Good Governance in the Treaty-Making Process and its Democratic Dilemma

Wanaporn Techagaisiyavanit

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GOOD GOVERNANCE IN THE TREATY-MAKING PROCESS AND ITS DEMOCRATIC DILEMMA

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Submitted to the faculty of Indiana University Maurer School of Law

in partial fulfillment of the requirements

for the degree

Doctor of Juridical Science

May 2012
Accepted by the faculty, Indiana University Maurer School of Law, in partial fulfillment of the requirements for the degree of Doctor of Juridical Science.

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Dedication

In memory of my grandfather, Surin Liengsomboon,
who had a profound passion for education and superior knowledge.

(1923 - 2006)
Acknowledgements

I wish to personally express my gratitude to Professor Sarah Hughes, my dissertation chair, for her constant encouragement and guidance. This dissertation would not have been successfully completed without her dedication and kind support, which played a big part in helping me overcome the difficulty I had from the very beginning. I also owe my deepest gratitude to Professor Susan Williams, whose classes had consistently provided me with perceptive inputs, and helped me put my dissertation together. Her understanding and personal care are very much appreciated. My thanks as well go to Professor Christiana Ochoa and Professor Donald Gjerdingen for their patience and direction. I would also like to thank Manit Jumpa, Professor of Law at Chulalongkorn University, who so generously shared his time and knowledge regarding the structure and substances of the Thai Constitution. I am also profoundly grateful to the Royal Thai Government for providing me with a full financial support throughout my years of study, and Thailand, my beloved home country. I am additionally thankful to Assistant Dean Lesley Davis and the International Graduate Program for making Indiana University Maurer School of Law such a wonderful experience that allowed me to share and cultivate my knowledge with other fellow students. I also wish to offer my regards to my parents, Akasit and Arada Techagaisiyavanit, for unconditional love and unending support. A further note of thanks goes to my cousin, Sadachai Nitayalumpong, who has always given me the courage to fulfill my dream. And lastly, I wholeheartedly thank my fiancé, Kyle Fyr, whose care and support has inspired me to complete the project.
Wanaporn Techagaissiyavanit

Good Governance in the Treaty-Making Process and Its Democratic Dilemma

The emergence of Thailand’s treaty reform has not only brought change to its legal landscape, but also significant social, political and economic implications within the governing process. While it is political and social in the sense that the mechanisms introduced under Section 190 of the 2007 Constitution (treaty clause) are intended to secure greater accountability and transparency in the public administration through the increased involvements of the public and the institutional branches, the economic dimension derives from the fact that this provision directly deals with the scope of the executive’s authority in the conduct of international relations, trade and investment upon which domestic economy depends. This new approach makes perfect sense, especially from the liberal democracy perspective which believes in the restriction of government power. Nevertheless, these implications in which the effectiveness and responsiveness of government function have been substantially undermined come with a new dilemma and challenges which also pose threats toward the principle of democracy and its implementation.

This dissertation hopes to provide a middle ground for Thailand’s treaty model through the exploration of the relationship between legal and political disciplines in the maintenance of the good governance principle and practice. In the derivation of the treaty model, the study draws out two important arguments to secure the government administration’s effectiveness, (i) the cultural component in which various democratic theories concerning the mechanism of public participation are examined to maximize the political role of the public, and (ii) the structural component in which the separation of
powers principle is addressed in relation to creating the proper roles and functions of the legislature and judiciary in the foreign affairs context. The comparative study of the surveyed countries’ treaty practices, which reveals the executive’s central foreign affairs authority, the legislative manner of control and the application of judicial limits, is also used in order to help determine the scope of the public, legislature and judiciary involvements in the treaty process along with these two important components.

The study opens up a new meaning of democracy in which practicality is the focus of its adoption. The proposed treaty model will not only carry out this important principle, but will also continue to operate as both the people’s safeguard against the encroachments of their interests and as the machinery that promotes a quality administration. Therefore, the research concludes that, while the current legal and institutional arrangements of the treaty clause are found inadequate to effectively respond to socio-political and economic challenges, the proposed treaty reform can become an important platform for a more ambitious model of the future.
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Introduction

Public participation and the principle of separation of powers have been known as ones of the most important democratic mechanisms that help legitimize a political process by enabling checks from the public and among the political organs whose functions and powers are prescribed by a constitution to ensure that their exercises of powers are in accordance with the objectives of democracy. Constituted as part of the civil and political rights, public participation is widely guaranteed by national constitutions and international law due to its ability to generate a quality political environment, namely accountability, responsiveness and transparency in the governing system. Along the line, the system of checks and balances under the principle of separation of powers is recognized for its significant role in maintaining the division of power and responsibilities among the institutional organs to prevent the domination of a particular branch over governmental activity. Because of their abilities to limit governmental authority through close public involvement and the supervision among these organs, it can also be said that the emphasis of these governing mechanisms’ function is particularly on the improvement of transparency and accountability in the public administration. Thus, in this traditional sense, public participation and the system of checks and balances are perceived as governing mechanisms that facilitate a better exercise of the people’s sovereign power by guaranteeing a type of political condition necessary for the maintenance of the system of self-governance.

To this end, Thailand democratic reforms through the implementation of the 2007 Constitution have strengthened these mechanisms by widely guaranteeing people’s right to direct political participation in several areas of public affairs while improving the ability of the legislature and judiciary in the scrutiny of the executive activity. This progressive move
made tremendous changes to the area of foreign affairs, particularly in the treaty-making process. Section 190 (the treaty provision) which came to replace Section 224 of the 1997 Constitution requires direct public involvement in the making of a treaty, and has expanded the power of the legislature in the approval of a treaty negotiation and the function of the judiciary in deciding the constitutionality of the treaty. Section 190 is thus seen as a revolutionary treaty model which proves the Thai democracy to be simply more than a representative democracy. By adding a public participatory process and greater checks from the legislature and judiciary, Section 190 is intended to empower the people with additional tools for counter-balancing the government, and to improve the transparency and accountability of the process in accordance with the democratic principle. The executive’s extensive obligations, which involve a public hearing, legislative approvals (prior and after a treaty negotiation) and the policing power of the judiciary, therefore, have a drastic impact on the treaty-making process.

Despite its democratic ideal that aims at increasing direct involvement of the people in governmental decision, the challenge that remains in the new phase of the Thai democracy is to ensure that these democratic mechanisms serve their purposes comprehensively and effectively in the sense that the improvement of transparency and accountability should not interfere with the responsiveness and effectiveness of governmental administration which are also vital to the management of domestic affairs and international relations. This question will therefore be addressed through the limits of the democratic mechanisms in the treaty-making context. The reconstruction of Section 190 will require that the interest of the government in having an effective and responsive administration be taken into account through adjusting the scope of public participation, balancing the roles of the legislature in
the treaty approval and the judiciary in the enforcement of Section 190 for these mechanisms to best fulfill their functions. With this respect, my thesis statement asserts that while direct political participation and the system of checks and balances are essential to the establishment of democracy, maintaining proper balance between these limits (citizens’ participatory rights and checks from other institutional organs) and the government’s interest in having an effective administration are even more crucial to the success of the Section 190 implementation and the procurement of the people’s interests in the realm of foreign affairs, which depend significantly upon the efficiency of government operation.

In this dissertation, Chapter I will introduce the problems of Thailand’s current treaty-making practice - the struggles we have had in order to affirm democracy and the principle of good governance by presenting internal and external weaknesses that have become the challenges in the maintenance of the two notions (accountability, transparency, responsiveness and efficiency). Chapter II will briefly explain Thailand’s political evolution, and its current political structure to serve as background information and a clarification of the public role and the functions of each institutional branch under the 2007 Constitution. In Chapter III, the examination of the value of liberalism which focuses on individuals’ fundamental rights to be incorporated into the process of public participation will provide an argument for narrowing down the treaty categories to be subject to Section 190 process (discussed in Chapter V). The proposal of a liberalism method presented in Chapter III is a cultural approach which argues for fostering people’s democratic political culture through the adoption of liberalism in a participatory process. Chapter III by exploring the notion of direct public participation through assessing its value (reflected in different democratic theories), weaknesses and contribution to democracy will thus address the first area of concern, which
is the treaty scope. Then, in Chapter IV, I proceed to address the second and third areas of concern regarding the necessity of the executive competence and judicial limits in the realm of foreign affairs, which is a structural approach. The argument will go to support the readjustment of the treaty process in Chapter V by allowing the executive to prior determine its competence together with the other two branches (through the determination of whether the treaty in question must follow through with Section 190 process), and applying the concept of judicial deference under the circumstances where important government policy decisions may be involved. This is another important component which touches upon the question of political structure by suggesting how the principle of separation of powers can play its role in the maintenance of good governance, not only through the imposition of “checks” on the public administration, but also through preserving each institutional branch’s independence and autonomy (power and responsibility). The arguments for a properly designed public participation under the liberal approach (Chapter III) and the executive competence in the area of foreign affairs (Chapter IV) will then come into play in the reshaping of the Thai treaty-making model (a proposal to amend the treaty clause) in Chapter V which addresses i) the treaty scope (the readjustment of important treaty categories to be subject to public participation and legislative approval) and ii) the treaty process (the suggestion of proper roles and manners of the legislature and judiciary’s involvements).

Although we cannot deny the crucial roles of the legislature and judiciary in the establishment of democracy as they are the institutional instruments of ensuring accountability and transparency of a governing process, the operation of their functions must not exceed the necessary level required to sustain all other democratic elements (namely, government accountability, transparency, responsiveness and effectiveness) within the
machinery of the public administration. The study therefore neither aims at questioning whether we should advocate the use of public participation nor answering whether we must fully embrace the executive’s monopoly of foreign powers, but rather examining what type of issues should be subject to the participatory method, and what can be a proper treaty-making process that will maintain balance between the people’s interests and the government’s responsibilities in order to secure the entire objectives of our democracy. The last Chapter (Chapter VI) will therefore provide the justifications why the proposed treaty model can fully serve these interests.
Chapter I: Good Governance in the Treaty Process and Problems in Democracy

I. Introduction

This chapter will introduce the current democratic challenges faced under the implementation of the 2007 Constitution in the area of foreign affairs, which specifically requires special process in the making of treaties that are important to national interest. The chapter is intended to explain the dilemma of improving transparency and accountability in governmental administration without paying adequate attention to other democratic elements by showing how the reduction of the administration effectiveness as a result of these efforts has interfered with the goals of democracy and the principle of good governance. Section I presents two crucial political events which mark the periods of political changes for the better and for the worse – the birth of the so-called “People Constitution” (2007) and its aftermath. Riots and the unwelcoming gesture of the rural poor under the operation of the 2007 Constitution is the conundrum brought by these changes. These are problems that require us to dig deeper into its root causes rather than simply labeling them as the conflict of colors to answer why the mechanisms of the current Constitution could not address them. Section II will then explain one of the newly developed mechanisms under the Current Constitution in the area of foreign affairs which has embarked on the idea of “strong democracy” through the strenuous checks of institutional branches and direct public participation in the treaty-making process. This Section shows how the new treaty practice is adopted for the enhancement of democracy and the principle of good governance. In spite of the good faith effort toward advancing the democratic goals, Section III will present internal and external struggles concerning the preservation of administration effectiveness and responsiveness to the domestic and international demands that the country is facing in the maintenance of these ideologies, which in turn have weakened some of their underlying objectives. The challenges in
practice are also the obstructions to the democratic and good governance principles. Thus, Section IV will serve as a summary of the current issues of the treaty process and an introduction to a solution that build toward a proposed treaty model that would help maintain the balance of the democratic elements, the interests of the people, and the smooth function of government.

II. Toward Political Changes

The summer of 2010 brought one of the longest and deadliest protests in the Thai history. When the Red Shirts were formed in March of 2010, it was peacefully joined by nearly 140,000 people.¹ However, the political movement which lasted nearly two months turned violent when the protesters’ demands had not been met. Numerous deaths and casualties were the results of the government’s attempt to disperse the demonstration. Grenades and gunfire were the primary means of communications between the two sides. A state of emergency was declared covering at least seventeen provinces nationwide.

Back in September of 2006, another military action had previously been taken, but for the different objective - to overthrow the government of the former Prime Minister, Thaksin Shinawatra, who was at that time in New York City for a meeting of the United Nations General Assembly.² The Royal Thai Army and the national police force roamed the streets of Bangkok. National television where the coup makers made their announcement ceased all scheduled programs. The Army declared martial law nationwide, ordered all soldiers to report to their barracks and banned unauthorized troops. Within a few hours, tanks and troops had successfully taken over the Parliament House and all other strategic points whereas 3,000 police forces were prepared to be deployed to ensure public order.³ Despite troops and tanks, the incidence turned out to be

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³ *Id.*
the most peaceful, non-resisting military coup in the Thai history.\textsuperscript{4} There were no clashes and gunshots. The reason behind the non-resisting gesture of the public was believed to be “the alleged corruption and internal rifts that had reportedly plagued the Thaksin’s administration”.\textsuperscript{5} The previous national crises were blamed for its lack of transparency and public participation in the policy decisions, particularly in the pursuit of international trade negotiations.

Despite the legitimacy claimed in the military intervention in 2006, it inevitably led to the bloody protest in 2010 whose proponents (primarily from the rural north and northeast) had benefited from the populist policies that Mr. Thaksin created during his five years in power - such as on health care, jobs and education. Unfortunately, the attempt of the opposite group to improve the country’s democratic condition (to fight against the corruption) was neither welcome nor supported by the rural poor. More sadly, the so called “People’s Constitution” of 2007, albeit equipped with several democratic mechanisms to ensure the system of good governance, has not seemed to solve the conundrum either. For one reason, establishing a democratic condition which requires people to be deeply involved, especially in the area that people may have little reason to care about, such as that of foreign policy, when they still struggle for their means is a leap of faith. And for another reason, subjecting the executive branch to the extensive check mechanisms in the areas which demand a speedy, responsive and effective administration when the branch barely has room to breath requires luck. Thus, this Constitution, although highly democratic, is still aspirational in its terms, and has posed critical problems in practice. But before we take a further look at what went wrong with our Constitution, we shall first appreciate the benefits it has to offer in the following section.

\textsuperscript{5} \textit{Id.}
III. Establishing “Strong Democracy” in Foreign Affairs

The 2006 coup d’état led to the abrogation of the 1997 constitution with a promise to bring back a better democratic one. The plan was to “materialize” the 1997 Constitution which “went a long way toward identifying basic rights of the people”, yet failed to achieve the objectives for the most part.\(^6\) Although the 1997 Constitution was praised for its several areas of improvements such as adding the provisions of the rights of locals over their natural resources, establishing additional checks and balances through independent governmental organizations, and providing the right of the people to petition for a bill, these initiatives have been deemed insufficient in terms of the areas they covered.\(^7\) The writers of the new Constitution were then charged with a challenging task in order to identify and incorporate the missing piece, “political will” of the people. The new phase of the Thai Constitution is thus intended to equip people with stronger civil and political rights, especially in the area of remote politics such as foreign affairs. The initiative, for the first time, requires people’s consultation and a more extensive legislative involvement in the making of important international commitments.

Despite the claim of a failure to carry out people’s political will in the previous Constitution, the 2007 version yet faces another real challenge which is how to accommodate both citizens and government’s interests, and to put the mechanisms that guarantee people’s certain control over governmental activity into practice. The 2007 Constitution was built upon a strong democratic principle that prioritizes people’s participatory rights in a wide range of national policy and legislations. The accountability thus takes place vertically (from people to government) and horizontally (among the branches). However, the downside of this heavily checked system is that it could place major obstructions in the executive administration if not properly balanced. The

\(^7\)Id.
administration ineffectiveness can pose challenges at two different levels. Domestically, it adversely affects a responsive characteristic of the government toward its people. And internationally, it causes disruption in the pursuit of the country’s diplomacy and foreign relations. These challenges faced by the government in fulfilling its constitutional obligations under the 2007 Constitution will be further elaborated in Section III.

A. Good Governance and Democracy in the Thai Constitution

i. Defining “Good Governance”

The concept of good governance may be close to the notion of democracy in the sense that it is a type of governing method which describes how public institutions should conduct public affairs and manage public resources in order to guarantee certain outcomes that benefit constituents. According to United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), good governance refers to the process of decision-making which possesses eight major characteristics, namely “participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and following the rule of law”. These are the manners in which a public institution should exercise its power in order to secure this term.

The participatory-based model of the Thai Constitution which guarantees more extensive rights and opportunities for citizens to equally take part in the conduct of public affairs can easily fit into this term by possessing these characteristics such as public participation, inclusiveness and accountability. Party to the International Covenant on Civil and Political Rights (ICCPR), Thailand affirmed its commitment to the Covenant in its Constitutional provisions, in particular Article 25 which guarantees citizens the right and the opportunity to take part in the conduct of public affairs. This commitment of

8 See http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp
public participation is strongly reflected in several constitutional provisions, for instance, Chapter 3, Part 11 concerning liberties in connection with assembly and association and Chapter 7 concerning direct political participation by the people. In addition to the right of the people to vote, Chapter 7 also guarantees the right to petition the proposal of a bill to the National Assembly, the right to lodge a complaint to remove the persons from office, and the right to a referendum where the matter may affect “national” or “public interest” or is required by law.\textsuperscript{10} And more importantly, the Constitutional duty of the government to seek public consultation, for the first time, is extended to the conduct of foreign affairs under Chapter 9, Section 190. Thus, these numerous mechanisms reflected throughout the Constitution are strong evidences of the writers’ efforts to meet the definition of “good governance” in which people are truly engaged in the governing process, and, as a result, transparency, accountability and responsiveness in governmental administration can be improved. In particular, the problems of transparency and accountability are expected to be better addressed through Section 190 which involves substantial legislative close supervision and a public hearing in the making of important international agreements.

\textbf{ii. Defining Democracy}

The concept of democracy, which is to be further explored in detail in Chapter III, is also closely connected to the principle of good governance. This section will therefore briefly introduce this self-governing concept in order to provide a better understanding with regard to the important characteristics of the Thai Constitution. Democracy means a type of governing process in which the supreme power is vested in the people. The term

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\textsuperscript{10} In contrast to the 1997 version, the provision that grants the people the right to a referendum where the matter may affect “national” or “public interest” or is required by law has a strong democratic character to the extent that a referendum could serve as a final word for a policy decision, and not just an advisory opinion MANIT JUMPA, “kwamroo beungton kiewkab rathatummoon hang ratcha anachak thai,” translated in BASIC KNOWLEDGE OF THE 2007 CONSTITUTION OF THE KINGDOM OF THAILAND 261 (2008).
\end{flushright}
thus suggests the power which is to be (whether directly or indirectly) exercised by the people in the political process to protect personal autonomy against arbitrary decisions made by a few.\textsuperscript{11} This notion of public participation provides a strong basis for self-government by carrying out its very fundamental function, enhancing the abilities of the people to control the direction of their communities and to defend their interests accordingly.

For Thailand, the efforts to strengthen the people’s participatory rights in the areas of national concerns are identifiable with Benjamin Barber’s term, “strong democracy”, which is defined by “politics in the participatory mode”.\textsuperscript{12} The framework of the Constitution opens up opportunities for the people to exercise their sovereign powers both through their representatives and through their own voices. The framework also allows broader checks from the legislature, judiciary and other constitutional independent organizations\textsuperscript{13} in the supervision of governmental activities. For instance, Section 190 expands the legislature’s role in the approval of treaty negotiation for a wide variety of important treaties while specifically granting the constitutional court the power to decide the constitutionality of those treaties undertaken by the executive.\textsuperscript{14} Such provisions have a strong democratic implication in the sense that the exercise of governmental power will be limited and carefully watched by different organs and through political participation of the people to ensure that the government pursues its policy in accordance with its citizens’ interests. Thus, the public participation and strong check mechanisms have

\textsuperscript{11} Democracy is valuable because it expresses the will of the people, and supports individual autonomy under conditions of interdependence. Amy Gutmann, \textit{The Disharmony of Democracy, in NEMOS: DEMOCRATIC COMMUNITY} 128 (John W. Chapman and Ian Shapiro, eds) (Vol. XXXV 1993).

\textsuperscript{12} BENJAMIN R. BARBER, \textit{STRONG DEMOCRACY} 151 (2nd ed. 2003). This type of democracy demands for a high degree of the state accountability which involves substantial direct participation on the part of people. GEORGE SORESEN, \textit{DEMOCRACY AND DEMOCRATIZATION} 10 (George A. Lopez et al., eds. 1993).

\textsuperscript{13} These independent organs include the Election Commission, Ombusmen, National Counter Corruption Commission, State Audit Commission. \textit{See CONST.} (2007), Ch. 11, §229-254 (Thail.).

