ *The Nation* (7 March 2003).

⁶¹ *Matichon* (9 November 2005).

⁶² The headline of *Thai Post* (20 April 2006) screamed, "Opening the curtain of the 'sapha phua-mia'".

Commission, and one judge each from the Supreme Court and the Supreme Administrative Court. The CDC argued that this selection mode would lead to “appropriate” (*mosom*) senators. After all, the previous election mode had led candidates to the Senate to depend on the voter bases (*than siang*) of MPs and thus made the members of the House and the Senate to be recruited from the same groups of people. Consequently, the Senate’s work had lacked transparency or fell under the control by a political party (a reference to Thaksin and his TRT). However, senators had to be politically neutral and be free in their decision-making since they were tasked with screening laws, the control of the behaviour of politicians, and the selection of members of the independent organizations. For the same reason, prospective senators had to pass careful consideration to make sure that they had sufficient knowledge and expertise to work efficiently. In addition, they had to come from a variety of professions so that their work would be comprehensive.⁶³

A prominent member of the CDC, Wicha Mahakhun, a former judge whom the coup plotters later appointed to their National Counter Corruption Commission, rejected all criticism of the appointment of senators, saying,

We already know that the election is evil. Why do the public want to see history repeat itself? Citizens, especially academics who wish to see the new constitution that brings real democracy are all dreaming. The election of senators was problematic. And why don’t people want a group of judges to help selecting senators for them?⁶⁴

However, his strong remarks were not enough to prevent a wave of criticism. Fellow CDA member Chirmsak Pinthong argued that neither the appointed nor the elected Senate had been of much use. Since the House had committees and the Council of State was checking legal issues anyway, the Senate was unnecessary.⁶⁵ Suriyasai Katasila, secretary general of the People’s Alliance for Democracy, accepted that the drafters’ rationale was that an appointed Senate could contribute to preventing a return of the “Thaksin system”. Yet, one of the shortcomings of the CDC’s proposal was the creation of a “new magic power” in the form of the seven members of the senator selection committee. Suriyasai argued that such a committee was not connected to the people. These seven members would make absolute decisions without being responsible to anybody.⁶⁶ Borwornsak Uwanno, the secretary of the

⁶³ For this paragraph, see คณะกรรมการการยกย่องรัฐธรรมนูญ (2007, pp. 71f.).

⁶⁴ *The Nation* (27 April 2007).

⁶⁵ *The Nation* (22 June 2007).

⁶⁶ *Krungthep Thurakit* (23 April 2007).

1997 CDA, commented that the Senate should reflect the interests of different social groups, such as the middle class, military personnel, ordinary citizens, and interest groups. If the Senate only came from elections, it would be the same as having more members of the House of Representatives. In Borwornsak's opinion, therefore, it was preferable to have a mixed system with both elected and selected senators.⁶⁷ This system, however, had been warned against earlier when Meechai Ruchuphan, the chairman of the National Legislative Assembly or NLA (the coup plotters' "parliament") warned that a mixed Senate would only see the two types of senators' quarrel amongst themselves.⁶⁸

On 22 June 2007, the CDA indeed deviated from the CDC's draft and adopted a mixed Senate. The very narrow vote of 37 to 35⁶⁹ demonstrated the degree of disunity on this point amongst the constitution drafters. Since the total number of votes was only 72, one could wonder where the remaining 28 members of the CDA were at the time of this important decision on the future shape of Thailand's representative system. In any case, the 2007 Constitution thus introduced a Senate with 76 members elected in each of the country's provinces, and 74 senators elected by the selection committee as described above.

Completing the Circle

After the CDA had completed its task, the people were asked to approve or reject it in a referendum. This is what the policy process calls policy legitimization. The constitution was approved with a majority of 58.8 percent to 42.2 percent – much narrower than the coup forces had hoped for. The Northeast, the most important region in electoral terms, even clearly rejected the draft. In the next step, called policy implementation, the constitution was implemented, starting with the general election of December 2007 and the formation of the Senate shortly afterwards. After this election, however, it turned out that the elite-imposed constitution, only thinly backed by a referendum of doubtful validity, had failed to earn legitimacy in important sectors of the polity. With its attempt yet again to amend the constitution, the PPP-led government under then-Prime Minister Samak Sundaravej, sparked major conflicts, and prolonged protests by the elite-related People's Alliance for Democracy.

⁶⁷ *Post Today* (28 February 2007).

⁶⁸ *Matichon* (4 February 2007).

⁶⁹ *The Nation* (23 June 2007).

Following the change to a government led by elite-supported Democrat Abhisit Vejjajiva, which was installed with military help and by one important faction breaking away from the Phuea Thai party (which was established after the PPP had been dissolved by the Constitutional Court), a parliamentary committee was established to study changes to the constitution. Remarkably, its six proposals included a return to the election system of the 1997 document. The debate dragged on until December 2009 without any apparent conclusion. Reaching a conclusion was made even more difficult when the Phuea Thai Party and the United Front for Democracy against Dictatorship (the “Red Shirts”) demanded nothing less than a complete return to the constitution of 1997. Obviously, in contemporary Thailand it has become more difficult for the Bangkok-based military, bureaucratic, and technocratic elite unilaterally to impose their version of the constitutional order on the population. It will perhaps need a change of mind towards accepting the need for an open pluralistic polity, and a truly inclusive process of constitutional policy making, to achieve what at present is so clearly lacking: polity-wide democratic political legitimacy.