\textsuperscript{14} For details, see Section II, B (iii).
added more democratic elements to this representational system along the line with what is required under the notion of good governance.

iii. Good Governance in Relations to Democracy

Good governance and democracy therefore share a common political characteristic which can be described as a process by which power is exercised. Both concepts are about a quality of a governing procedure, one which is “good” and another which is “by the people”. Nevertheless, one may argue that governance by the people (democracy) is not necessarily “good governance” when it results in the alienation of the minority’s interest. This issue is something that the principle of good governance warrants within the element of equity and inclusion. However, rather than seeing both terms as conflicting, I would call good governance a subset of democracy as a concept that operates under the umbrella of self-governance. Whereas the term “good governance” is narrowly defined to signify a few prime elements, democracy confers a wider meaning of what it is to be “self-government”. The debates among different schools of thoughts are the evidence of a wide variety of qualities that each one regards to when defining the meaning of “democracy”. However, this section is only meant to show an overlapping concept between good governance and democracy which are believed to be enhanced under the new model of the Thai Constitution.

15 The term “good governance” is not only limited to the meaning of the process of decision making, but also refers to the quality which is to be distinguished from “bad governance”. These qualities are participation, the rule of law, transparency, responsiveness, consensus-oriented, equity and inclusiveness, effectiveness and efficiency, and accountability. Asiwaju Bola Tinubu, Good Governance, Democracy and Sustainable Development Centre for Peace and Conflict Studies, Dec. 15, 2008, P. 10

16 Another distinctive aspect that departs the concept of good governance from democracy is basing a decision on consensus. Many models of democracy such as liberalism and agonism may reject this rationale by seeing it as suppression of differences and subordination of rights which could eventually lead to violent conflict. Carol C. Gould, Diversity and Democracy: Representing Differences, in DEMOCRACY AND DIFFERENCES 172-174 (Seyla Benhabib ed., 1996). Bonnie Honig, Difference, Dilemma, and the Politics of Home, in DEMOCRACY AND DIFFERENCES 261(Seyla Benhabib ed., 1996) (“[when] both oughts are compelling, and the situation that stages their conflict is inescapable. In such cases, I think if constructively at all, in terms of acting for the best and this is a frame of mind that acknowledges the presence of both the two oughts”).

17 These interpretations reflect in the different models of democracy such as classicalism, developmental republicanism, liberalism, elitism, pluralism, agonism.
Several elements of good governance can be identified within the concept of democracy. Among other things, good governance emphasizes participation in the governing process (whether private or public) by stakeholders. By the same token, the system of self-government (democracy) which refers to a mode of decision-making over which the people exercise their control also suggests the significance of the people’s involvement in such a process to assure their ownership in a sovereign power. Political participation within the meaning of democracy may range from electoral process to direct public participation in important policy decision. In a slightly different aspect from good governance, democracy is also an end objective. Democratic means established under various models of democracy are themselves the goal of a governing system that the principle of good governance defined, namely accountability, transparency, responsiveness and effectiveness. Therefore, the questions of what is the purpose of good governance and how we come about it are where democracy comes into the equation.\textsuperscript{18} The means that the principle of good governance warrants also serves as an objective of democracy. And, these qualities must be secure for a system to be democratic and good governing. For the purpose of this dissertation, these characteristics will be our focus in the development of a treaty-making model in Chapter V. How far the Thai Constitution has carried these concepts into practice, especially in the area of foreign affairs will be examined in the following section.

B. A Move Forward: Democracy and Good governance in Foreign Affairs

i. Thailand’s Treaty-Making in the Historical Context

Thailand’s treaty-making experiences dated back to the Sukhothai period (AD. 1257-1350) in which Siam (the previous name of Thailand) maintained foreign relations with China, followed by Ayudhya (AD. 1350-1767) and Ratanakosin periods (AD. 1767-\textsuperscript{18} Tinubu, \textit{supra} note 15, at 11.
However, it was the *Ratanakosin* period that expanded and modernized the treaty practice of Thailand with western powers such as Great Britain and the United States.\(^{20}\) The vast majority of treaties concluded were commercial in nature. The Treaty of Amity and Commerce with the United Kingdom in 1826 became Thailand’s first recognition of Western power in the region. In 1833, the United States began diplomatic exchanges with Siam, as Thailand was called until 1938. However, it was during the later reigns of Rama IV (or King Mongkut, 1851-68), and his son Rama V (King Chulalongkorn (1868-1910), that Thailand established firm rapprochement with Western powers. The Thais believe that the diplomatic skills of these monarchs, combined with the modernizing reforms of the Thai Government, made Siam the only country in South and Southeast Asia to avoid European colonization.\(^{21}\)

The turning of the twentieth century marked a major change of the Thai’s treaty-making history. By joining the peace treaty of 1919 and undertaking internal legal reforms, Thailand gained better recognition as becoming a modernized nation, which led to the abolition of unequal treaties with several western nations.\(^{22}\)

**ii. The Tradition: Executive as the Authoritative Treaty-Maker**

The first Constitution of Thailand (June 24, 1932) formalized the practice of a treaty-making.\(^{23}\) Whereas the treaty-making process has been changed back and forth in later Constitutions, the tradition that remains unaltered is the plenary foreign affairs power of the executive with accountability toward the legislature whenever certain categories of treaties were to initiate. The common categories that are subject to

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20 These are Treaty of Amity and Commerce with the United States in 1833, Treaty of Friendship, Commerce and Navigation with Great Britain in 1855, France, Denmark and the German Republic in 1858, and Portugal and the Netherlands in 1859 and 1860 respectively. *Id.* at 174-175.


22 This recognition is especially significant to the abolition of extraterritorial regimes that had previously been imposed upon Siam through the refusal of the application of Siam’s law upon foreigners. *Id.* at 177.

23 *Id.*
parliamentary approval are peace treaties, treaties which provide for a change in the territories of Thailand or affecting its sovereign rights, and treaties which require legislative enactments for implementation. These types of treaties require the Executive to seek guidance and consultations from the National Assembly (the Parliament) which is composed of the Senate and the House of Representatives. This political structure will be elaborated in Chapter II.

The requirement of active participation of the public in the treaty-making process was never present in the Thai constitutional history. Public involvement rather took place in a form of treaties publication, also known as Government Gazette, which is tantamount to promulgating the treaty as the law of the land. Nevertheless, a collection of treaties compiled and published by the Ministry of Foreign Affairs was generally “for official use” with “limited circulation”. The role of the public in the matter of foreign affairs was thus restricted. Treaty negotiations were undertaken without public acknowledgements and inputs. And thus, the executive’s conduct in the foreign affairs was primarily subject to legislative supervision, and not directly accountable to the people.

iii. Against the Conventional Practice

It was the conclusion of several Free Trade Agreements (FTA) and other treaties undertaken by Thaksin’s Administration that triggered the claims of the opposition party and others as non-transparent for aiming at favoring his affiliated business enterprises. Such claims brought major changes to the treaty-making process.

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24 See, e.g., CONST. (1932), Ch. 4, § 54 (Thail.) (repealed 1946), CONST. (1946), Ch. 4, § 75, § 76 (Thail.) (repealed 1947), CONST. (1949), Ch. 7, § 153, § 154 (Thail.) (repealed 1951), CONST. (1991), Ch 7, § 156, § 177, § 178, (Thail.) (repealed 1997).
Section 190 may be seen as a revolution of a treaty-making process that makes foreign affairs no longer simply the matter of a state.\textsuperscript{26} Traditionally, the power to negotiate and conclude international treaties is vested in the executive branch under the prerogative of the King.\textsuperscript{27} The Cabinet is deemed the vital decision-making body since its decisions can become the source of authority for government actions. A proposal of any treaty negotiation must be subject to the ratification of the Cabinet before it can proceed. The Cabinet is thus traditionally an independent authority that undertakes the initiation of the vast majority of treaty negotiations, whereas the role of the Parliament had always been “supplementary or complementary” as ones being called upon to approving treaties in limited cases as reflected in Section 224 of the 1997 Constitution.\textsuperscript{28}

A treaty which provides for a change in the Thai territories or the jurisdiction of the State or requires the enactment of an Act for its implementation must be approved by the National Assembly.\textsuperscript{29}

However, this authoritative tradition is being replaced by the increasing parliamentary, judicial and public roles in the treaty-making process under the Constitution of 2007. Not only does Section 190 require specific procedures which subject treaty-makings to public scrutiny and legislative approval, the provision also broadens the categories of treaties that must undergo such a process which is subject to the supervision of the Constitutional Court, the sole interpretative authority. These categories are as follows:

A treaty which:

\[\text{\textsuperscript{26} In the old days, a treaty-making is a matter reserved for the privileges. Very few selected officers were afforded opportunity to attend international treaty negotiations. \textit{Id.} at 193.}\]
\[\text{\textsuperscript{27} Although the King is absent from any formal political role, he is often used as the legal representation of the executive government. This is due to its unique tradition dated back hundreds of years that regards the King as a divine figure and a guardian of his people.}\]
\[\text{\textsuperscript{29} \textit{CONST.} (1997), Ch. 7, § 224, (Thail.) (repealed 2006).}\]
(1) Provides for change in the Thai territories or
extraterritorial areas over which Thailand has sovereign
rights or jurisdiction in accordance therewith or in
accordance with international law
(2) Requires the enactment of an Act for the implementation thereof
(3) Has extensive impacts on national economic or social security, or
(4) Generates material commitments in trade, investment or
budget of the country must be approved by National
Assembly.  

The specific procedure is described in the following paragraph:

Prior to undertaking a treaty negotiation of any treaty
specified under paragraph two,
(1) The Council of Ministers shall provide information and
cause to be conducted public hearings, and shall give the
National Assembly explanations on such treaty.
(2) For this purpose, the Council of Ministers shall submit to
the National Assembly a framework for negotiations for
approval.
(3) When the treaty under paragraph two has been signed, the
Council of Minister shall, prior to the declaration of
intention to be bound thereby, make details thereof
publicly accessible…

In the case where there arises a problematic issue under
paragraph two, the power to make the determination
thereon shall be vested in the Constitutional Court…

Aside from broadening the first treaty category to include “extraterritorial areas
over which Thailand has sovereign rights or jurisdiction”, the 2007 Constitution, which
came to replace the 1997 version, has encompassed two additional types of treaties
(having economic and social impacts, or generating material commitments in trade,
investment or budget of the country) that must be subject to its procedure. These efforts
are in accordance with the preamble of the Constitution that clearly stated the
commitment in adhering to “the protection of rights and liberties” and “of public role and
participation” of the people in the government. Thus, to ensure the accountability,
responsiveness and openness of government’s foreign affairs administration, the types of

30 CONST. (2007), Ch. 9, §190, (Thail.) (amended 2011).
31 Id.
32 Expanding the language from “the change in the jurisdiction of the state” to “the change in the
extraterritorial areas over which Thailand has sovereign right or jurisdiction” may give rise to the
Governmental constitutional mandate in the eventual future claim of territories that Thailand may have
sovereign right to exercise upon. Therawat, supra note 28, at 9.
treaties that are subject to the public and legislative scrutiny have been expanded as well as the meaning of “treaty” which is intended to include any kind of international commitments.\textsuperscript{33}

Against this backdrop, given this broad language, nearly all treaties run the potential risk of being inadvertently interpreted by the Constitutional Court to be subject to Section 190 process. The addition of the third and fourth criteria basically serve as “catch all” categories that do not address the extent of “extensive impacts” and “material commitments” whereas the legislative intent is of little help since it only indicated the purpose of setting the principle of a treaty-making process.\textsuperscript{34} Although the recent amendment of Section 190 aims at addressing this issue by requiring legislation to determine the types of treaties to be subject to the special treaty process,\textsuperscript{35} the solution is deemed temporary, and can fall short of any anticipation on the emergence of the new kinds of treaties. Section 190 has therefore shrunken the executive’s primary role in the treaty conduct through expanding the meaning of important treaties. The making of treaties, which had traditionally been shielded from the public eye, is now the public subject with close supervision of the legislative and judicial bodies. The executive branch is now deemed more accountable than ever. What could go wrong with this highly democratic mechanism might have been beyond the anticipation of the writers as problems became materialized under the implementation of the 2007 Constitution.


\textsuperscript{34} "The terms economic security and social security are also too vast and subjective, hence, a potential cause of controversy and an open door to abusive interpretation that restrain the Government’s freedom of actions and to a large extent compromise its stability by the constant risks of being accused of the unconstitutionality of its actions” Therawat, supra note 28, at 7.

\textsuperscript{35} “There shall be the law on the determination of the treaty types, negotiation framework, procedures and methods for the conclusion of treaties having extensive impacts on national economic or social security or generating material commitments in trade or investment…” CONST. (2007), Ch. 9, §190, ¶ 5 (Thail.) (amended 2011) (emphasis added).
IV. Problems in the Democratic Treaty-Making Process

Thailand has taken a progressive step to enhance the legitimacy of the international treaty-making process. As introduced in Section II(A), the notion of “strong democracy” and good governance have been incorporated into the Thai Constitution of 2007 by ensuring the direct involvement of the public and close supervision of other branches in the treaty-making process.\(^{36}\) Under these principles, the executive treaty power is directly held accountable to the people. Nevertheless, the implementation of the specific treaty-making procedures under the current Constitutional mandate has posed challenges to the government administration as well as the balance of powers among the institutional branches. The following section will put these issues into perspective by examining (i) internal weaknesses which concern the obstruction of effective and responsive governmental administration to domestic needs, (ii) external weaknesses relating to the country’s economy and credentials in the international realm as a result of the new constitutional requirement, and the role of the courts which have aggressively policed this constitutional commitment. Both internal and external weaknesses can eventually lead to the undermining of certain elements of democracy and good governance that we originally intended to secure.

A. Challenges in Practice: Obstruction to Internal and External Affairs

i. Internal Weaknesses: Ineffective and Unresponsive Administration

The primary objectives of having both horizontal (parliamentary approvals) and vertical checks (direct public participation) are to generate a responsive, transparent and accountable government in the sense that treaties are to be undertaken in accordance with the will of the people and the interests of the country, and not in any particular

\(^{36}\) Benjamin Barber described the concept of strong democracy as a modern form of participatory democracy which rests on the idea of a self-governing community of citizens who are united to express the common goals and in the interest of the community. It is this method that gives rise to the legitimacy of politics. BARBER, supra note 12, at 117.
individuals’ favor. However, the newly designed constitutional requirements for the treaty-making process have frustrated certain democratic goals that the process also intends to secure. Far from improving the quality of responsiveness, these mechanisms can result in the reduction of the administration effectiveness in taking care of the issue at hand or other pressing matters, and in pursuing other valuable treaties that are unquestionable beneficial to the country’s economy and foreign relations.

The new treaty-making process that allows an open-ended list of treaties to be subject to its substantial procedure can divert government’s attention, time, energy and resources away from other critical issues. Although the effort to tackle the vagueness of Section 190 treaties has been made through the requirement of enacting the law that restricts these important categories, the approach does not necessarily provide a safe haven for any new international commitments (which tend to evolve with changing conditions and the demands of the international environment) as long as the Constitutional Court acts as the primary guardian of the treaty determination. Thus, international agreements that bear different titles, but share the nature of the treaties listed in the legislation would still be subject to interpretation. And whether the executive will also retain this interpretive discretion is questionable. These Section 190 treaties are out of the question subject to the detailed treaty-making process which can be divided into two primary stages, prior to entering into negotiations and prior to being bound by the treaties. Both phases require public involvement and parliamentary approvals. With this respect, according to the constitutional requirements, it is not sufficient to make the framework of a treaty available to the public. The government must provide information and conduct public hearings to respond to and to receive public comments. This requirement certainly demands more than merely a passive role of citizens in receiving

information. Pursuant to this understanding, first of all, the government has a positive duty to arrange and facilitate public forums to meet the constitutional obligations.

Secondly, the mandate for the parliament approvals of the treaty frameworks make legislature responsible for keeping an eye on a wide variety of treaties (which will not necessary be restricted by the legislation), which could either result in their paying too much attention while piling up other issues or passing through the contents swiftly and allowing those treaty frameworks to go unattended.38

The reduction of the effectiveness of the Thai government administration is posing two phases of challenges; the current situation in which the government’s resources, time and energy have been heavily invested into the constitutional requirements of the treaty-making process in order to avoid any sort of political backlash, and the future challenge in which the government will become further unresponsive by being tempted to fast-forward their obligations only to satisfy the rules while ignoring the true meaning of the procedure. A wide range of treaties could be potential candidates that mandate the government to provide resources for the public hearings.39 There is then a question of the effectiveness of the public participation mechanism. The quality of this democratic mechanism will be affected as a result of the government’s unmanageable workloads. While government resources will be drained down into the demanding treaty

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38 By way of comparison in the U.S., despite the conviction in the predominant role of Congress in the treaty-making process, most senators agree that every international agreements should not be required to submit for advice and consent since it would be literally impossible to give all of them thoughtful consideration. And because of the large number, many would be of a routine nature which would result in Senate’s lack of attention. John C. Stennis & J. William Fulbright, Senators, Lecture at American Enterprise Institute for Public Policy Research: The Role of Congress in Foreign Policy (July, 1971), in THE ROLE OF CONGRESS IN FOREIGN POLICY, 1971, at 5. See also LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS 58 (1990) (casting doubts on the serious scrutiny by the Senate of the executive agreements that were required to report to Congress under the Case Act). The failure of the legislative supremacy model in the early days brought a change of perception of executive power in America. The overriding problem was known for Congress’ inability to get anything done. MICHAEL RAMSEY, THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS 118 (2007).

process due to the possible open-ended interpretations of the important treaties, public comments and concerns from the hearing which are formed as part of the people’s wills and intellects will run the risk of failing to take part in the final decision. Within this treaty-making framework, there is no guarantee that public hearing will play much role in shaping the treaty content. The deficiency of the existing public participation mechanisms that encompass broad public issues (such as those affecting national budgets, having substantial social, economic impacts or national security) is that these issues do not provide the government enough reason and purpose to be responsive to the public views due to the fact that there are no urgent individual needs to attend to. Thus, the democratic dilemma here does not only include the government’s focus on satisfying its constitutional obligation in one area which causes unresponsiveness or results in delayed responses to other pressing issues, but also its insensitivity to the public comments in that particular area itself.40

ii. External Weakness: The Impact on the Economy and Foreign Relations

Section 190 has been subject to criticism for its substantial burdens that must be borne by the government which has not only caused major disruption in its administration, but also in the pursuit of the country’s foreign diplomacy.41 The increased

40 Another drawback presented by “direct democracy” is the inducement of the citizens’ excessive role in directing how to manage political and economic affairs, which sometimes render the administration impossible to handle the demands and expenses. The situation oftentimes inadvertently results in the staleness (indifference) of the administration due to the State’s budget issue. Direct Democracy, The Tyranny of the Majority, THE ECONOMIST, Dec. 17, 2009, available at http://www.economist.com/world/united-states/displaystory.cfm?story_id=15127600.
41 The Constitution grants the executive branch the power to conclude treaties under the prerogative of the King. The additional treaty-making procedures which require public hearings and a presentment of a treaty framework to the parliament prior to a negotiation may cause major disruption in the government administration. Particularly, given a rapid change in the matter of international relations, several treaties are cooperative and friendly in nature. It tends to rather benefit than hurt the nation. The government should be entrusted with full discretion when concluding such treaty is in accordance with the power originally granted by the Constitution. Rujikej Chumkasorakit, Praden wikrao rang rathatumnoon hang ratchaanachak that: bot banyad kiewkub sonthisanya nai rathatumnoon [Analysis on a referendum: Treaty Clause in the Constitution], 24 (Working Paper, 2007). See also, supra note 39, at 4. (“Section 190 has presented the biggest challenge to the function of the department of negotiation due to the nature of the international transactions within the treaty-making process which requires expediency, secrecy and efficiency of the negotiating authority. The delay caused by the complexity of the current treaty process is also seen as a
uncertainty of whether a treaty in question is subject to the constitutional process has substantially stalled the administration in the conduct of foreign affairs. Given its broad scope of international agreements and the vague time frame of public participation, Section 190 has slowed down the administrative process of various government agencies as they hesitated to pursue international negotiations without several prior consultations for fearing of the violation of the constitutional process had the agreement been cast into Section 190. In fact, not only did these efforts to consult upset the country’s partners to the agreements due to the delay, they also turned out to provide no greater comfort than the government acting on its own when the office of the Juridical Council, which had previously acted as a primary legal counsel of the executive branch by giving advice regarding whether a particular agreement is subject to Section 190 treaty-making process, later declined its role. The deference of its opinion was due to the role of the Constitutional Court as the sole authoritative interpreter under the 2007 Constitution. Thus, despite the amendment of Section 190, paragraph 5 concerning the law on the treaty category determination, there is little doubt that the legislation will solve the main issue which is the control of the Constitutional Court’s interpretation.

This reaction clearly also has a detrimental effect on several beneficial agreements such as Bilateral Air Service Agreements, Bilateral Investment Treaties or the Convention for the Avoidance of Double Taxation which are primarily deemed to promote the national economy, and do not normally have negative consequences. The process of contradiction to the condition of the World Trade Organization membership which requires that the party country make good faith efforts in facilitating free trade…”

42 JUMPA, supra note 10, at 295.
43 Id (providing examples of the occasions that the Office of Juridical Council has declined its role in giving its opinion concerning treaties that may be subject to Section 190 procedure).
44 Id.
45 Bilateral Air Service is an agreement which two nations sign to allow civil aviation between their territories. The agreement normally commits the parties to open their routes, ports and deregulate the size of an airline which tend to benefit the tourism and airlines industries of the countries. Bilateral Investment Treaty (BIT) is a treaty that obligates the parties to guarantee certain rights of foreign investors in a host country. This treaty is deemed to draw and create incentives for foreign capitals and investment. The
these treaties, as well as others that are cooperative in nature, has been inevitably delayed. The country thus faces losing economic opportunities that are contingent upon the entry into force of those treaties. At the same time, many international agreements whose terms are subject to automatic renewal at the end of their enforceable period are made impossible under this new constitutional requirement. This does not only have certain negative economic consequences, but also the impact on the country’s international relations and its credibility. The example is reflected in the constitutional challenge of Japan-Thailand Economic Partnership Agreement (JTEPA) that had set Japan off after their nearly three years of negotiations.46 Whereas the constitutional safeguard in the area of the treaty-making is meant to preserve the common goods, the national interests are also at stake on the other end.

The roles of the courts in vigorously enforcing the constitutional provision are proven to present major obstructions in government administration, and a threat to the country’s established international relations. The erosion of the executive zone took place through their expansive interpretation of treaties that require public hearing and parliamentary approvals (demonstrated in the case of Joint Communiqué between Thailand and Cambodia dated June 18, 2008) as well as approving the public hearing standard (the Japan-Thailand Economic Partnership Agreement-JTEPA).47 The Japan-

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47 Bangkok Pundit, Yellow Shirt Turns on Abhisit, ASIAN CORRESPONDENT, Nov.24, 2010, http://asiancorrespondent.com/42930/yellow-shirts-turn-on-abhisit/ (“finally, someone willing to admit [that] the source of the problem is the court decision in 2008 which applied such a broad interpretation to Section 190”). Cf., Another criticism of the Ultra Vires of the Constitutional Court also came from the case concerning the accession of Thailand to the Bio-Diversity Convention under Section 224 of the Constitution B.E. 2540 in which the Court had decided unconstitutional for lacking parliamentary approvals. The interpretation of the Constitutional Court was felt erroneous by inadvertently expanding the parliamentary role in the treaty making process. Therawat, supra note 28, at 3.
Thailand Economic Partnership Agreement (JTEPA) is the case example that involves the demand on an Administrative Court to determine government’s standard of conduct in the treaty-making process, specifically the holding of a public hearing. Although the Administrative Court declined its jurisdiction, it had done so due to its lack of power on the constitutional matter, and not on the ground that it cannot impose a public hearing standard in the treaty-making process.  

JTEPA, nevertheless, became the first case that sounded the alarm of our foreign relations. The constitutional challenge of the Thai-Japanese trade agreement created tension and resentment among the Japanese negotiators and investors as they felt deceived and dishonored. The outcome of the court’s decision to withhold Joint Communiqué between Thailand and Cambodia also resulted in the severance of Thailand-Cambodia diplomatic relations.

The types of treaties in which public participation and legislative involvement must at least be warranted are thus dependent upon the judiciary interpretation of Section 48. In this case, the plaintiffs representing people from various sectors alleged that their lives had been or would be adversely affected from the conclusion of JTEPA which had not completed the public hearing process. Despite the defendant (Ministry of Foreign Affairs)’s contention that it had assigned the Chulalongkorn University research centre to conduct public hearings 3 days following the cabinet decisions, the plaintiffs claimed that people were not given sufficient opportunities to participate because the hearing was not widely announced and took place for a short period of time. Such conduct shows bad faith of the government when it tries to exclude people from meaningful participation and discussions which, in effect, prevent people from effectively checking the government’s exercise of power. This constitutes “an unlawful act by an administrative agency or State official” within the meaning of Article 9 of the Act on Establishment of Administrative Court and Administrative Court Procedure B.E. 2542 (1999) which gives rise to the Administrative Court jurisdiction. The Administrative Court of First Instance rejected the claims and its decision was affirmed by the Supreme Administrative Court on the ground that the conduct of foreign affairs is conferred by the Constitution of the Kingdom of Thailand, not by any legislation. Whereas Article 9(1) only grants the Administrative Court its jurisdiction over disputes in which government officials act “in a manner inconsistent with the law or the form, process or procedure”, the government’s failure to act in accordance with the constitutional requirements is out of the question falls outside the Administrative Court’s discretion. Affirming that it had no jurisdiction according to Article 9, the Administrative Court did not get to determine whether the public hearing claimed by the Ministry of Foreign Affairs to be meaningfully held meets the “standard” of public participation. Saan Pokklong [The Administrative Court], Mar. 30, 2007, Ruling No. 178/2550 (Thail.), available at http://www.admincourt.go.th/50/s50-0178-o01.pdf.


49 Shortly after Cambodia’s appointment of Mr. Thaksin Shinawatra as economic advisor to Cambodia’s prime minister, each side then recalled its ambassador from each other to signal the official end of their tie. Thomas Fuller, Thailand Recalls its Ambassador to Cambodia, N.Y. TIMES, Nov. 5, 2009, http://www.nytimes.com/2009/11/06/world/asia/06thai.html.
Section 190 of the Thai Constitution has identified categories of the shared “vital interests” (which should be seen as the interest of the country) in the form of different types of international agreements, namely those affecting the Thai territories, its sovereign rights, the laws, national economic or social securities, or generate material commitments in trade and investments of the country. To this effect, it is up to the Constitutional Court to decide what constitutes a treaty, and which one that must undergo the Section 190 treaty-making process. The provision did create a big loophole providing no clear answer to such a question, and “to interpret whether a treaty will have negative effects on the economy and society is subject to each interpreter”. Thus, the process will depend on whether the court will apply an expansive or limited interpretation. The requirement of the legislation enactment to determine Section 190 treaty types may provide a certain restriction on the Court’s interpretation. But the approach will only serve as a temporary remedy as the new meanings of international terms and commitments are meant to expand with an ever changing international environment, and the demands of the international community.

Under the implementation of former Section 190, the case of the Joint Communiqué between Thailand and Cambodia dated June 18, 2008 (concerning the Thai government’s acknowledgment of Cambodia’s enlistment of the Temple of Preah Vihear as a World Heritage site) had been interpreted by the Constitutional Court as a treaty that affects Thailand’s “sovereign rights”, “territories” and has “extensive impacts on national economic or social security”. According to the Constitutional Court’s rationale, the

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51 Supra note 47.
52 Located near the border of Thailand and Cambodia, the Temple of Preah Vihear has long been the subject of dispute concerning its ownership. This is due to complicated history in which the French colonial map mismatched that of the Thai, showing the line deviating from the watershed in the Preah Vihear area while placing the entire temple on the Cambodian side. The International Court of Justice (ICJ) ruled in favour of Cambodia, holding that Cambodia has sovereign right over the Temple of Preah Vihear. Thailand has then made a reservation objecting such decision, but never made an appeal. In addition, the ICJ’s failure to specify territory borderlines over which Cambodia has sovereign right left the dispute unresolved. Temple
content of the Joint Communiqué was a formal recognition by the Thai government of Cambodia’s full sovereign right over the Temple and its surrounding area, which could affect the Thai entitlement to the claim over the Temple territory which has not yet been settled, and to its persistent objection to the International Court of Justice’s ruling in 1962, in the future. The possible loss of the country’s sovereignty over a territory is sufficient to trigger the Section 190 procedural mandate. Such interpretation is of course no longer restricted to “[a] treaty which provides for a change in the Thai territory”, but to include those that may create the “possible loss of sovereignty on a parcel of land”. Although this change is meant to clarify the old term, “in jurisdiction”, it is yet a subject of a battle between the executive who prefers a narrow interpretation and the judiciary who is more willing to apply a broad interpretation to encompass the areas over which the country may have possible sovereign rights. And as a result, under the aggressive role of the judiciary, the new term of Section 190 (“extraterritorial areas over which Thailand has sovereign rights or jurisdiction in accordance therewith or in accordance with international law”) could invite an expansive judiciary interpretation to include any type of treaty that may lead to such effect.

The same issue may also arise by the vague term “extensive social and economic impacts” when there is no standard for the extensiveness. The process of qualifying treaties of course involves the speculation of the impacts. Another core decision rendered by the Constitutional Court was that the Joint Communiqué could create social impacts
by affecting social and economic rights of citizens living in the disputed area as well as the relations among citizens of both countries living side by side.\textsuperscript{56} Remarked by a foreign affairs official, “the Thai-Cambodian Joint Statement signed by then foreign minister Noppadon Pattama and Cambodian Deputy Prime Minister Sok An on June 8, 2008, in support of Phnom Penh’s plan to list Preah Vihear temple as a World Heritage site was a victim of this differing interpretation. The Constitutional Court on July 7 in the same year ruled the statement affected national security and society in general, even though this was not the case”\textsuperscript{57}. Such broad criteria will eventually create all kinds of claims upon treaties “when it does not matter whether the changes under Section 190 are for the worse or for the better and also when many changes can affect the economic or social lives of the people”\textsuperscript{58} in some ways.

The amendment of Section 190 in 2011 was the evidence of these impractical aspects of the treaty process that became obstacles to the implementation of fuller democracy.\textsuperscript{59} Nevertheless, it is questionable whether this minor change can make a whole difference in addressing the underlying problem, which requires balancing the roles of the institutional branches and the public in the treaty process rather than simply making a list of important treaties. The ruling of the Constitutional Court on the Joint Communiqué between Thailand and Cambodia may signify the judiciary role in upholding the participatory rights of the people and constitutional commitments of the

\textsuperscript{56} Saan Rathatumnoon [The Constitutional Court], Jul. 8, 2008, Ruling No. 6-7/2551 p. 24 (Thail), available at http://61.19.241.65/DATA/PDF/2551/A/108/1.PDF. But see, Thugs Templar, THE ECONOMIST, Sept. 24, 2009, available at http://www.economist.com/world/asia/displayStory.cfm?story_id=14506572 (The ruling of the Constitutional Court together with the mob under the People’s Alliance for Democracy (PAD) in fact created great tension among the Thais and between the Thais and the Cambodians which led to the clashes between the Thai and the Cambodian troops causing several lives and the tourist industry. Villagers living in the area were rather disturbed by the arrival of the PAD who “wrongly” claimed the loss of the Thai territory).

\textsuperscript{57} Supra note 47.

\textsuperscript{58} Therawat, supra note 28, at 7.

political branches in the treaty-making context. Unfortunately, the approach had inadvertently encouraged the phenomenon of ineffective administration by the judiciary’s vigorous role which has put many government’s treaty activities on hold.\textsuperscript{60} At the same time, the fear of political backlash which forces the government into holding a public hearing and securing legislature’s approval only to satisfy the requirements is not going to improve its responsiveness to social needs and concerns. At the international level, although the judiciary can invalidate a treaty under the constitutional authority, the country can still face international liability, and will be required to provide some sorts of compensation, pursuant to the Vienna Convention on the Law of Treaties which also operates as customary international law.\textsuperscript{61} Thus, even though the new legislation specifies a list of special treaties for the purpose of Section 190 process, I personally have little doubt that this solution will run into the same problem, which will essentially involve the Court in the final treaty determination. And this can potentially be extended to any new kinds of treaties that emerge after the list has been completed, as the Court remains the sole interpretive authority. To my conclusion, because the mechanism of Section 190 is deemed vital to the maintenance of democracy and good governance, there are thus the issues of the treaty scope, process and the proper roles of the institutional organs and the public that must be addressed and re-evaluated.

Overemphasizing the transparency and accountability of the treaty process may not get us very far down the path of democracy and good governance when the mechanism interferes with other democratic objective. Efforts to uphold certain democratic values can be made at the expense of another. Thus, these challenges do not

\textsuperscript{60}Ministry of Foreign Affairs showed a strong support in the amendment of Section 190 as a means to move stalled on-going negotiation forward. \textit{Supra} note 47.

only present themselves in terms of practicality, but most importantly also in a form of a threat to the democratic principle.

B. Challenge in Principle: Obstacles to Good Governance and Democracy

It must be acknowledged that democracy is committed not only to the process that reflects people’s will, but also the outcomes that secure the people’s will. Democracy therefore is not merely about ensuring accountability and transparency through the process of self-government. It is also about listening, responding to and carrying out people’s voices to serve its purposes. These are also some of the primary characteristics under the principle of good governance, that is, to be responsive and effective in managing public affairs. Assuming that the current means (Section 190) is sufficient to guarantee these qualities in our government is out of the question. Effectiveness in governmental administration which refers to “processes and institutions [that] produce results that meet the needs of society…” has been undermined under the implementation of Section 190 mechanism. Both internal and external challenges have clearly shown how these missing components (responsiveness and effectiveness of the government administration) affect the interest of the people and the country.

There are reasons why responsiveness and effectiveness must form part of our self-governance. Democratic theory such as classicalism, republicanism or liberalism strongly believes in the people’s involvement in the political process based not only on political, but also social values the system of self-governance can secure, protecting communal interest, promoting social harmony or developing individual’s moral

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63 Id. Other than forming as part of “good governance” principle, the effectiveness in the administration has other significance that must not be underestimated or mistaken for a “mere convenience” of the government. This political characteristic provides a foundation for a government to be responsive at national and international levels.
However, the procurement of these values is highly dependent upon the effective engagement and faith of the people in the governing process which requires a responsive and effective administration to accomplish this task. These are the qualities that keep our democratic ideology moving by making sure that people by feeling a sense of belonging want to exercise their sovereign power and count on the system.

Section 190 may arguably satisfy certain elements of democracy and good governance, specifically transparency. However, the current means seems to decrease the odds of affecting the outcome of a policy decision by the public in the area of foreign affairs due to the extensive obligations that have continued to disrupt governmental function. Ironically, the improvement of our democracy has impeded the objectives in itself. For now, the people may enjoy the expansive participatory rights, but in the long run this safety valve can only take effects when a responsive and effective characteristic of the state are present to ensure that the people’s feedback and intentions will form parts of the political decisions, and that state’s policies will be guided by public opinions. Thus, the promotion of democracy and good governance depends on this importation question which is how to secure not just transparency and accountability of a government, but a political environment that builds upon trust and understandings in the community, rather than how to constantly overwhelm the administration with a variety of check mechanisms that will only lead to the impediment of the primary objectives of our Constitution.

V. Conclusion

From the day military and tanks occupied the center of Bangkok in 2006 to the day people roamed the streets and destroyed their home country, Thailand’s efforts to enhance its democracy has been proven to fall short. Deeper than it appears on the surface as a battle between political alliances, the riot has a more significant implication on the

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64 For classicalism, public participation in the decision-making allows individual to be educated, to distinguish his own impulses and desires and to pursue general interests. CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 25 (1970).
question of administration effectiveness and responsiveness to the demands of the rural poor. Poverty, income disparity, poor education and health care cannot be alleviated through simply having a transparent, but responsive and effective administration for attention and resources to be allocated and redistributed to the areas that mostly are in need. Internal weaknesses will continue to be the reason why people do not have faith in the current Constitution and would rather use violence than the Constitution in the exercise of their power. At the same time, effective external responses are as crucial as the domestic ones in the sense that their absence could mean a loss of the country’s credibility, diplomacy and interest upon which the country’s economy has increasingly depended.

There is no question that Thailand through improving the level of public participation and the involvement of the institutional branches in the area of the most affected national interests reflect its vision in the value of democracy and good governance. Section 190 treaty provision is an attempt to embark on the idea of making state affairs a true public one in which the content of the future treaty is accessible to the people and their representatives. Nevertheless, the provision has continued to pose major obstacles to government performance. To this end, this dissertation will propose a treaty model which focuses on the adjustment of the three primary areas within Section 190, namely i) the treaty scope – concerning the types of treaties that must be subject to this special process, ii) the treaty process – concerning the level of public participation and legislative approval in the process, and iii) the proper role of the institutional branches – concerning the competence of the executive in the determination of the special treaties, and the manners of the legislature and judiciary involvements throughout the treaty-making process. The proposal to amend Section 190 therefore requires the re-evaluation of the public participation scope and the consideration of the executive’s flexibility in the
exercise of its foreign affairs power in order to maintain proper government function and a guarantee of fuller democracy.
Chapter II: The Political Character of Thailand

I. Introduction

It has been said that Thailand is one of a few countries in the world that has the honor of being the country with the largest number of Constitutions, which unfortunately provides little contribution to the quality of the country’s socio-political life. Since its first creation in 1932, the Thai Constitution had been seen as a lifeless instrument representing the symbol of democracy rather than an enforceable principle. A series of these written Constitutions had been manipulated and shaped by the socio-political interests of various factions of the ruling elites to fit their personal agenda. Constitutions merely served as instruments written to legitimize, yet to preserve the status of the ruling elites rather than the people’s fundamental interests. Thus, transparency and accountability remained “rare commodities” in the public administration.

During the periods of the political struggles, the efforts to overcome these anti-democratic elements that rampaged among the ruling elites gave rise to the promulgation of the 1997, and eventually to the 2007 Constitutions, which brought substantial changes to the political and legal landscapes of Thailand. The 1997 Constitution has provided a key bench mark in a reform process. The notion of the separation of powers was seriously adopted to promote the ability of other political branches to check on the executive’s activities. Several mechanisms were established to restrict bureaucratic powers, to better protect individual liberties, and most important of all to improve the people’s ability to directly scrutinize government conduct. The focus of the modern Thai Constitution is thus centered on enhancing government’s accountability and transparency, which are also the means of protecting civil liberties against a tyrannical form of government. The principle of the separation of powers has never been better followed since the adoption of the 1997 Constitution, especially when this legal instrument has officially established a
truly independent judiciary body, known as the Constitutional Court, to rule on the constitutionality of the other political departments’ activities. This practice has been further emphasized in the 2007 Constitution, which does not only enjoin substantial scrutiny of the legislature and the judiciary upon the executive, but also empowers the people to keep an eye on their government.

With this respect, this chapter will briefly introduce the development of Thailand’s political character since its official adoption of the first Constitution, its struggles to fit Western ideology into the traditional Thai governing system that has long embraced the monarchial institution, its readjustment throughout the reform periods (Section II), followed by a summary of its institutional functions and powers under the current Constitution (Section III). This chapter is therefore designed to provide the basic understandings of the Thai political culture and the current political structure, which are indispensable components in the analysis to seek a reform that can be a better suit for its social and political environment.

II. The Evolution of the Thai Politics: From the Struggle for Power to the Struggle for the People

Since 1932, a series of Thai Constitutions had been known to promote the steady expansion of the Thai ruling class as well as to preserve their status. The primary functions of the early versions of the Thai Constitutions were to legitimize the ruling class’ power, to earn recognition from western nations, and to serve as political machinery against their main rivalry in politics.¹ Thus during this transitional period,

¹ For instance, during the transitional period, an alliance between the National Assembly and the executive was created. The composition of members of the National Assembly which came from both electoral process and appointments had facilitated a political party to easily manipulate, manage and control the Assembly. KOBKUA SUWANNATHAT-PIAN, KINGS, COUNTRY AND CONSTITUTIONS: THAILAND POLITICAL DEVELOPMENT 1932-2000 31-38 (2003). FRED W. RIGG, THAILAND: THE MODERNIZATION OF A BUREAUCRATIC POLIT 152-153 (1966).
although it is true that political powers were retrieved from the monarch, they were rather passed onto members of bureaucracy both civilian and military, and not onto the people.¹

Under the interim Constitution of 1932, all powers once exercised by the monarch under the traditional system of absolutism then had to be returned to the people, and exercised through the Assembly of the People Representatives (legislature), the State Council (executive) and the courts (judiciary).² Nevertheless, in practice, these powers were instead put in the hand of the new ruling elites. Rights and duties of the people specified in the permanent 1932 Constitution were limitedly exercised solely through the elections of representatives.³ Technically speaking, the sovereign rights of the people were bestowed upon those who were in control of the Assembly. The power to carry out policies rested within the political ruling party and not with the elected representative body while media censorship was prevalent.⁴

The 1946 Constitution brought another major change to the political structure by introducing bicameral Parliament consisting of the House of Representatives and the Senate of which members are to be elected.⁵ Nevertheless, the government assured its majority control in Parliament through the interim method of election which not only did it allow the candidates to vote themselves into the Senate, but also laid down the

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¹ This political culture was attributed from the fact that the 1932 movement was primarily led by a group of the few educated who had the privilege to learn and import the ideology from western countries, rather than those of the middle class, industrial workers or publicly supported organizations which is distinguishable from western experiences. RIGG, supra note 1, at 148-149.
² CONST. (1932), §2 (Thail.) (repealed 1946). It has been acknowledged that the very first version (provisional Constitution of 1932) was a mixture between western parliamentary system and Soviet Doctrines in which political authority was to rest with a national assembly, and a People’s Committee was to be elected by the assembly as its executive while this central executive committee had responsibility for appointing and supervising the People’s Commissars who carried administrative responsibilities. Id. at 56.
³ SUWANNATHAT-PLAN, supra note 1, at 36. It was also clear that the promoters of the 1932 Constitution hoped to maintain their control over the government by means of their majority in the Council. Id. at 91 (explaining the transformation of monarchy during the modernization period which basically transferred powers from the absolute monarchy to office-holding, new ruling elites).
⁴ Benjamin Batson, Siam’s political future Documents from the End of the Absolute Monarchy 101-102 Department of Asian Studies, Cornell University, Data Paper no. 26, 1974 (citing King’s Prajadhipok’s abdication statement expressing his concern on the incompatibility of the government administration with individual freedoms and principles of justice).
⁵ See CONST. (1946), §17 (Thail.) (repealed 1947).
qualifications of voters and candidates in such a manner to provide wider participation of its supporters.\textsuperscript{7} As history repeated itself, the power struggles among the ruling elites continued. As a result, this Constitution was short-lived, and within a year later was abrogated and replaced by the 1947 Provisional Constitution under the new military leadership.\textsuperscript{8}

The efforts to improve the democratic aspect of the Constitution were, however, at least seen in the 1949 Constitution which created a control mechanism of the legislature by way of voting no confidence in the Prime Minister and his Cabinet, as well as expanding more rights and duties of the Thai people than any other previous versions.\textsuperscript{9} The Constitution was easily passed by majority votes in the Parliament.\textsuperscript{10} But again, the 1949 Constitution was not so welcome among those “who saw the Charter as an obstacle to their effective participation in national affairs”\textsuperscript{11} and who felt that their interests were being taken away. The opposition from the factions of the ruling class, therefore, became a strong force that sealed the fate of the 1949 Constitution.

The promulgation of the 1952 Constitution was then understood to provide a solid political ground for the military junta government who was able to nominate and select most of the appointed members of the Assembly.\textsuperscript{12} Through this controlling method, the position of the government became invincible, and nearly authoritarian with weak opposition in Parliament. Under the cloak of constitutionality, the justification of the then government was further supported by the belief that common people were not sufficiently knowledgeable, and thus incapable of making any direct political decisions without their

\textsuperscript{7} SUWANNATHAT-PIAN, supra note 1, at 45.
\textsuperscript{8} Id. at 48. See also http://www.parliament.go.th/parcy/sapa_db/cons.php (listing a series of the Thai constitutions).
\textsuperscript{9} Memorandum Conversation between Prime Minister Phibun and Ambassador Edwin Stanton (Mar. 1, 1949) RG 59 892.01/3-149.
\textsuperscript{10} SUWANNATHAT-PIAN, supra note 1, at 50.
\textsuperscript{11} Id. at 51.
\textsuperscript{12} Id. at 46.
representatives. These political responsibilities thus fell upon the so-called educated and well-informed, in other words, the ruling elites, to exercise such political power on behalf of the people.

The tradition of the monopolization of power by the government continued from 1950s-1970s under the “Paw Khun” style of democracy (despotic paternalism) which bequeathed the supreme power in the executive who supposedly acted as the guardian of the people as well as their interests. Under this patriarchal system, there certainly is a presumption that the leader must adhere to the virtue and the Buddhist principles reigning with kindness and justice in the best interest of the people. The system of the separation of powers was not only seen as unnecessary, but also antagonistic to the sacred teachings of Buddhism of unity and affection. Since the existence of opposition parties was perceived as a threat toward national harmonization, there was a complete absence of “checks and balance” mechanism in the political process. The 1968 Constitution was also described as the document of military leadership. As easily predicted, the system, although inspired by strict moral principles in the hope to provide the nation with social and political stability, did not make very far when such system only tempted the leader to exploit their monopolistic position. This traditional Thai style democracy eventually got brought down by widespread resentment among the intellectuals, followed by a student...
uprising in 1973, which led Thailand into the next phase known as the period of “limited democracy”.

Between 1970s and 1990s, Thai democracy was still far from perfect with heavy influence of military-style administration. The emergence of the new generation together with the growth of a politically aware community made it harder for the extremist regime to survive. As a result, a compromise of the ruling class to adopt western-based democracy through the re-establishment of parliamentary system, elections and political parties was deemed necessary. Nevertheless, such system still allowed the bureaucrats, technocrats and military to actively participate, and pursue their wealth and interests under the disguise of democracy.\textsuperscript{15} The senate body that was entirely appointed by a “ruling clique” neither in anyway would represent the interests of the people nor served as a counter force to the power exercised by the executive.

Despite the existence of the Constitution, it was quite clear that its function was to legitimize the political system, and to facilitate the exploitation of power by a certain group of people. The term “limited democracy”, thus, basically suggested a less accountable system in the decision-making process in which the role of the representatives is secondary to the appointed in running the country.\textsuperscript{16} In sum, this version of Thai democracy was proven to be no different than the previous “Paw Khun” style as the legislature and the executive were working nearly as the same body. The only differences were the power that changed hands and the governing style that was transformed on its face. The power was simply transferred to the new emerging elites “who literally bought their way into Parliament”\textsuperscript{17} continuing the cycle of corruption. The

\textsuperscript{15} The Constitution of 1978, for instance, was written to allow the entire senate body to be appointed while government officials and military officers could simultaneously held their senator position. \textsc{const.} 1978, Ch. 6, §84 (Thail.) (repealed 1991).
\textsuperscript{16} \textsc{suwannathat-piar}, \textit{supra} note 1, at 17.
\textsuperscript{17} Id. at 16.
1991 Coup of course did not end this vicious cycle, but only to begin another round of abuse to be pursued by a different group, yet again under the military leadership.

The arrival of the 1997 Constitution was meant to overcome past political misconduct and to advance the country’s democratic development by focusing primarily on improving the people’s rights and freedoms and the qualities of the political institutions. The Constitution was designed as the “People Constitution” by incorporating stronger checks directly from the people in addition to that of the conventional parliamentary system, requiring a fully elected Senate body, establishing a party list system, creating independent “watchdog” organizations, and better securing the people’s political and civil rights.\(^\text{18}\) For instance, Section 121 required the entire two hundred senate members to be elected by the people from seventy-six provinces. Section 214 gave the people the right to a referendum on any issues that may affect national or public interests. The Constitutional Court, the National Counter Corruption Commission (NCCC), and the Election Commission (EC) were created by the Constitution as additional control mechanisms.\(^\text{19}\) These independent agencies are empowered to conduct an investigation, dissolve the political party or remove the person from his office. These far-reaching efforts were also seen as novel to Thailand’s judicial reform since Thailand had not had a legal tradition that completely separated the judiciary from the executive branch, prior to the 1997 Constitution.

The 2007 Constitution therefore built upon the 1997 constitutional framework and its fundamental principle that had sought to correct its weakness by securing the institutional foundations for a more stable polity which ironically resulted in “electoral

\(^{18}\) The 1997 Constitution was regarded as the People’s Constitution for the fact that it was the first time in history that the drafters directly engaged with the public. Regional seminars and questionnaires were used extensively to gauge public opinion on political reform seeking to address the civil society’s interest. Erik Martinez Kuhonta, *The Paradox of Thailand’s 1997 People’s Constitution*, XLVIII ASIAN SURVEY 373, 374-378 (2008).

\(^{19}\) See CONST. (1997), Ch. 10, (Thail.) (repealed 2006) (providing independent organizations for the scrutiny of state powers).
Thus, one of the key reforms undertaken under the 1997 Constitution to ensure greater governmental stability became the target at which the 2007 version aimed to break in order to improve the ability of the opposition to censure executive power. Several aspects concerning the reconstruction of political institutions include, for instance, the reduction of the number of the parliamentary members’ votes to launch censure motions against a prime minister and his cabinet, the composition of appointed senators from a special ad hoc panel, the selection of the Constitutional judges entirely by the judiciary, and making the public as the forth branch of government by providing ample opportunities for their political participation. These mechanisms are clearly designed to provide the people a better control over the executive’s activities, including its authority in the realm of foreign affairs. The arrangement of the current political structure will be elaborated in the following section.

It is indisputable that the primary objective of the 2007 Constitution is to address the past mistakes that had allowed corruption and the absence of the true protective mechanism of the people’s life and liberties to shape our democracy. Groups of the privilege had been fed, empowered and expanded through the exploitation of “their constitutions”. It is quite clear that the current Constitution is fully aware of this bitter history. But the new challenge is yet to come. Although countering the executive power

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20 The system of strong executive was created through the creation of a party list coupled with a five percent threshold level of single-member districts, and the ninety-day rule were all meant to strengthen institutions and government stability. The effect of the five percent threshold had effectively increased the proportion of the dominant party’s seats while keeping out small parties that could potentially provide the opposition making it harder to launch censure debate which requires at least two-fifths of the members of both Houses. See Kuhonta, supra note 18, at 375 n.4 (“A five percent threshold means that a party must receive at least five percent of total votes in order to be allotted seats in Parliament. A single-member district is one where only one seat is contested per district, as opposed to a multi-member district where several seats may be contested. The ninety-day rule is a rule that stipulates that a member of Parliament (MP) has to be part of a political party for at least 90 days before registration for the next election.”).

21 The strategy was intended to correct the failure in the 1997 version, although entailing the entire Senate body to be fully elected, that could not escape the influence of the executive, and inevitably became political machinery for the dominant political party at that time. It has been reported that most senators that were up for running the election and won the election had close tie with Thai Rak Thai, the leading party, which as a result failed miserably in acting as an impartial body to check on the lower House. Id. at 384.

is the rule of thumb to keep democracy alive, we still have to keep in mind that this rule cannot be overly followed in such a way that it would hamper the government’s effective administration, and eventually turn democracy against us. Seeking balance in the system is always a challenge. However, the continuing efforts in search for a better answer are a crucial part of the legal and political evolution, and the key to the new development of “democracy”.

III. Political Structure under the 2007 Constitution

Thailand had officially adopted the system of constitutional monarchy on June 24, 1932 (B.E. 2475) after its long tradition of absolutism by declaring the Constitution as the supreme law of the land while the King remains the symbol and the national identity of the country.22 Prior to this period, Thailand possessed neither a legislature nor an executive, as all political powers were vested within the monarch. This tradition had been the heritage of the Sukhothai Kingdom in the 12th century. Thus, the draft Constitution of 1932 signed by King Prajadhipok, created Thailand’s first system of separation of powers, a single House legislature (People’s Assembly) with seventy appointed members. Since the period of the first Constitution that brought Thailand the new political character, there are a total of eighteen Constitutions partaking in the democratization process for the past eighty years.23

Under the governance of constitutional monarchy, Thailand has followed the principle of the separation of powers by having the Constitution prescribe functions and powers to three institutional organs, namely the legislature, the executive and the


23 This is the number of the Thai Constitutions that are originally drafted and passed either as provisional or permanent Constitutions.
judiciary. The Legislature is bicameral, with a fully-elected House of Representatives and a partially-elected Senate. The Executive has the King as the chief of state and the prime minister as the head of government. The Judiciary is composed of the Constitutional Court, the Courts of Justice, the Administrative Courts and the Military Courts. The primary responsibilities of these three departments were roughly prescribed under the first Constitution, which had slowly evolved into a more sophisticated and accountable model as citizens’ participatory roles have been increased in the political process making them a potential “fourth branch” of government. Such a progressive movement is reflected in the differences between the very first version in which the legislature is consisted of only the House of Representatives with limited functions and the later ones that have guaranteed greater citizens’ rights and freedoms as well as their abilities to scrutinize government’s conducts. The establishment of the Constitutional Court in 1998 also affirmed the effort of the political reforms to enhance the basic rights and freedom of the Thai people.

A. The Public (Direct Participatory Roles)

Since the promulgation of the “People Constitution” (the 1997 Constitution), there has been a drastic change in principle that embraces the sovereign right of the people. The 1997 and 2007 Constitutions both replaced “the sovereign power comes from the Thai people” of the 1991 version with “the sovereign power belongs to the Thai people” to further emphasize the inviolability of the people’s fundamental rights and

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24 The turning point of the Thai Constitution was said to be after World War II, where a new Constitution (1946) was promulgated. The Constitution was considered the most democratic at that time since it had created for the first time a bicameral legislature consisting of the Senate and the House of Representatives. Also for the first and last time the constitution called for a fully elected Senate. JUMPA, supra note 22, at 5.

25 Id. at 6-7.

26 CONST. (2007), Ch. 5, §87 (Thail.) (providing that state policies, in principle, shall be pursued in a manner that promotes and lends support to public participation by taking into consideration public discussion in the determination of state policies and plans for economic and social development at both national and local levels).
liberties by the state,\textsuperscript{27} which is also dedicated by the entire section under Chapter III of the 2007 Constitution.

To ensure the implementation of this fundamental principle in the primary stage, rights and liberties in connection with information and complaints, and in connection with assembly and association specified in Part 10 and 11 within Chapter III guarantee at least basic civic roles in political participation.\textsuperscript{28} These are, for instance, the rights to acquire and to have access to information in possession of government agencies, the right to receive explanations of the on-going activities, the right to express his or her opinions in the concerned project, or the right to peacefully form an association to convey their political will. These freedoms are valuable in the sense that they can be exercised simply through the people’s initiation without support by the state in the first place.

The notion of “rule by the people” has been advanced by the incorporation of direct public participation (in the political process) into the directive principles of state policies stipulated under Part 10, Chapter V of the current Constitution. The section expressly required the state to promote direct participation by the people in several areas of state affairs such as policies and plans for economic and social development at both national and local levels, the provision of public services, and most importantly the scrutiny of the exercise of state powers at all levels.\textsuperscript{29} New government control mechanisms have been added to improve the ability of the people to keep an eye on their

\textsuperscript{27} CONSTITUTION DRAFTING ASSEMBLY, LEGISLATIVE HISTORY OF THE THAI CONSTITUTION 2 (2007), available at http://www.nesac.go.th/library/Main_highlight/pdf/cons_book2550.pdf. See also CONST. (2007), Ch. 3 (Thail.) (guaranteeing equality, personal rights and liberties, rights in the administration of justice, rights in property, rights and liberties in occupation, liberties in expression of persons and mass media, rights and liberties in education, rights to public health services and welfare from the state, rights in connection with information and complaints, liberties in assembly and association, community rights and right to protect the Constitution).

\textsuperscript{28} These rights and liberties are subject to limitations where the disclosure of the information will affect the security of State, public safety or other individuals’ interests or unless there is a law enacted for securing public order “during the time when the country is in state of war, or when a state of emergency or martial law is declared”. CONST. (2007), Ch. 3 §56, 63 (Thail.). It should also be noted that the limitation of the disclosure of public information is narrow in the sense that only those that “shall” affect the state security, public order or individual interests can be protected. Thus, the possibility that certain information might have such consequences will rule out the privacy of the information.

\textsuperscript{29} JUMPA, supra note 22, at 180.
government, and to intervene in its conduct when it fails to act in accordance with the rule of law. Governmental decisions are also required to seek public consultation under certain circumstance.³⁰

To ensure the exercise of state powers in accordance with this principle, the Constitution provides direct channels for the public to actively engage in political decisions. Pursuant to Chapter VII (Direct Political Participation by the People), Thai people are guaranteed the right to petition the proposal of a bill to the National Assembly, the right to lodge a complaint to remove the persons from office, and the right to a referendum where the matter may affect “national” or “public interest” or is required by law.³¹ The Constitution requires only 10,000 eligible voters to propose a bill in Parliament whereas only 20,000 eligible voters can launch an impeachment motion against a political officeholder.³² The required small number of participants is to facilitate the participatory process, and to overcome the common issue of lacking sufficient supporters which can disqualify the public initiative. The right of the people to a referendum in national policy decisions, on the other hand, is not guaranteed by the number of voters’ participation, but rather can be exercised through either the discretion of the executive or legislation. Such a provision also has a strong democratic implication in the sense that a referendum could serve as a final word for a policy decision, and not just an advisory opinion.³³

The power of the mandatory public consultation can also render certain acts of the executive unconstitutional. A clear example is demonstrated in the treaty-making clause (Section 190) that explicitly requires a public hearing prior to the executive’s entering

³⁰ See CONST. (2007), Ch. 3 §66, Ch. 7 §165, Ch. 9 §190 (Thail.).
³¹ See Chapter I, Section III, A (i).
³² CONST. (2007), Ch. 7 §163-164 (Thail.). JUMPA, supra note 22, at 251.
³³ Unlike the 1997 version which limits the status of the referendum to advisory opinion, this is another distinctive feature carried under the 2007 Constitution that allows the result of the referendum to determine the policy decision. It nevertheless depends entirely on the executive whether to adopt the recommendation of the people. JUMPA, supra note 22, at 260-261.
into a negotiation of “special treaties” (mentioned in Chapter I). A failure to conduct a public hearing in such a circumstance provides a legal basis for the executive to be challenged in the Constitutional Court rendering the particular treaty void, and the government liable. However, the requirement of public consultation in the treaty-making context does not always give the public the control over treaty contents since the executive still retains its discretion in adopting the people’s suggestions. But it can still be an effective means to limit governmental authority through this power sharing procedure which is to remind us that the “sovereign power belongs to the people”.

The effectiveness of the extensive public involvement in political affairs to ensure transparency in governmental administration is unquestionable. However, its effectiveness to ensure government’s accountability and responsiveness may not be entirely clear. As mentioned, the constitutional duty of government generally does not go beyond providing resources for public participation. And for the government to give serious thoughts to the public inputs is outside the constitutional mandate. The government’s careful consideration of public opinion is another question that requires us to examine further to ensure the effective implementation of this democratic mechanism, and is to be addressed in Chapter III.

**B. The Legislature**

Under the Constitution of 2007, the legislature is known as the National Assembly consisting of two chambers; namely the Senate (the Upper House) and the House of Representatives (the Lower House) whose members cannot simultaneously assume both positions.\(^3^4\) The House of Representatives has 480 members, 400 of whom are directly elected from constituent districts and the remainder drawn proportionally

\(^3^4\) **Constitution of Thailand (2007), Ch. 6 §88(Thail.).**
from party lists. The Senate is a non-partisan body with 150 members, 76 of whom are directly elected (one per province). The remaining 74 are appointed by a panel comprised of judges and senior independent officials from a list of candidates compiled by the Election Commission by taking into consideration equality and fairness of persons represented from various sectors as well as those from the socially underprivileged. The candidates must also demonstrate the knowledge, expertise or experience suitable to the duty of senators.

i. Accountability

In addition to the power of the judiciary in the appointment of the Senate body, the legislature can face accountability through the power of the prime minister (executive) to dissolve the House of Representatives for a new election under Section 108 and the power of the Constitutional Court (judiciary) to remove a person’s membership of the House of Representatives under Section 106 and the Senate under Section 119 respectively. In addition, pursuant to Section 91, either the members themselves of both Houses or an independent constitutional agency such as the Election Commission of not less than one-tenth of the entire number may lodge a complaint with the House President in the removal of the other member, which is to be deferred to the final decision of the Constitutional Court.

ii. Roles and Functions

The Parliament or the National Assembly is the law-making arm of the government with the primary responsibility to enact organic laws and legislation of the country. The legislative branch of government (National Assembly) consists of the two

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35 The Constitution of 2007 has reduced the number of the members of the House from 500 to 480. In addition, in the event that results in members of the House of Representatives being less than four hundred and eighty in number but being not less than ninety five percent of the total number of members of the House of Representatives, it shall be deemed that members in such number duly form the House of Representatives. *Id.*, Ch. 6 §93.
36 *Id.*, Ch. 6 §111.
37 *Id.*, Ch. 6 §113.
legislative bodies (the House of Representatives and the Senate), each of which has its own responsibilities. Their primary law-making duty is enumerated in Chapter VI, Part 7 of the 2007 Constitution. The National Assembly is also charged with functions to scrutinize and control the government administration, to approve matters of major concerns, and to appoint or remove government officials of the Constitution. These responsibilities go along with the principle of “checks and balances” to ensure that government acts transparently and accountably in accordance with the national policy and the people’s interest.

The increased parliamentary role in the political decision-making process has become a key element to improving the democratic character of the Thai Constitution. Typically, the parliament’s common duties are to provide approvals for matters of national interests, namely the country’s budget and spending, the government’s decision to declare war and to make treaties. Within the current Constitution, the scope of some of these common duties have been broadened through redefining what it means to be “matters of major importance”, particularly in the treaty-making area. The addition of the special categories of treaties that must be subject to the new treaty-making mechanism pursuant to Section 190 was the product of this meaning expansion.

The traditional role of the parliament in the treaty-making process had been deemed supplementary as ones being called upon to approve treaties in limited cases. The structure of the executive’s treaty power can be viewed as a negative list approach in

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38 Id., Ch. 6 §142-150. The procedure of the enactment of legislation can be initiated by the Council of Ministers, the members of the House of Representatives, the Court, or the public (not less than 10,000 of the eligible voters). The proposed bill must first be submitted to the House of Representatives for debate, amendment and vote. After it has been approved by the House of Representatives, the bill is then forwarded to the Senate. If the bill is disapproved, the amended bill will be withheld and returned to the House of Representatives for further consideration. The bill proceeds to the next stage once the Senate approves it. After the bill has been approved by both houses, the prime minister then presents it to the King for his assent (signature) which shall come into force upon its publication in Government Gazette.

39 For detailed roles and functions of the Parliament, see http://www.parliament.go.th/main01.php

which plenary power in the making of treaties is vested in the executive unless stipulated in the exceptions under the Constitution. This tradition has continued since the very first Constitution of 1932 (B.E. 2475) of which Section 54 required that any treaty providing for changes in the Thai territories or requiring the enactment of an Act for its implementation must be approved by the House of Representatives. A series of the Thai Constitutions have demonstrated this traditional approach as follows.41

Constitution of 1946 (B.E. 2489), Section 76 provides that “any treaty providing for changes in the Thai territories or requiring the enactment of an Act for its implementation must be approved by the National Assembly”.

Constitution of 1949 (B.E. 2492), Section 154 provides that “any treaty providing for changes in the Thai territories or requiring the enactment of an Act for its implementation must be approved by the National Assembly”

Constitution of 1968 (B.E. 2511), Section 150 provides that “any treaty providing for changes in the Thai territories or requiring the enactment of an Act for its implementation must be approved by the National Assembly”

Constitution of 1974 (B.E. 2517), Section 195 provides that “any treaty providing for changes in the Thai territories or extraterritorial areas over which Thailand has sovereign rights, or requiring the enactment of an Act for its implementation, or treaty of military alliance must be approved by the National Assembly”

Constitution of 1978 (B.E. 2521), Section 162 provides that “any treaty providing for changes in the Thai territories or extraterritorial areas over which Thailand has sovereign

Constitution of 1991 (B.E. 2534), Section 178 provides that “any treaty providing for changes in the Thai territories or extraterritorial areas over which Thailand has sovereign rights, or requiring the enactment of an Act for its implementation must be approved by the National Assembly”

Constitution of 1997 (B.E. 2540), Section 224 provides that “any treaty providing for changes in the Thai territories or extraterritorial areas over which Thailand has sovereign rights, or requiring the enactment of an Act for its implementation must be approved by the National Assembly”

Not until the Constitution of 2007 (B.E. 2550) had substantial changes been made to the participatory role of the parliament and the public in the treaty process. As presented in Chapter I, the new requirement of the participation from both Houses before and after a treaty negotiation process, although aiming at strengthening the legislative function (as a scrutinizer who represents the people’s interests), poses a new set of democratic challenges. The balance of the legislative involvement in the treaty-making process must be sought and maintained without compromising other democratic values to ensure the practicality and the effectiveness in the administration of the executive and the function of the legislature itself.

C. The Executive

The Executive is composed of the King serving as the chief of state, the Prime Minister as the head of government, and the Council of Ministers as the cabinet. Pursuant to Chapter 9 of the 2007 Constitution, the prime minister is elected from among the members of the House of Representatives following national elections for the House of
The leader of the party positioned to organize a majority coalition generally becomes the prime minister by the King’s appointment (for formality), who also appoints no more than thirty-five other ministers to constitute the Council of Ministers. The prime minister term is also limited to two four-year.

i. Accountability

The executive is directly accountable to the Parliament. Pursuant to Section 176, upon coming into power, the Cabinet must state its policies and explain its operations to the National Assembly within fifteen days following the date it takes office in accordance with the directive principles of fundamental State policies under Section 75. Despite the restriction on passing the no confidence vote by the National Assembly during this early process, the Constitution did state that the prime minister and each minister must be individually and collectively responsible to the National Assembly for the policies they had delivered, which can subject them to a later challenge. Thus, the “ministership” may be terminated under the circumstances in which members of the House of Representatives pass a vote of no confidence pursuant to Section 158 and 159 by a simple majority vote or three-fifth of the members of the Senate passing a resolution for the removal of the minister in question.

During the periods of the massive political reforms, whether or not members of the executive body can continue to hold their offices can also be subject to public

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42 CONST. (2007), Ch. 9 §171 (Thail.) (“The Prime Minister must be a member of the House of Representatives appointed under section 172. The President of the House of Representatives shall countersign the Royal Command appointing the Prime Minister”).

43 Id., See also JUMPA, supra note 22, at 273.

44 The Constitution of 2007 added the new rule which limits the term of the prime minister to two consecutive terms or eight years designed to eliminate the concentration of power. Constitution Drafting Committee, “Sarasamkan kong rangrathatummoon chabab mai B.E. 2540,” translated in THE SUBSTANCE OF THE DRAFT OF THE NEW CONSTITUTION 128 (2007).

45 Nevertheless, no vote of confidence can be passed since this process is intended for government to prepare plans for the administration of the State affairs for the purpose of determining guidance on the discharge of official duties for each year in accordance with section 76. CONST. (2007), Ch. 9 §176 (Thail.).

46 There are, in fact, other causes for the termination of the ministership such as death, resignation or criminal conviction. What is mentioned here is the termination primarily caused by the direct accountability of the executive to the legislature.
approval since the people is endowed with the right to lodge a complaint to remove the persons from office. Under the 2007 Constitution, only 20,000 eligible voters are required in order to launch an impeachment motion against a political officeholder.47

ii. Roles and Functions

Within the executive body, the Monarch serves as the symbol of the country, and has no actual role in politics. The primary roles of the King is to approve or disapprove bills adopted by the Parliament (the National Assembly),48 and to appoint the prime minister and the cabinet as a matter of formality. Bills passed by both Houses of Representatives and the Senate can only become law upon approval of the bill by the King. Bills do not become effective as laws without the approval of the King, unless later re-affirmed, and ratified by the Parliament.49

The Prime Minister is the Head of Government whose primary responsibilities are to administer all government agencies except the courts and the legislative bodies. The Council of Ministers or the Cabinet is in charge of all the day-to-day government activities, except those of the Parliament and the Courts. The Cabinet sets governmental policy and goals. The individual ministers and deputy ministers will carry out those policies and goals within their own designated ministries. The individual ministers head up their respective departments by providing policy direction to the permanent officials who, in turn, give direction to the various supervisors and other leaders within their department. In addition, all ministers and deputy ministers sit as members of the Council of Ministries, which normally meets once a week to establish government policy on any

47 CONST. (2007), Ch. 7 §163-164 (Thail.).
48 Id., Ch. 6 §150.
49 The bill must be presented to the King for his approval. If the King disapproves a bill as a proposed law, the bill is returned to the Parliament to consider the King’s objections. If the parliament nonetheless approves the law again, by at least a two-third vote of both houses of the parliament, the bill is returned to the King for reconsideration. If the King still declines to sign the bill into a law, the Prime Minister is authorized to promulgate the bill as a law by publishing it in the Government Gazette, the official newspaper of the Government equivalent to the King’s assent. Id., §151.
issues requiring government attention. The Council of Ministries has the power to submit urgent legislation (Emergency Decree) to the King for immediate implementation by Royal Decree, to be followed by the submission for the consideration of the Parliament within three days.\textsuperscript{50} Once such a proposal has been adopted by Royal Decree, it is the law of Thailand unless overturned by an action of the Parliament. The Council of Ministers also prepares and proposes the country’s budget spending to the Parliament.\textsuperscript{51}

Being the constitutional monarchy, the executive powers are, in theory, the prerogative of the King. These rights include the power to issue an Emergency Decree (Section 187), to declare the martial law (Section 188), to declare war (Section 189), and to conclude treaties with other nations and international organizations (Section 190). These functions, in practice, are within the primary responsibility of the Cabinet, some of which are directly accountable to the Parliament such as the power to declare war requiring two-thirds votes of the members of both Houses to give the approval, and the power to conclude treaties involving both substantial parliamentary and public consultations in the process.

The 2007 Constitution brought a drastic change to the relationship between the political branches and the public, especially in the treaty-making realm. Pursuant to Section 190, the power to make certain treaties is no longer exclusive to the executive. The greater participation of the legislature and the public are deemed necessary, and required for the important treaties to take effects.\textsuperscript{52} The requirements of an initial public hearing as well as parliamentary approvals prior and after the treaty negotiation, albeit

\textsuperscript{50} JUMPA, \textit{supra} note 22, at 176.
\textsuperscript{51} Id. at 264.
\textsuperscript{52} Prior to undertaking a treaty negotiation of any treaty specified under paragraph two,

\begin{enumerate}
\item The Council of Ministers shall provide information and cause to be conducted public hearings, and shall give the National Assembly explanations on such treaty.
\item For this purpose, the Council of Ministers shall submit to the National Assembly a framework for negotiations for approval.
\end{enumerate}

When the treaty under paragraph two has been signed, the Council of Minister shall, prior to the declaration of intention to be bound thereby, make details thereof publicly accessible… Const. (2007), Ch. 9 §190, (Thail.) (amended 2011).
improving the transparency of government administration in the treaty-making process, 
have been cast doubts in terms of its practicality and the effectiveness in the 
implementation of democracy and good governance. Controlling executive activity does 
not necessarily mean reducing its capability to carry out an effective administration. This 
rationale is something that the new mechanism must take into consideration since the 
quality of the executive function also plays a vital role in supporting the democratic 
characteristic of the public administration.

D. The Judiciary

Blending the principles of traditional Thai and Western laws, Thailand's judicial 
system is composed of the Constitutional Court, the Courts of Justice, the Administrative 
Courts and the Military Courts. The new court system which guarantees greater 
independence from political influence by transferring powers to administer all courts 
away from the executive branch to the judiciary has been established under the 2007 
Constitution.53 Nevertheless, all judges are appointed by the King. And the King’s 
appointments to the Constitutional Court are made upon the advice of the Senate in which 
the nine Constitutional Court judges are drawn from the Supreme Court of Justice and 
Supreme Administrative Court as well as from among substantive experts in law and 
social sciences outside the judiciary.54

Under the 2007 Constitution, the Constitutional Court is the highest court of 
appeals, although its jurisdiction is limited to clearly-defined constitutional issues. Its 
members are nominated by a committee of judges, leaders in parliament, and senior

53 The executive branch had had a traditional role in administering all courts. However, under the new court 
system, the Ministry of Justice (Judiciary) is now the sole organ overseeing agencies within the judicial 
process such as the National Police, the Attorney-General’s office, the Correction Department. 
RAKSASATAYA & KLEIN, supra note 22, at 25.
54 Pursuant to Section 204, the Constitutional Court shall consists of the President and eight other judges of 
which three judges shall come from the Supreme Court of Justice, two judges from the Supreme 
Administrative Court, two quailed persons from a legal field, and two others from the field of political 
science, public administration or other social science. CONST. (2007), Ch. 10 §204 (Thail.).
independent officials, whose nominees are confirmed by the Senate and appointed by the
King. The Courts of Justice have jurisdiction over criminal and civil cases (consisting of
general courts, juvenile and family courts and specialized courts) and are organized,
pursuant to Section 219, in three tiers: Courts of First Instance, the Court of Appeals, and
the Supreme Court of Justice. 55 Administrative courts have jurisdiction over suits
between private parties and the government, and cases in which one government entity is
suing another.56 In several southern provinces where Muslims constitute the majority of
the population, Islamic law and custom were applicable to matrimonial and inheritance
matters among the Muslims. Provincial Islamic Committees therefore have jurisdiction,
but limited to that over probate, family, marriage, and divorce cases.

The primary role of the judiciary is adjudication. Due to its nature that directly
affects rights and liberty of the people, the branch must be guaranteed of its
independence, and free from any political interference. 57 Thus, to assure the
independence of this organ in the adjudication, three principles have been established;
first prohibiting the legislature and the executive from interfering with judges and the
judiciary either directly or indirectly by precluding the ability of the executive to remove
judges such as other government officials, secondly prohibiting internal interference
(within the organ) by preserving the autonomy of each judge in their respective case, and
thirdly prohibiting the withdrawal or transfer of the pending case by a higher-ranking

55 Id., §219.
56 See Article 9 of the Act on Establishment of Administrative Court and Administrative Court Procedure
(“Administrative Court ha[s] the competence to try and adjudicate or give orders over… (1) the case
involving a dispute 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…”).
57 Pursuant to this principle, the Office of the Judiciary under the Ministry of Justice which is an
organization and a juristic person has become the sole organ responsible for the administration works of all
official’s order to another judge. The case that is being considered must be concluded and complete by the same judge.\textsuperscript{58}

To improve the independence of the branch, the Constitutional Court was formally established under the 1997 Constitution, and came to replace a traditional constitutional body known as “Constitutional Council” which was claimed to lack complete independence for having persons of other political branches in the body.\textsuperscript{59} The 1978 Constitution, for instance, provided the composition of the Constitutional Council to include the President of the National Assembly and other appointments by the National Assembly.\textsuperscript{60} With the promulgation of the 1997 Constitution, the Constitutional Court was elected as an independent organization responsible for scrutinizing government conduct as well as upholding the democratic principles laid down under the Constitution. The 2007 Constitution has since continued this readjustment by prohibiting the selection of the President and judges of the Constitutional Court from any government officials or state agencies to maintain the independence of the Constitutional Court.\textsuperscript{61}

\textbf{i. Accountability: Constitutional Court}

Under the Constitution, the King’s assent is required in the appointment and the removal of judges, except in the case of the Constitutional Court judges where advice of the Senate must also be required (Section 204). In practice, the selection committee for judges of the Constitutional Court is consisted of the judiciary (the President of the Supreme Court of Justice and the President of the Supreme Administrative Court), the executive (the President of the House of Representatives and the Leader of the Opposition in the House of Representatives) and the President of a constitutional

\textsuperscript{58} JUMPA, supra note 22, at 299.
\textsuperscript{59} \textit{Id.}, at 303.
\textsuperscript{60} \textit{CONST.} (1978), Ch. 10 §184, (Thail.) (repealed 1991).
\textsuperscript{61} \textit{CONST.} (2007), Ch. 10 §207, (Thail.).
independent organ while the Senate is required for a sitting to pass a resolution approving the selected persons (Section 206).

One of the grounds for vacation of the members of the Constitutional Court is through the Senate passing a resolution pursuant to Section 274. The resolution of the Senate under this section is deemed final and no request for the removal of such a person from office can be made on the same ground. Thus, it can be said that the power to appoint and remove the constitutional court judges rest in the legislative body whereas the role of the executive has substantially decreased in such a process to ensure that the decision to be rendered against the executive body is made impartially and independently.

ii. Roles and Functions: Constitutional Court

The Constitutional Court generally has jurisdiction over the constitutionality of parliamentary acts, royal decrees, draft legislation made by political parties and members of the National Assembly, disputes concerning violations of individual rights guaranteed under the Constitution as a result of the legislation in contrary to the supreme law of land (Section 212), as well as the conflict of powers and duties between at least two political organs being the National Assembly, the Council of Ministers or non-judicial constitutional organs (Section 214). With this respect, the jurisdiction of the Constitutional Court is set forth in four areas; firstly determining the constitutionality of statutes and the organic law bill, secondly considering the qualifications of a member of the National Assembly, a minister and any person holding public offices, thirdly deciding on issues concerning the powers and duties of political organizations under the

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62 RAKSASATAYA & KLEIN, supra note 53 (“the Constitutional Court shall substantively pursue the following duties; (1) consideration and adjudication of any provision of law, rule and regulation as being contrary or inconsistent with the Constitution; (2) consideration of disputes among constitutional organizations as to their powers and duties”). Other functions include making recommendations to the National Assembly and the government in the amendment of the present Constitution.
Constitution, and fourthly having other jurisdictions as stipulated by the Constitution and organic laws.\textsuperscript{63}

Since the Constitution prescribes powers and duties to the constitutional organizations, it is deemed important that there must be an organ to decide on the issue in relations to the performance and powers of these organizations. Section 214, then becomes the key provision that explicitly assigns this role to the Constitutional Court. To the significance of Section 214, the power granted to the Constitutional Court to resolve “political questions” pertaining to the allocation of powers and competence between the legislature and the executive has also been read along with Section 190 that explicitly grants the Constitutional Court, for the first time, the power to resolve disputes concerning the types of treaties that must undergo the special treaty process, which in a way determines the executive’s authority in the treaty-making process.\textsuperscript{64} Pursuant to this Section, the Constitutional Court has the final word to decide whether the treaty in question and the act of the executive are constitutional by circumventing such a process or in other words, whether the executive is competent to solely execute the treaty without parliamentary and public involvements.

It is indisputable that resolving the issues of political powers is one of the primary functions of the Constitutional Court as reflected in Section 190 and specifically in 214. Nevertheless, these assigned duties may not be as simple as they may appear in the constitutional text. Judicial intervention in the political branch’s administration and decisions to ensure their transparency and accountability also brought other challenges

\textsuperscript{63} Id. at 6.

\textsuperscript{64} “In the case where there arises a problematic issue under paragraph two, the power to make the determination thereon shall be vested in the Constitutional Court…” CONST. (2007), Ch. 9 §190, ¶ 6 (Thail.).
that bear the cost of other democratic values. Entrusting the power entirely to interpret duties and functions of government in one independent organ seems to be a democratically-sound solution to curtail the government’s ability in determining its own competence. However, in practice, this judicial function which allows the court to have a final word on who gets to do what may also put many activities of the political departments on hold as a lack of the other political branch’s participation in such an activity may provide a ground for a constitutional challenge. As presented in Chapter I, the extensive judicial interference may become a major impediment to the effectiveness of government administration which is also a required component for the administration to be responsive to the social needs. At the same time, the missing component in its jurisdiction to address a substantive guarantee violation by a treaty raises a serious concern about the proper role of the Constitutional Court and balance of the judiciary function. Thus, the removal of the judicial role from the political process will not provide us a better answer either since such an argument will only bring down the democratic character of our governing system. Rather the degree of its involvement must be elaborated.

Therefore, the issues of judicial intervention and the executive autonomy must be addressed, especially when they have significant implications upon the people’s interests. As part of this dissertation analysis, the level and manner in which the judiciary should be involved (the appropriateness of the Constitutional Court’s roles and functions), to at best safeguard the people’s constitutional rights, to assure the executive autonomy and to maintain the balance of powers among the institutional branches in this realm will be examined and suggested in Chapter IV (the Separation of Powers) and V (the Treaty-Making Model) respectively.

65 While being in its infancy, many have feared that decisions rested only in the hand of 15 justices are also running the risk of subverting the supremacy of the constitution by resorting to subservient law rather than the intent of the constitutional text. Cf., RAKSATAYA & KLEIN, supra note 22, at 35.
IV. Conclusion

Since the drastic change in the 1930s up until the adoption of the 1997 Constitution, Thailand’s political reforms had been accused of hypocrisy in which an emphasis was placed on the appearance of a process (a constitution, Parliament, political parties and an election), rather than a principle. Despite the incorporation of the separation of powers doctrine, “the charter actually gave the Assembly no more real power than it gave to the king”.66 Independent organizations to represent public interests remained weak politically while the acclaimed “free press” was typically controlled by influential officers to promote their personal agenda. The principle and the true objectives of democracy (life and liberties of the people) were lost in the process. These were the early challenges that the Thai had struggled to overcome over a sixty year period. However, through the arrival of the modern reforms that attempted to seal these loopholes (political exploitation) and to uphold the basic socio-political rights and privileges of the people, a new form of challenge that has another democratic implication has emerged.

Although the focus has now shifted to the enforcement of the very fundamental principle of democracy under the current Constitution by incorporating direct democracy (public consultation) in several areas of political affairs, facilitating strenuous checks from the legislature and other independent agencies, curtailing the executive decision-making authority, and reinforcing judicial policing power, there is yet the question of practicality, and how the new approach can achieve its objectives realistically, particularly in the treaty-making process. As part of the efforts to undertake serious political reforms, Section 190 has proven to be the most advanced, yet daunting treaty provision. On an international scale, the obstruction of the administration effectiveness

66 RIGG, supra note 1, at 161.
has adverse implications for the country’s political and economic opportunities in the pursuit of foreign relations and the maintenance of its foreign diplomacy, whereas on a domestic scale, this outcome threatens the government’s responsiveness to social concerns. Maintaining the executive’s primary role and authority in the area of foreign affairs is still arguably crucial, but cannot be overly emphasized to prevent the repetition of our past mistakes. Balance in the exercise of the executive’s foreign affairs power must be sought and established. The legislative and judicial controls over the executive’s conduct must be effectively implemented. At the same time, the role of the public in the political process which is instrumental to the cultivation of the self-governing process must therefore be emphasized in a tactful way through an effective public participation mechanism. How to sustain and nurture the democratic principle in the treaty-making process will require us to look back at the process or the means itself to bring about the constitutional ultimate goals. The rest of the chapters will therefore dedicate to the analysis of our means.
Chapter III: On Thailand’s Democracy (The Public Role)

I. Introduction

With the implementation of the improved check mechanisms as laid down in Chapter II, the Thai Constitution is believed to enhance political equality by expanding people’s rights to political participation in various areas of public affairs. Thailand’s efforts to advance its democracy through improving the level of public participation in the most affected areas of national interests reflect its vision in the value of participatory democracy. Increasing the role of public participation is not only believed to serve the social purposes (individual capacity-building and social understanding development), but also the legitimacy of politics.

Unfortunately, inserting mechanisms into the Constitution may not be a sufficient guarantee of procuring civil rights and liberties, given that several factors cannot be corrected simply through a change in a political structure. A mixture of issues which have arisen in modern Thai politics range from political passivity of those who have little to care about less immediate concerns to deep social fragmentation driven by those who are gravely affected, but inadequately accommodated. The people’s feeling of being disregarded and disenfranchised also has much to do with the effectiveness of the administration. In light of these weaknesses, the concept of liberalism must be strengthened in the context of Thai political participation. To meet these challenges will require us to look at the root causes in order to understand human psychology and to secure an effectual vehicle (governmental function) in the delivery of our objectives. Despite various criticisms, I see the advantages of the liberal ideology as a way of generating an approach to better enforce people’s participatory rights, which has become one of the primary challenges of our time.
With this respect, this chapter seeks to raise practical aspects of liberalism (to be advanced in the application of a treaty-making model in Chapter V) in response to the weaknesses posed by public participation in the context of Thai democracy through the examination of various political theories and the root causes of the modern challenges. The following section briefly introduces the issues of public participation under the current Constitution. Section III will walk us through the idea of direct participation portrayed by each school of thought, namely republican, liberal, elitist and participatory models which present certain elements that can provide positive changes to the Thai democracy. While these democratic models attempt to explain the extent of civic roles in political arenas in the most effective fashion, each by itself may not provide an adequate respond to Thailand’s current political issues. Following along the path, Section IV will then present the condition of Thailand’s democracy in correspondence with Chapter II and its evolution from the early elitist to a participatory-based form, which has yet continued to pose the same set of problems concerning citizens’ certain attitudes toward politics (whether apathy or aggression) caused by a mistrust in their government and the absence of certain qualities in the administration. These questions must be addressed through an understanding of our cultural traits and the development of the social discipline, and by balancing government functions to generate the type of governing process that, in turn, fosters the “citizenship” character of the people. In connection with such arguments, Section V elaborates justifications for the employment of a liberal element and a set of participatory mechanisms to enhance the function of public participation which I believe the Constitution is lacking in this participatory mode. And last but not least, Section VI will serve as a conclusion – a summary of a better solution.
II. Modern Challenges

Since the arrival of the 1997 Constitution, Thailand has taken an aggressive move to advance the country’s democratic development by focusing primarily on improving the people’s rights, government accountability and the integrity of political institutions through the incorporation of a strong check and balance system directly from the people in addition to that of the conventional parliamentary system.\(^1\) Thailand clearly perceived direct political participation by the people to be a supplemental mechanism of ensuring the quality of “self-government”. Public participation has, therefore, dramatically gained a major role in several areas of public affairs, and as a matter of a State’s fundamental principle. The public participation mechanisms will be further elaborated in Section IV, B (ii).

Despite the benefits that public participation has to offer, there are several general claims against this concept.\(^2\) This section will focus on some of the primary claims that are directly applicable to Thailand’s current democracy condition as partially laid out in Chapter I. These are the issue of citizens’ passivity in the area of “remote politics”, deep social division aggravated by the discontentment of personally affected, but inadequately accommodated individuals and the ineffectiveness of the administration.

A. Passivity, Low Level of Energy and Thoughts, Weak Sense of Social Responsibility

The apathetic, less-informed and non-energized characters of the average citizens in the realm of politics is a typical claim asserted by elitism and pluralism which perceive

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\(^1\) Pursuant to the Constitution of 1997, important democratic mechanisms such as the system of a fully elected Senate, the establishment of a party list system, the creation of independent “watchdog” organizations, and the better procurement of the people’s political and civil rights were put in place.

\(^2\) These claims are, for instance, permission to allow a small percentage of citizens to pass legislation through initiatives (Gilbert Hahn & Stephen C. Morton, Initiative and Referendum, Do They Encourage or Impair Better State Government? 5(4) Fla. St. U.L. Rev. 937(1977)), the incompatibility with the ideal of consensus government (MADS QVORTRUP, A COMPARATIVE STUDY OF REFERENDUM 9 (2002)), the rigidity of its outcome by providing no opportunity for amending a measure or arriving at a compromised solution (JAMES BRYCE, MODERN DEMOCRACIES 159 (1921)), and exacerbation of conflicts (DAVID B. MAGLEBY, DIRECT LEGISLATION, VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 181 (1984).
public affairs as a business of bureaucrats and experts. According to their views, the complexity of modern society, economy and social issues result in a pattern of citizens’ disengagement, which justifies the comprehensive roles of the wisest and the most experienced in directing those of lesser knowledge and skills. Schumpeter especially cast doubts on the level of political commitment among the average citizens as national issues tend to be so remote that most people “hardly have a sense of reality”, in contrary to a business world that their lives directly depend upon.

As much as I would like to deny this claim, I must admit that Thailand’s political climate, from a certain angle, does not depart from this understanding. From the beginning of the 1932 peaceful revolution led by the educated few and army officers, the practice of “self-governance” was ruled by a facade of parliamentary system in which “few bothered to vote, electoral competition was at a minimum, and the government appointed half the members of parliament”\(^3\). For a long time, fierce political battles among the ruling class had effectively excluded the people’s political participation. This is not to blame the elites, but also the low civic spirit within the Thai people themselves that had fueled these vicious cycles. The evolution of the Thai political system was remarked as the system of “passivity of the overwhelming majority of the people”\(^4\). It is a remarkable phenomenon to those who witnessed a series of dramatic events in the early days in which the Thai people served as no more than the spectators of heated political scenes.

Today, one may easily argue that the level of energy and a democratic mindset among the people have been increased with the implementation of a new set of check mechanisms. Nevertheless, the political energy has been unleashed into the wrong channel, and in a rather destructive manner while leaving a formal public forum of


\(^4\) Id. at 359.
discussion empty and unattended. The outbreak of the bloody protest is just a form of aggression and violence, and not rationality found in a democratic activity. Despite the (detrimental) activism, citizens’ passivity still reigns in areas of national concern which is where their understandings and intellectual minds could have been at their best use. In the end, the question as to why people would rather use violence in search for a better answer to their livelihood than delivering their opinions on the “national issue” ought to be clear by now. This answer should alarm us about the type of issues that immediately demand public participation to redirect the people’s energy in a constructive manner, and the type of democratic mechanisms that can effectively accommodate the people’s concerns to relieve this tension.

B. A Source of Deepening Social Divisions

According to pluralism, public participation can bring conflict to the surface, deepening social divisions rather than uniting them. The cause for concern is especially that of a polarized society which is easily fueled rather by rage than rationality. According to David Magleby’s study, direct democracy (referendums on legislation) “intensifies conflict and leads to a politics of confrontation.”5 Along this line, elitism described the unfit character of average citizens for state affairs by referring to “the emotionality of the masses” that tends to impair their judgment in politics, and consequently weakens its stability. Extensive participation may radically transform politics into a battlefield causing undue disruption and, in an extreme case, fanaticism.6 For pluralism, a certain degree of citizens’ passivity is actually preferable in order to secure a stable political environment.

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5 MAGLEBY, supra note 2, at 181.
6 DAVID HELD, MODELS OF DEMOCRACY 204 (2nd ed., 1996). See also Berelson B, Democratic Theory and Public Opinion 16(3) PUB. OPINION Q. 313-330 (1952). QVORTRUP, supra note 2, at 87 (“The prejudice of the people is far stronger than those of the privileged classes; they are far more vulgar; and they are far more dangerous because they are apt to run counter scientific conclusion”).
The issue of social fragmentation in Thailand is at its peak since the bloodless coup of 2006. The country has been broken into two. Violence that led to the military crackdown in the summer of 2010 was a failure of reconciliation attempts. At the deepest level of the social disharmony, freedom of speech and assembly were mobilized by the people to channel their anger, resentment and hatred as opposed to reason and understanding. People’s political judgments and decisions are based on their political alliance and loyalty. On the surface of this fragmentation, the colors that each side attaches itself to may symbolize their political alliance. However, the root causes of the divergence are rather driven by economic and social inequalities that have rampaged among the lower class. The side that the rural people take merely suggests whom they perceived to have better responses to their demands. Politics of the rich in the past has worsened the economic and social conditions of the poor. The country’s harmony had continued to crack until it was finally broken in the summer of 2010. The seriousness of the situation raises questions on scholars’ minds whether public participation will serve as a tool of compromise or a sword, and whether people will turn a public forum into another battlefield. There is a dilemma. However, to completely deny a “public space” will only suppress this tension, and eventually encourage violent political participation outside regulated forums and institutions.

There is of course a pressing need to respond to this challenge. To my understanding, public participation is not exactly the cause of violence, but only a

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7 Sanitsuda Ekachai, *Thailand’s Shocking Inequity Statistics*, BANGKOK POST, Nov. 30, 2009, http://www.bangkokpost.com/blogs/index.php/2009/11/30/thailand-s-shocking-inequity-statistics?blog=64. (A shocking statistic revealed that “the top 20% own 69% of the country’s assets while the bottom 20% own only 1%. Among the farming families, nearly 20% of them are landless, or about 811,871 families, while 1-1.5 million farming families are tenants or struggling with insufficient land. On income distribution, the top 20% enjoy more than 50% of the gross domestic product while the bottom 20% only 4%”)

8 Martinez Kuhonta, *The Paradox of Thailand’s 1997 People’s Constitution*, XLVIII ASIAN SURVEY 373, 374 (2008) (“...the rural poor finally felt enfranchised under the Thaksin regime’s populist programs....”)

channel for people to express their senses of exclusion and under-accommodation. The root cause is rather the unresponsiveness of the government to their (primarily) economic and social problems that they felt had received better responses by the previous administration. Nevertheless, to open up a wide variety for the cause of public participation to be conducted without specificity is not going to address these personal high demands either. Thus, how to design a forum of public deliberation that can create a positive atmosphere in the society and foster the community is a question for a constitutional designer to contemplate.

C. A Source of the Ineffectiveness of Government Function

In the challenge of a democratic practice, we constantly face the question of whether it is feasible to extend citizens’ rights to public participation in all areas of state affairs, especially when societies are densely populated, complex and heterogeneous. Besides the problems of factions (differences of interests) as foreseen by Madison, the issue then boils down to the institution that takes charge. Elitism has been the strongest proponent for the argument concerning the ineffective operation of an administration under direct democracy (public participation). From Max Weber’s position, elitism advocated that direct democracy is unfavorable, let alone impossible, because, in a heterogeneous society, it would only lead to ineffective administration and political instability.  

In the context of the Thai democracy, this challenge has presented itself in a form of the opposition party’s extensive demands of public participation on all kinds of issues (under the broad criteria provided by the Constitution) that the government finds impossible to catch up with, as a way to discredit and destabilize the administration. The consequence is that the Constitution can subject the government to many methods and

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10 Held, supra note 6, at 163.
levels of public participation while the government, nevertheless, can neglect as many citizens’ comments as it wishes while managing to satisfy the constitutional requirements. The challenge of the opposition, however, has not necessarily guaranteed the responsiveness of the government, and even disrupted the smooth operation, particularly in the treaty-making process. The scenario has stalled the government’s function by either their paying too much attention to holding all types of public participation to avoid the opposition’s claim while piling up other issues, or doing it frivolously and allowing the important concerns of citizens to go unattended.

Maintaining an effective and efficient government is a pre-requisite for the function of democracy. In my view, these qualities form part of a “responsive” administration (as a primary character of effective representation) because for a government to be receptive to people’s needs and critiques, it does require a well-functioned, ready-to-handle type of government.

III. Political Theory: Governing Principles from Different Schools of Thoughts (Ideas Concerning Political Participation addressed by each school)

Political theorists came up with several approaches to define “democracy” whether by political conditions or principles. However, by looking at its Greek roots, democracy does not only serve as an end objective, but also as a means of a governing procedure, in which power is to be exercised by the people to form the state and decide on policy decisions. Thus from an understanding of the meaning of “democracy”, it at least suggests the rights of the people to take part in the political process to ensure that

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11 “Demos” simply means people and “kratia” is to rule, which gives a general meaning of “rule by the people”. MICHAEL SAWARD, THE TERMS OF DEMOCRACY 8 (1998).
12 GIOVANNI SARTORI, DEMOCRATIC THEORY 3 (1962), See also, Id., at 15 (suggesting that democracy is generally understood as “a political system in which the citizens themselves have an equal effective input into the making of binding collective decisions. [W]hereas a non-democratic system gives power to the hands of certain individuals to make binding decisions without any accountability to citizens”).
their voices be heard and their views be taken into account. And to secure these rights, a
government must be established by “deriving their just powers from the consent of the
governed”. Thus, ultimate authority and sovereignty lie in the people who gave their
consent through political participation upon which legitimate government rests.

This method of self-rule on which democracy is based upon seems to entail public
participation by reminding us that representation can be improved by citizen deliberation
and reciprocal communications between a government and people. This section, I have
selected four different models of democracy, namely republican, liberal, elitist and
participatory which portrayed, and in some cases, delimited the ideas concerning public
participation. And how this self-rule principle is carried out by each school also extends
to the role of public participation that each of them regards in relations to the function of
democracy. From a minimalist perspective in a civic role advanced by elitism to the
extended notion of civic virtue in developmental republicanism, these models have
presented their elements throughout the evolution of Thai politics. My mission is to
analyze the weaknesses, and to seek an equation among these models for the right fit for
the Thai democracy in response to the challenges of my generation.

A. Republican

Republicanism believed in the freedom of a political community based on self-
government in which citizens are endowed with the right to directly participate in
government. Similar to the classical model, republicanism approves of public spirit - the
willingness of a person to set aside his personal interests in the pursuit of the public ones.
The fundamental principle of this developmental model is to secure a form of association

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13 Nevertheless, another way of interpreting effective democracy argued by Ross Harrison is to look at the
people’s wishes being represented and effective as long as people get what they want even though it was
15 Id.
that will defend “the good” of all members by a collective force and unity. It holds the ideal of strong and collective identifications of the people by the principle and communal values they share. This is a crucial role that Republicanism believes public participation can play in the development of individuality by placing the community’s interest ahead of anything else, and by relinquishing personal desires and preferences.

Advanced by Jean Jacque Rousseau, public participation is believed to contribute to the formation of capable citizenry in the governance of state affairs by enhancing an individual’s sense of social responsibility and creating concerns for public issues. He placed a wider role of public participation by perceiving it as “central to the establishment and maintenance of a democratic polity”. With this respect, there is the need for “psychological connections” among the people within the system they live in order to form a community, and to gain the full potential and benefits of democracy. According to this view, citizens’ deliberations on public issues can help creating people’s sense of belonging, which in turn will provide long-term incentives for them to protect communal interests. Public participation, hence, serves more than simply a protective tool against tyranny, but also a constructive mechanism that unites individuals’ goals.

The presumption about the qualities of individuals required for effective self-governance may be challenged given the current condition of Thai politics, in which members lack sufficient incentive to deliver a collective decision. Although Rousseau acknowledged that “this was democracy for small states”, arguing that a small scale politics is more manageable in terms of the amount of public issues that also immediately

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16 HELD, supra note 6, at 57 (quoting JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 60 (1762)).
18 Rousseau’s theory goes beyond the protective function of participation as an assurance of the institutional arrangements. He believed that there must be a continuing interrelationship between the working of institutions and the psychological qualities and attitudes of individuals interacting within them. Id. at 22.
19 Public participation in the decision-making allows individual to be educated, to distinguish his own impulses and desires and to pursue general interests. Id. at 25.
touch upon people’s lives, with a smaller group of people to reconcile, it does not mean that this model should not be applied in the case of a deeply divided society. Its motivational assumptions (public virtue and the common good notions) are essential to reduce controversies and relieve social tension. It is of course a matter of providing a participatory framework guided by the idea of Republicanism that would motivate people to contribute to matters that they are sure can make changes to their lives and to resolve their differences. Nevertheless, providing public forums for broad national issues may not necessarily create a “republican” environment. Careful consideration to reshape the issues for public participation is required to help develop the right mindset toward this Republican orientation.

B. Liberal

Liberalism perceives human beings as free and equal individuals. Although a state must retain a monopoly power to provide a basis for private transaction, its capability to regulate must be constrained to minimize the negative effects of their policy decisions upon personal rights and freedoms of individuals, the primary interests to be safeguarded under the notion of liberalism. The authority bestowed by individuals on government is thus for the pursuit of the essential purposes of the governed, namely the preservation of “life, liberty and estate”. It is a protective model which seeks both to restrict the power of state, and define a private sphere by using democratic mechanisms primarily to protect and promote individual interests. Liberalism’s aim is, therefore, to secure the political conditions that are necessary for the exercise of personal freedom.

20 HELD, supra note 6, at 56.
21 Montesquieu, in the same manner, devoted his life on the question of institutional limits on state action believing that “individuals’ capacities and energies would be unleashed in the knowledge that privately initiated interests would be protected”. Id. at 83.
According to John Locke, “the institution of government can and should be conceived as an instrument for the defense of the life, liberty and estate of its citizens”.23 The boundary of each individual is respected through the principle of morality that encouraged individuals to preserve each other’s liberty.24 Thus, liberalism under Locke’s philosophy is not entirely self-indulging that is merely centered on personal rights, interests and concerns. His idea demanded that people take into consideration other’s fundamental rights and justice when weighing against one’s own. With this respect, the liberal concept does not only focus on the pursuit of individual satisfaction, but also the moral development of individuals. This is also the way John Stuart Mill defined “liberty” that one is free to pursue so long as it does not cause harm to others, deprive others of theirs or impede their ability to obtain it.25

Liberalism may perceive citizens’ involvement in political affairs as necessary to guard their human dignity, social justice, and to guide their own destiny as people are the best defenders of their own rights. But the emphasis on the pursuit of individual interests is the weakness of liberalism that needs to be carefully addressed in order to provide a possible answer to our current challenges (citizens’ apathy, social division, unresponsive administration). The focus of the liberal approach can induce public activism by encouraging the expression of personal needs and desires, which must be subject to limitation (delineate the scope) to create compromise among the community members and an administration which is capable of handling all the important issues. Thus, the strength of liberalism is reflected in the value it places on collectively protecting individuals’ fundamental justice (rights to life, liberty and security) that everyone equally shares. This is especially the case, as Mill argued, “when people are engaged in the

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23 Held, supra note 6, at 78.
25 Held, supra note 6, at 102.
resolution or problems affecting themselves or the whole collectively, energies [will be] unleashed which enhance the likelihood of the creation of imaginative solutions and successful strategies”. Liberty, by itself, may not be sufficient to guarantee “human excellence”. However, liberty pursued and facilitated through a proper means can bring about the development of independent, autonomous and rational minds necessary for a formation of a strong community. These means will be discussed later in the chapter.

C. Elitist

Elitism is on the other end of the spectrum, which sees the limitation of political participation by the people as necessary. A very low level of civic involvement in political activities has been suggested by its governing term which limitedly defines democracy as an “institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote”27. Elitism sees the impracticability of direct democracy and the necessity of effective and centralized organization in order to handle the issues of mass society. The growth of technical experts, skillful bureaucrats and a hierarchical political structure then render the exclusion of most citizens’ political roles inescapable. Thus, with a low estimation of individuals’ intellectual capacities and enthusiasm, political participation is a function of the upper class. Citizens’ right to political participation has been limited to an electoral process where competitive parties and strong leadership take the lead in shaping people’s interests and public policy. The development of commerce, social structure and human conditions render elitism justifications for making the ability of

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26 Under Mill’s philosophy, vigorous protection of individual liberty enables a person to “flourish” and to fully pursue his political and economic freedom which, in return, can benefit all in the long run. HELD, supra note 6, at 104 (emphasis added).
citizens to replace one government by another the sole channel of restraining governmental power.

David Held may agree with the conditions of modern societies that demand quite a level of experts, but not with those of humans that it should circumscribe citizens’ role in partaking in political decisions. Held suggested that citizens’ passivity, apathy and ignorance do not create the pattern of the upper class politics, but are rather the product of this exclusivity. To many people who have little interest in political activities, they “simply do so precisely because they experience politics as remote, and because they feel [that] it does not directly touch their lives or that they are powerless to affect its course”28. He further emphasized that the more the issues immediately affect people’s lives, and the more those affected are assured that their inputs will be taken into account, the more successfully direct public participation will serve its purposes. From this perspective, citizens’ activism may require an involvement of personal interests, and a responsive administration to create trust within the system in order to foster involved citizens in the long run which is crucial to the success of direct democracy.

In sum, elitism may provide one easy solution to the politics of a mass, complex society by putting issues in the hand of a capable few who make decisions on behalf of their constituents. The model was, in fact, reflected in the early pattern of Thai politics. The system of the “capable” may guarantee convenience in government administration, but not necessarily responsiveness as the Thai ruling elites continued to exploit people’s indifferent political attitudes. A stable political environment is not to be expected either. With the current political condition, social fragmentation will only be worsened when people’s interests, especially the rural poor continue to be inadequately addressed.

Similarly to the issue of passivity raised by Held, emotionality of the mass may not be the

28 Joseph Schumpeter himself saw this similar problem that as long as people view domestic and foreign affairs as remote issues, they will continue to disengage, and “without a sense of responsibility that comes from immediate involvement, ignorance persists” HELD, supra note 6, at 175-181.
cause for elitism’s justification, but the consequence of its “remote democracy”. Elitism does not provide us enough reasons why we should keep the majority of the people uninformed, passive and socially irresponsible when there is neither a guarantee of a responsive government nor peaceful politics. Elitism merely exploits the electorate’s weaknesses that are susceptible to strong influence of their leaders without seeking to improve human conditions to become more capable simply because this is what the system thrives on. As reflected in the Thailand’s political evolution, this model is out of the question a major failure for the Thai-style bureaucracy.

Elitism, nonetheless, at least pointed out human flaws that we can seek to overcome through the design of an appropriate mechanism, and the understanding of a human nature. Preparing social conditions, besides providing resources and opportunities, is arguably as crucial for effective public participation since it takes a democratic political structure (opportunity and resources), effective governmental function (immediate response) and mentally active citizens altogether to form fuller democracy.

D. Participatory

Participatory democracy offers a broader range of civic engagement by enhancing the role of citizens in managing public affairs. The model shares certain ideology with classicalism in terms of equality and respect among citizens by their ability to directly participate in all areas of public affairs. Participatory democracy reinforces the idea of direct “self-governance” which replaces the roles of political ruling class by those of the people. It recognizes certain political conditions of modern politics that can be resolved through civic education, attitudes and actions under the mode of direct participation.29

Only the transformation and the expansion of understandings among citizens that takes

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29 Barber described the conditions of modern politics as conflicting, pluralist and exclusive (the separation of public and private actions). And only by civic education will citizens become capable of making common purpose rather than their altruism. BENJAMIN R. BARBER, STRONG DEMOCRACY 117 (2nd ed. 2003).
place during the process can make them discover the commonality of their purposes. And therefore, in contrast to republicanism, community grows out of this process, and not the other way around.

Participatory democracy provides a full spectrum of public participation. This type of direct democracy extends and, in fact, encourages people’s participation beyond the public realm. The development of “citizenship” and the formation of a community can take place in a private sphere such as workplaces or local organizations. The practical aspect of this model is its emphasis on the transformative process at the local scale by creating a training ground for individuals to take advantage of the available participatory mechanism in the exercise of their control and judgment over decisions that may affect their personal lives and community. 30 This practice also helps lifting a restrictive role of citizens due to their lack of interest in national politics in the long run. A certain limitation is also suggested, under this model, in correspondence with the exercise of a local autonomy in a sense that the action of public participation is not necessarily required at every level and in every instance, but rather frequently enough when significant decisions are being made, 31 (which, in this case, are those affecting us personally and our community).

In sum, whether participatory mode of democracy supports public participation in a public or private sphere, one of its primary objectives is to cultivate civic ideals, and develop an individual’s judgment in the direction of the community. However, the dangers of adopting the model in a full range to apply to all kinds of public issues (as Thailand is currently facing) are the citizens’ apathy in complex matters, the inability of a government to follow through its obligations and the citizens’ discontentment in personally affected areas that have not received adequate attention. The transformation

30 Id. at 209-211.
31 Id. at 151.
process toward a civic community thus depends heavily upon people’s taking appropriate actions, a government’s good response and not merely the implementation of an institutional framework. The real challenge here is how to induce people to deliberate, and to eventually speak for the interest of the community. As Held suggested, by giving people good enough reasons to care about politics (through personal incentives and a responsive government), you may be halfway to creating a community (as public participation becomes more successful in serving its purposes). Thailand’s current political and social conditions can benefit from the model through the idea of embarking on small-scale concerns such as the issues of personal justice and community livelihood which may make it easier on us to grasp common action amidst the social conflict. This can serve as a foundation for civic action and responsibility at the national level “where participation is harder, but the stakes are much higher”.32

IV. Thailand’s Democracy Condition: From Elitism to Participatory Model

A. Political Development: Sources of Political inequality

The year 1932 marked an important change in the political system of Thailand both for the better and for the worse. The introduction of the principle of separation of powers under the sovereign rights of the people has also invited the system of elite favoritism in which politics is the business of the upper class. The Constitution, although emphasized in the preamble that the “sovereign power comes from the Thai people”,33 helped institutionalize a hierarchical political structure in which only knowledgeable bureaucrats took charge in the administration. There was no direct public participation in political affairs in the early constitutions. Rights and duties of the people specified in the permanent 1932 Constitution were limitedly exercised solely through the elections of

32 Id. at 211.
33 CONST. (1932), Preamble §2 (Thail.) (repealed 1946).
representatives.\textsuperscript{34} Later constitutions were drawn in such a way that would allow the government to take control of the Parliament one way or another. The 1946 Constitution, for instance, allowed the candidates to vote themselves into the Senate, and provided the qualifications of voters and candidates that facilitated a wider participation of its supporters.\textsuperscript{35} In the same manner, the Constitution of 1952 gave ways to the military government to nominate and select most of the appointed members of the Assembly.\textsuperscript{36} A lack of education and understanding in the new form of governance were the primary justifications for the common people to be excluded that unfortunately made elitism a perfect fit for the early model of Thailand’s democracy. These factors became major causes that led to the pattern of political exploitation.

It can be said that political inequality and political exploitation are causes and consequences in themselves. The development of Thailand’s democracy has shown that political inequality causes political exploitation, which in turn aggravates the condition of political inequality. Despite a series of Constitutions, it was clear that running the country was a matter of the upper class. Each constitution was primarily designed by a particular group either to fit their personal agenda or to prevent the surge of its rivalry without paying adequate attention to the fundamental principle, e.g. people’s life and liberty. Thai Constitutions were not taken seriously as binding documents in the sense that whenever there is a shift in power among the ruling elites, the Constitution was suspended to permit new rules in favor of those in power. The purpose of its Constitution rather served as a

\textsuperscript{34} KOBKUA SUWANNATHAT-PIAN, KINGS, COUNTRY AND CONSTITUTIONS: THAILAND POLITICAL DEVELOPMENT 1932-2000 36 (2003). It was also clear that the promoters of the 1932 Constitution hoped to maintain their control over the government by means of their majority in the Council. FRED W. RIGG, THAILAND: THE MODERNIZATION OF A BUREAUCRATIC POLITY 91 (1966) (explaining the transformation of monarchy during the modernization period which basically transferred powers from the absolute monarchy to office-holding, new ruling elites).
\textsuperscript{35} SUWANNATHAT-PIAN, supra note 34. at 45.
\textsuperscript{36} Id. at 46.
tool to institutionalize elitism by supporting an ongoing power struggle among various factions of the ruling elites in order to legitimize the politics of their time.\textsuperscript{37}

Nonetheless, despite the improvement of the Constitutional mechanisms that renders the government’s exercise of power directly accountable to the people in the vast areas of national interests, the outcome falls short. Not only do the mechanisms provide no guarantee for better responsiveness of government’s administration, but also worsen its efficiency. Social unrest, violence and hatred among the people which had been previously fueled by cycles of political and social inequalities are not resolved by the new mechanisms. It is, on the contrary, seen as a legitimate source of the people’s power to roam the streets. Passive political culture has obviously taken its toll on us by widening the gap between “the haves” and “the have-nots” while perpetuating a pattern of unresponsive administration. Consequently, when people decided to speak up, they used violence rather than words to communicate their troubles.

\textbf{i. Elitism and Cultural Discipline: Deferential Mindset}

The idea of elitist governing style in the early days was reflected in a form of monarchy, the system in which the ruling class gave directions and made decisions for the people. Thailand’s long tradition of absolutism under which the king was a patriarchal figure, who subsumed all the powers within him, had shaped Thailand’s social structure in a form of class divisions. The instant change of its governing form in 1932 was substantial to a formation of the political structure, but was not quite at the social level. The deferential mindset of the people in public affairs, especially in the early period, cannot be blamed on anything else but the patriarchal role of the benevolent monarch and the social status of individuals that had designated their roles within a hierarchical structure.

\textsuperscript{37} RIGG, \textit{supra} note 34, at 152-153.
Elitism suggested that the absence of substantial civic engagement in the governing process was crucial for the stability of the system. In comparison to the system of absolute monarchy, the relationship between the king and his subjects which was more of a family-oriented form based on unity and affection literally reduced the role of Thai people in public affairs to “the governed” who were subject to the governor’s decisions. Neither political mechanisms nor people acted as internal checks. This was due to the fact that the Buddhist moral rules operated as constraints upon the exercise of his absolute power. The deferential posture of the people was made stronger, especially when the king’s absolute power was perceived less as a threat, and more of a mental shelter and protection of their livelihood. In addition, Thailand’s old feudal system which allowed individuals’ status to be marked by their entitlements to the pieces of property also played a significant role in designating social responsibilities of each individual and the scope of their roles in public affairs. Thus, class divisions were seen as an effective way for nobility to assert their power and control over resources and manpower. Civic roles were essentially limited to no more than carrying out decisions that had already been made for them.

The product of passivity and apathy were the results of the old style elitism. Although this was what Held suggested in the elitist democracy model, both governing

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38 The concept of the “Lord of Life” pertains to nothing (about absolute or arbitrary power of life and death over his subjects) more than his moral obligations to perform certain social tasks to satisfy his people’s needs. DAVID M. ENGEL, LAW AND KINGSHIP IN THAILAND DURING THE REIGN OF KING CHULALONGKORN 2 (Alton L. Becker et. al., 1975).
39 The king himself is obliged to act in accordance with the ten kingly virtues and the Buddhist principles for the interest of his people. The tradition is also Hindu-derived believing in the righteous role of the king by adhering to justice and the tenth kingly virtues, namely giving, morality, liberty, rectitude, gentleness, self-restriction, non-anger, non-violence, forbearance and non-obstruction. Id. at 4-5. See also DAVID K. WYATT, THE POLITICS OF REFORMS IN THAILAND 8 (New Heaven, 1969) (suggesting the effect of the transformation which embodied Buddhist moral principles in the reign of kingship helped strengthen the checks against despotic excesses of absolute rule).
40 Among these are princely group, nobles, common and bondsmen whose legal rights and public duties were varied depending on their membership of the group. HOOKER, M. B., A CONCISE LEGAL HISTORY OF SOUTH-EAST ASIA 27-28 (1978). The abolition of the class of bondmen which was instituted in the late 1800 during the reign of King Chulalongkorn suggested the significance of having lower class control in the early period. ENGEL, supra note 38, at 18.
styles share the common character which focus on excluding people from forming their thoughts and taking part in political decision. A long range of a hierarchical system had forged certain political culture in the Thai people’s blood. Under the benevolent monarch, powers exercised by the king were justifiable to the people whereas citizens’ roles were best played (as understood among the people) by rules within their designated realms of responsibilities. Under such a circumstance, their needs to stand up and speak for their interests seemed unnecessary as decisions were to be made for them accordingly. Their limited freedoms were directions and decisions to be followed (obligations) in exchange for a protection of the communal interests. Despite this positive interaction between the ruler and the ruled, the hierarchical structure did not disappear without leaving certain conditions in a cultural trait. Not only did the system strip away the people’s roles in politics, but also their political mentality. The absence of political equality in the early Thai democracy further contributed to a passive nature among the average citizens when it came to deliberating policy decisions. People would still do it, not because they realized the importance of the rights they currently possessed, but simply because they were asked to do so. Political inequality is easily aggravated under such conditions. It is not surprising why politics easily fell into the hands of those who understood the culture too well, and decided to act on it. Thailand’s democratization in 1932 may be known as one of the shortest and bloodless revolutions. New political institutions were set up overnight. However, as Sartori suggested for a democratic culture to take root, it could take up to a generation. And it is up to us to ensure that the process takes place.

**ii. “Transform-Placements Process”**

In his essay, Ian Shapiro described Huntington’s theory of democratic transitions under four different accounts; two of which are “transformations” and “replacements”. The former refers to the scenario in which democracy is endowed by the elites in power,
whereas the latter requires the opposition to take the lead. In either case, the scenarios suggested that the adoption of democracy is possible in the exclusion of the lower class.

Thai democracy is a complex situation. It did involve a mixture of the efforts of a new wave (the educated few) and the understanding Monarch to come to terms with the necessity of the country’s new political system. Thus, on one hand, the process is transformative in the sense that the Monarch willingly gave up his absolute power, and allowed it to be returned to the people, while he still served as their mental shelter and the symbol of national unity. And on the others, this substantial political reform was led and proposed by a group of high ranking colonels and the educated upper middle class. Although it is true that the movement was also driven by resentment among government officials who had been laid off due to worldwide economic recession at that time, the fact that the opposition group pursued an immediate action by using the military instead of public mobilization is evidence that they acknowledged that a royalist mindset still reigned in the general public (a lack of popular will towards the reform), especially in the lower class and the underprivileged.

The resolution of the country by employing legal means (drafting the Constitution) without taking into account social factors was a risky business as the absence of strong political will of the people has later contributed to the vicious cycle of political exploitation by a ruling class. The fact that the 1932 movement was primarily led by a group of the educated few who had the privilege to learn and import the ideology from Western countries, rather than those of the lower class, industrial workers or

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41 IAN SHAPIRO, DEMOCRACY’S PLACES 93 (1996).
42 SUWANNATHAT-PIAN, supra note 34, at 4 (“In spite of his own belief that a real democracy is very unlikely to succeed in Siam…[and] even be harmful to the interest of the people, the King was truly of the opinion that it was a necessity that Siam must adopt democracy…”).
43 ENGEL, supra note 38, at 123. Hindley, supra note 3, at 356.
44 The promoters of the 1932 revolution was consisted of few civilians with radical minds and a lack of mass support and conservative army officers wishing to inherit and gain access to power and privileges after the relinquishment of the monarchy. Hindley, supra note 43.
publicly supported organizations suggested the absence of a democratic mindset of the general public, which significantly forged a form of elitism.\textsuperscript{45}

iii. Direct Adoption of Western Democracy: the Establishment of Forms rather than Principle

The adoption of Western-based democracy which took shape only in the forms (parties, elections and parliament) rather than principle brought negative consequences.\textsuperscript{46} As Giovanni Sartori suggested, imitation of a political form that has been invented somewhere is not hard to do, but it never guaranteed a survival of democracy. Thus, despite the establishment of a parliamentary system, elections and political parties, the elitist system has allowed bureaucrats to actively participate and pursue their interests under the cloak of democracy. This is obviously the advantage that elitist democracy offered to the ruling class by limiting the people’s political participation.

While weak political will of the common people was more prevalent at that time, there was a question of the fitness of the newly adopted Western ideology to the Thai political culture and the social structure. In his Majesty’s remark (King Prajadhipok), his deepest concern was that the Government might not employ proper methods of administration compatible with “individual freedom and the principle of justice” for the people.\textsuperscript{47} As a result, the powers that must be returned to the people who had little idea what to do with it were simply changed hands to the new ruling elites under the disguise of democracy. The sovereign rights of the people were bestowed upon those who were in control of the Assembly. Whereas rights and duties of the people specified in the

\textsuperscript{45}This phenomenon made Thailand distinguishable from Western experiences. RIGG, supra note 34, at 148-149. See also Ulrich K. Preuss, The Exercise of Constituent Power in Central and Eastern Europe, in THE PARADOX OF CONSTITUTIONALISM 213-216 (Martin Loughlin & Neil Walker, eds., 2007).


\textsuperscript{47}Department of Asian Studies, Cornell University, Data Paper no. 26, 1974 (citing King’s Prajadhipok’s abdication statement expressing his concern on the incompatibility of the government administration with individual freedoms and principles of justice).
permanent 1932 Constitution were limitedly exercised solely through the elections of representatives, the National Assembly was heavily controlled by the government to maintain its position.\textsuperscript{48} A lack of the people’s political will and participation was a contributing factor to the abuse of power of the ruling class to enrich their wealth, and preserve their status. The cycles of military intervention were the evidence of this fact that it did not end the country’s ill fate, but rather opened up another opportunity for the new ruling class to step in.

### iv. Unresponsive and Ineffective Administration

The failure of Thailand’s democracy which heavily relied on the elitist democracy led to a weak enforcement of the democratic principle while overemphasizing the process (having various mechanisms and political institutions) that had been put in place only to benefit a particular group.\textsuperscript{49} The weak enforcement also had much to do with the Thai people’s mindset that allowed the practice of political exploitations to persist whereas the establishment of a formal process such as a constitution, Parliament, political parties, and election served nothing more than to verify the position of those in power.

These are the sources of unresponsive administration in which the government’s high-handed method had primarily been made against its opponent with little regard to people’s interests and their well-being. Decisions were made and resources were allocated in favor of those in power which further aggravated political and social inequalities. Transparency and honesty remained rare qualities in government administration. Corruption had thus rampaged among ruling elites.\textsuperscript{50} Thus, the claim of a responsive administration, if any to be made, is for the rich.

\textsuperscript{48} SUWANNATHAT-PIAN, supra note 34, at 36. RIGG, supra note 34, at 156 (Despite the parliamentary system, it was clear that the promoters of the 1932 Constitution hoped to maintain their control over the government by means of their majority in the Council).

\textsuperscript{49} SUWANNATHAT-PIAN, supra note 34, at 4.

\textsuperscript{50} Corruption is defined as abuse of public power for private benefit. Examples of corruption include the sale of government property by public officials, bribery, and embezzlement of public funds, patronage and
Arguably, the early challenges that the Thais had struggled to overcome over decades may have been alleviated. Nevertheless, a new form of bureaucratic inefficiency has also emerged by the arrival of the modern reforms that attempt to seal these loopholes, and to uphold the basic socio-political rights and freedoms of the people. The recent version of the Thai Constitution may have been devoted to promoting accountability and transparency in government administration by incorporating direct democracy (public consultation) in vast areas of political affairs as well as facilitating strenuous checks from the legislature and other independent agencies. There is yet the question of practicality, and whether the drastic approach will, in turn, further undercut the effectiveness of an administration, which is already lacking. The requirement of extensive public participations in all kinds of national issues may satisfy a core democratic element (self-governance), but is deemed inadequate if its effect causes failure in government’s policy decisions to reflect any of citizens’ opinions and concerns.

The emergence of the new rights in political participation is a sharp contrast to the traditional constitutions that solely emphasized an electoral process as a means to control the government’s exercise of power. The new rights affirm the principle of political equality and justice. It is then left to the people to exercise and enforce these rights with appreciation and responsibility. And it is up to us to redesign the participatory mechanisms to keep the people within this line. These are cultural, political and social issues that cannot be addressed merely through a change of a political structure, but through a new creation of cultural and social disciplines.

B. Emergence of Participatory Model under the Emphasis of “Civic Virtue”

i. Constitutional Reforms (1997 and 2007 models) and the Public Spirit

The arrivals of the 1997 and 2007 Constitutions brought about periods of major political reforms that had incorporated the concept of participatory democracy with an emphasis on the people’s deliberation in the interests of the nation. Thus, the Constitutions are not only meant to combat the country’s past failure by focusing primarily on improving the people’s participatory rights in the political decision-making process (in addition to the checks under a conventional parliamentary system) to induce government accountability and transparency, but also to create a stronger sense of public spirit. Although previous Constitutions spelled out a certain degree of civic duties, no constitution can make it clearer than that of the 2007 version in the requirement of a person’s duty to defend the country and “to safeguard national interests.” Thus, the new Constitution may generously provide people with participatory rights in the political process (to be described in the following section), but it does also require a higher form of participation in which Rousseau believed through “stressing the centrality of obligations and duties [of the people] to the public realm.” These collective obligations are fundamentally reflected, for instance, in Section 67 in the national conservation and protection of the environment, Section 71 in defense of the country’s national interests, Section 87 in the participation concerning the determination of policies and plans for national economic and social development, and Section 190 in the involvement of treaties affecting national sovereign rights and jurisdiction, economic, social security, trade and budget of the country. By shaping the issues that are nationally-centered to be subject to

51 Pursuant to the Constitution of 1997, important democratic mechanisms such as the system of a fully elected Senate, the establishment of a party list system, the creation of independent “watchdog” organizations, and the better procurement of the people’s political and civil rights were put in place. Based on this foundation, the promulgation of the 2007 Constitution took a further step in strengthening the Thai democracy, especially in the improvement of people’s participatory rights in the decision-making process. 52 See CONST. (2007), Ch. 4 §70-71 (Thail.) (Duties of the Thai people “to protect and uphold the Nation, religions and the King…to defend the country and safeguard national interests…”).
53 HELD, supra note 6, at 56
public deliberation, the Constitution does not only seek to foster an active and involved citizenry, but also implies its faith in the people’s public spirit to come forward with a united goal to make their decisions based upon “the common good”.

**ii. What do the Participatory Rights Cover?**

A broad framework to promote public participation in political decision-making, state plan and policy and in the scrutiny of the exercise of the government powers has been laid down in the 2007 Constitution as a matter of principle. Chapter V, Part 10 (*the directive principles of state policies in relation to public participation*) established the purposes and general areas of public participation that the state must accommodate. The provision also requires the state to provide resources and education in the promotion of this political right. This broad framework, therefore, laid a strong foundation for several other sections in the implementation of public participation for national interests.

The guarantee of public engagement in political realm is certainly not limited to liberties in connection with assembly and association (Chapter III, Part 11). Chapter VII provides substantial rights to the people for their direct political participation (in addition to petition for the proposal of a bill to the National Assembly, to lodge a complaint to remove the persons from office) in a referendum where the matter may affect “national” or “public interest” or is required by law. This general term has become a rule of thumb which can trigger the people’s right to political participation as long as issues affecting national interests or the common good are implicated. The new public rights are, therefore, included in several policy decision-makings such as in the areas of foreign affairs and environmental protection. The following sections are operated in accordance with the directive principles of state policies in relation to public participation.
Section 165 (Chapter VII) specifies circumstances under which a referendum may be conducted, in the case where the Council of Ministers is of the opinion that any issue may affect national or public interests.\footnote{CONST. (2007), Ch. 7 §165 (Thail.).}

Section 190 (Chapter IX) requires public hearing in a treaty-making process for any treaty which “provides for a change in the Thai territories or extraterritorial areas over which Thailand has sovereign rights…or has extensive impacts on national economic or social security or generates material commitments in trade, investment or budgets of the country.”\footnote{Id. Ch. 9 §190 (amended 2011).}

Section 66 (Chapter III) endows the right of a community to participate in the conservation, preservation and exploitation of natural resources, and in the protection, promotion and preservation of the quality of the environment. According to this provision, public consultation must be made prior to undertaking any project or activity which may seriously affect the community with respect to the quality of the environment, natural resources and health.\footnote{Id. Ch. 3 §66.}

iii. “Developmental” Element under Participatory Democracy

From its framework to specific provisions, the Thai Constitution can be described as aspiring toward participatory democracy by focusing on the people’s rights to self-governing through a means of direct political participation other than an electoral process. Nevertheless, the Constitution’s specific reference to civic duties (Chapter IV) and to specific provisions (Chapter VII, Section 66, 165 and 190) concerning political participation in the issues of national concerns as described (e.g. to petition to remove officers, to deliberate on a treaty that has extensive impacts on national economic or social security) presents a certain element of republicanism by demanding a collective role of the people to address, strictly speaking, non-private issues. Thus, matters affecting
national or public interests which require individuals’ decisions to be based on what is best for the country (rather than personal preference) establish a system of cooperation. And it is this system that republicanism strives for. Thus, the current Thai Constitution does not only adopt the idea of participatory democracy (forms of direct democracy in several areas of political decision-making), but also place an emphasis on the developmental element stressed in the republican model by subjecting concerned national issues ranging from environmental conservation to foreign policy to public deliberation in the creation of “concerned citizens”.

The adoption of participatory democracy is clearly established in the Constitution’s principle which seeks to promote civic roles in the governing process and to emphasize that “the sovereign power belongs to the Thai people”. The directive principles of state policies fully embrace the notion of strong democracy by specifically requiring the state’s roles not only in promoting public participation at all decision-making levels, but also in providing civic education for political development. Civic education and well-informed citizens remain ones of the most important ingredients stressed by participatory democracy that made citizens capable of transforming one’s interest into a community’s.\footnote{B\textsc{arber}, supra note 29, at 117.} The extent of this type of direct democracy goes beyond an electoral process, and is not only limited to a “consultative”, but is also an “initiative process”. The entire constitutional chapter on direct political participation by the people has dedicated to empowering people to propose a bill and to remove misbehaving officers from the office. Thus, through these different types of processes, the participatory model is clearly adopted under the Constitution to generate people’s stronger political will power in directing the fate of their community.
Beneath the participatory model, an element of republicanism is arguably present in terms of the types of issues to be subject to public participation, which in a way demands a community mindset of participants to solve problems that may be remotely out of their concerns. These issues are those affecting public interests: territorial demarcation and sovereignty, national budgets, economic and social security and so on. The presumption is there in the qualities of individuals required for effective self-governance, and that people aspire to “think community” to begin with. Opportunities for public participation (public issue formulation) then become the formation of “a society in which the affairs of the state are integrated into the affairs of ordinary citizens”.\(^5\) In my view, the aspect of the participatory process that stresses a collective decision-making of the people in the issues that concern the nation as a whole (civic virtue) rather than individuals requires a high degree of a citizen’s communal mindset. Individuals’ aims and wishes are cast away by issues framed toward social responsibility and the pursuit of public wellness. This specific aspect of the Thai’s participatory democracy can be seen as inspired by republicanism.


Despite the mixed elements of the Thai Constitution, republicanism and participatory democracy operate on different presumptions and principles. Whereas the former is based on politics of homogeneity, the latter recognizes one of the most important conditions of modern politics; competing interests, conflicts and pluralism. The function of public participation under participatory democracy is rather employed to reconcile these differences than to forge consensus based upon previous norms.\(^5\) Both models are clearly different in terms of their means in the pursuit of their social ends. The

\(^5\) Held, supra note 6, at 57.

\(^5\) Barber, supra note 29, at 128-131 (describing political conditions that impose “a necessity for public action…for reasonable public choice, in the presence of conflict and in the absence of private or independent grounds for judgment”) (emphasis added).
version of direct democracy by Benjamin Barber, thus, rejects a republican approach
based on its collectivist, unitary aspects and the idea of civic virtue community through a
believe that individuals’ interests must be first recognized and transformed, only then a
community can later be created. This is, however, what might be missing from the idea
that the current Constitution embraces as it requires people to deliberate with a public
mind, and to think collectively in the interest of the country. Its focus of public
consultation at a national level, without paying adequate attention to small scale issues,
may increase the degree of this ideological tension, and jeopardize participatory principle
itself. What we might be implementing here is pushing this deeply divided society to
address highly collective and extremely political issues. Whereas there is an absence of
public participation in the areas of economic and social concerns at individuals’ level,
these are inadequately provided at a local scale. The path to fully appreciate the benefits
of participatory democracy requires us to rethink and redesign the scope of public
participation.

The problems of the Thai democracy that encompasses various dimensions,
citizens’ apathy in politics, serious social fragmentation or administration inefficiency are
legitimate reasons to undertake another round of constitutional adjustment by shifting
public participation’s focus more on the issues that affect individuals’ fundamental rights
and local communities’ rights. This is the area where the idea of liberalism can help
bridging the gap between participatory and republican models by raising the issue
concerning fundamental justice (life, liberty and security interest) that each individual

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60 Section 66 (Chapter III) may provide a community right in the management and preservation of their
local resources. These rights are still limited to environmental protection, natural resources preservation
and the public health. Similarly, although section 287 (Chapter 14) states that local residents have the right
to public participation “in the case where any act to be performed by a local government organization may
have material impacts on the livelihood of local residents”, this right is of course limited to a local
government’s conduct or activity, and does not apply to an act of the central government such a treaty
making or border settlement.
shares to develop into a common understanding. Barber may reject liberalism based on
the argument of self-consummation. However, there is a tactful element that lies in this
individualistic character which can have positive impacts on Thai democracy. The
importance of shifting the scope of public participation to focus on individual
fundamental interests, and the role that liberalism can play in order to reconcile these
differences will be further elaborated in the following section.

The current approach may seem generous in its terms for inviting political
participation by the people to address all kinds of complex national issues. It is, however,
inadequate to overcome specific weaknesses posed in the modern Thai society. In the
path toward building citizens’ strong commitment to make a public choice and creating a
community, individual needs and differences must be first recognized, shared and
understood by others. The following section seeks to resolve the tension between the two
ideologies by suggesting how the incorporation of liberalism can come into play to help
bridging the gap, and to overcome these specific challenges.

V. Toward Cultural Reform and Creation of a New Social Discipline through
Strengthening Political Participation Instrument

Because of the weaknesses of public participation set forth in the first section, this
republican-mixed participatory form is deemed inadequate in response to these modern
challenges. Adopting a liberal component in participatory democracy is required, and
does not necessarily replace the republican values. On the contrary, my arguments in the
following section will show how this approach can enhance the quality of a “citizenship”
(informed, socially responsible and rational) by breaking a certain aspect of cultural
barriers and a negative social discipline.

Liberalism underlines the importance of an individual’s fundamental rights to
make us realize the values of the rights we hold to begin with. It is the notion that will
make us understand that our rights are as important and as uninfringeable as others. Thus,
in the exercise of one’s personal freedom, one cannot do so without disregarding his or her community. Liberalism, to my understanding, does not go so far that it legitimizes the supremacy of one’s interest over another’s. Liberalism requires us to recognize each individual’s interest and prioritize it in accordance with its necessity on the basis of mutual understandings and compromises. Through this mode of participation, democracy will turn into a project that forges ordinary citizens’ potentiality through self-discovery of their personal needs, and eventually the realization of the common concerns.

A. The Need to Break Cultural and Social Barriers to Fully Embrace Democratic Principles

A series of constitutional reforms have been undertaken primarily aiming at deconstructing and reconstructing Thailand’s political structure (the establishment of various democratic forms). Despite the transformations of its legal and political landscape, the conduct and political will of the people in the pursuit of this path may only be enhanced if facilitated by effective mechanisms. An emphasis on a liberal component within participatory democracy is a way to create active citizenship and a new social discipline that teaches them to deliberate on the basis of rationality, and to give faith in the governing system. It is, therefore, my understanding that the improvement of Thailand’s democracy condition does not solely depend upon a change in the political structure, but also the cultural and social aspects to be addressed in the context of liberalism.

B. Justification for Incorporating Liberalism into Participatory Democracy: the Affirmation of Fundamental Rights

The attack on liberalism oftentimes relies on the assumption of the pursuit of pure self-interest, rather than of the community as a whole. The typical claim lies in the heart of human nature which is based on self-satisfaction, self-fulfillment and a desire for personal gains. For better or worse, this is the reality we must acknowledge. My take on
the incorporation of the liberal approach into public participation, of course, does not approve of all sorts of unlimited personal freedoms and individuals’ rights, but rather of those that need to be protected. Here, we are talking about the protection of negative freedom, freedom from interference of one’s fundamental rights and liberties. When it comes to the issues surrounding individuals’ fundamental justice (human rights, life, liberty and security interests), no matter how diversified the community is, we cannot deny that all equally share the same type of legitimate interest and the desire to secure a livelihood.

The deficiency of the existing public participation mechanisms that encompass broad public issues (such as those affecting national budgets, having substantial social, economic impacts or national security) is that they sometimes do not give people enough reasons to be active and to become concerned citizens, while at worst failing to accommodate those who might be personally affected. With the dramatic increase in numbers of the “qualified issues” for public participation, there is also a question of how well numerous public hearings will respect and reflect people’s opinions, if at all. Can the government meaningfully follow through with this constitutional obligation, especially given that there is no follow-up process? In contrast to the matter of individuals’ fundamental rights, high-profile national issues arguably tend to produce less responsive administration with regard to public opinion due to the fact that there are no individual needs to serve, no specific misery to attend to, and no one to contest this government’s failure. Benjamin Barber referred to this scenario as political hypocrisy in which political elites throw referenda at the people, and overwhelm them with all kinds of complex mass society problems.61 The process therefore leads to further passivity through self-

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61 Barber’s claim, however, rather pointed out to the problem of a lack of information, full debate and insulation from money and media that prevent people from fuller and effective participation. Because the active, engaged and civic-minded characters of citizens have been presumed, the argument for strong
perpetuating ignorance in the areas of “remote politics” while building up tensions for better responses in the areas of “daily politics”.

To get people to come forward and deliberate in accordance with our democratic purposes, the process must create a system that fosters civic activity and trust among the constituents (among the people, and between the people and the government). The justifications for adopting the specific aspect of liberal ideology (in the protection of individuals’ life, fundamental liberty and security) is, therefore, to form this meaningful decision-making process by the people through (i) breaking the pattern of passivity, (ii) keeping the executive truly accountable and responsive to its constituents, (iii) generating compromise within the society, and (iv) developing the “will power” as opposed to the “want” as part of the social harmony process. The approach seeks to break the barrier between liberalism and democracy by using liberal elements to recover its moral dimension. When the system is designed to cultivate individuals’ motivations and intellects, only then the maintenance of liberty and individual development “can be fully achieved with the direct and continuous involvement of citizens in the regulation of society and state”62.

i. Breaking the Pattern of Passivity

It has been said that for democracy to be meaningfully implemented, there needs to be more than simply political rights and public space. People themselves must exercise these powers actively and caringly.63 In the absence of the energy and the civic spirit, the function of democracy is deemed to diminish. Citizens’ attitude toward politics can be a barrier to its development when citizens fail to act upon which the circumstances so require.

62 HELD, supra note 6, at 267.
63 ALAN KEENAN, DEMOCRACY IN QUESTION 7 (2003).
In light of this difficulty, the theory of a “civic reserve” developed by Gabriel Almond and Sidney Verba suggested that citizens, while generally uninterested in public affairs, will be able to “mobilize resources if…their interests are threatened.”

By the same token, Carol Pateman supported that the pattern of citizens’ apathy and ignorance can be broken by “making democracy count in people’s everyday life.”

She acknowledged the weaknesses of the human nature that any decision would not be made as effectively as “in those nearer home”, and that people will learn to participate from issues that they are most interested in and likely to have a better grasp of which are those “immediately touch their lives”. According to this logic, strong motivations and passion of the people to play their parts in public realm are simply generated from policy decisions or governmental actions that directly affect or threaten their personal justice. Thus, one of the simplest ways to overcome people’s passivity and indifference in politics is to let them address and manage their affairs through issues that are individually or community related. Following the “civic reserve” theory, citizens’ activism and interests in politics are generally heightened when they personally feel that there is a need to take action.

In response to the question of a constitutional mechanism, these rationales require that we readjust the scope of public participation by prioritizing those who are to be personally affected by government’s undertakings to get their words out in a formal hearing process prior to the project. The strategy is thus to extend the method of democratic control to the areas upon which people’s livelihood depend. Although this view sounds somewhat self-indulgent in a sense that people’s active and effective participation would be more meaningful, it is generally accepted that citizens’ interests are best served when they are personally engaged in the decision-making process.

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64 VQORTRUP, supra note 2, at 28-29. See Gabriel Almond, Civic Culture, in THE BLACKWELL ENCYCLOPEDIA OF POLITICAL SCIENCE 91 (Vernon Bogdanor ed. 1991). Montesquieu also defended the idea that “individuals’ capacities and energies would be unleashed in the knowledge that privately initiated interests would be protected”. HELD, supra note 6, at 83.

65 PATEMAN, supra note 17, at 104.

66 HELD, supra note 6, at 269.
participation requires a subject of discussion that they personally care about or have a reason to be interested in, it is by no means that an end result will always be self-satisfactory, especially when the surrounding issues concern an individual’s fundamental rights. No matter how self-interest driven one can be, the matter that requires immediate attention justifies individuals’ articulation of their personal needs and concerns. It is one of the easiest starts to prepare people to articulate their personal needs in a way of a public spirit. My intention is to propose a basic solution that can serve as a stepping stone toward a more ambitious goal such as national politics. Before then, the character of an active, concerned and informed citizen must be nurtured. And we can leave the elitism’ claim behind that because of the passive and apathetic characters that citizens in general possess, people should be kept in their private realm. Besides, legitimacy in policy decisions will be automatically improved as those personally affected can exercise the right to express their problems and propose solutions of their own.67

ii. Keeping the Executive Fit

The primary arguments for limiting the scope of public participation to issues that immediately concern individuals’ fundamental rights go directly to support the function of democracy in two ways. One is necessary for securing effective and responsive administration, and the other is for inducing and maintaining active roles of citizens in the political realm. The latter effect is also contingent upon the former. Public participation can serve as a safety valve to secure people’s interests only when a responsive character of the state is present to guarantee that people’s feedback will form parts of the political decisions, and that state’s policies will be guided by public opinions. The same holds true for the maintenance of effective public participation that can protect individuals’ justice and the quality of one’s citizenship as “engaged citizens”. Thus,

67 Shapiro criticized Gutmann and Thompson’s false presumption on the legitimacy of deliberative process concerning the health care issue that involved less than twenty percent of affected population. IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY 29 (3rd ed. 2006).
framing issues to enable public participation to serve specific purposes, to have real impacts on people, and to be practically feasible are crucial to what type of effects we wish public participation to have upon the people. This certainly requires us to refrain from generating all kinds of high-profile, complex and random issues for public consultation. Even Benjamin Barber in his book, *Strong Democracy*, suggested its own version of limitation by pointing out that direct self-governance of citizens does not necessarily take place “at every level and in every instance, but frequently enough and in particular when basic policies are being decided and when significant power is being deployed”. 68 And with my own interpretation, the “basic policies” and “significant power” here refer to fundamental issues surrounding individuals’ life, liberty and security.

The concern of the effectiveness of government administration addresses the issue of public participation process on two grounds: first, the areas of public participation and secondly, the manner in which to institute. The issues of fundamental individual rights are increasingly important in the treaty-making context and especially crucial in the health and environment related legislation enactment that demands a highly responsive administration. By cutting down the potential issues to be subject to participation process may not be sufficient to secure the type of administration that we want, a formal hearing which allows an appeal process is necessary to make sure that people were listened and the government’s decision is carefully observed. It is true that the issue of individuals’ fundamental interest already provides government a specific purpose to be attentive. This follow-up process will serve as a formal safeguard in addition to such rationality.

The process of public participation requires people to come forward and deliberate. But it takes a responsive and effective administration for public participation
to fully serve its function - effective in the sense that a government can manage its resources and handle the mandatory requirements, and responsive in a way that it can truly incorporate public feedback into policy decisions.69 Keeping the scope of the issues broad thus runs the risk of producing dysfunctional administration through the cumulative consequences of all sorts of initiatives that a state finds impossible to catch up with.70 The reduction in the effectiveness of the Thai government is posing challenges such as unmanageable workloads and irresponsible administration (temptation to fast-forward their obligations only to satisfy the rules while ignoring the true meaning of the procedure), especially in the absence of any formal follow-up process.71

Centering issues on individuals’ fundamental rights and guaranteeing a responsive formal process help create people’s trust in government and faith in democracy by showing them that democracy is not simply an abstract notion, but a process in which their actions can make a difference. Public participation oftentimes fails to transform conflicts into a solution primarily because the citizens’ compromised position fails to form part of the political decisions. It then becomes simply a meaningless tool that draws people together just so they can find out later on that their share of concerns have been given up for something else that they did not negotiate for.72 Using public participation to

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69 HELD, supra note 6, at 154 (2nd ed. 1996) (citing HABERMAS J., STRUKTWANDEL DER OFFENTLICHKEIT (1962) (“It has been said that the realms of social life where matters of general interests can be discussed and where different opinions can be reconciled by allowing arguments to be sustained are fundamental to the health of politics”).

70 The example of the direct democracy dilemma was given in the domestic legislature context. Since the 1970s voters have tended to like initiatives that promise better schools, new hospitals or tougher prison terms, but they are oblivious to the costs involved. At the same time, they loathe taxes and in many states they have insisted, by voter initiative, that two-thirds majorities are needed to raise them. Direct Democracy, The Tyranny of the Majority, THE ECONOMIST, Dec. 17, 2009, available at http://www.economist.com/world/united-states/displaystory.cfm?story_id=15127600.

71 Although freedom of speech (under civil and political rights) is traditionally regarded as a negative right in nature, for these rights to be fully respected, “one must entrench rights to resources that help the exercise of those rights…” Thus, this type of negative rights which arguably does not enjoy unlimited exercises because it could have both budgetary and certain political consequences. CECILE FABRE, SOCIAL RIGHTS UNDER THE CONSTITUTION 40, 42 (2000).

72 Diversity of viewpoint in foreign-policy decision making is useful primarily because it, as an end in itself, gives the public a sense that its viewpoint has been heard and considered. MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 32 (1990) (emphasis added).
address broad political issues such as matters affecting a national budget, social security and so on can give rise to such problems, especially when the reflection of citizens’ input in the national issues is commonly minimal.

David Held emphasized the significance of maintaining the effectiveness of public participation by pointing out that if people have reasons to believe that their inputs are unlikely to be taken seriously, incorporated or weighed equally as those of public authorities, it is less likely of course that people will count on the system or find the government trustworthy.73 The result will further undermine the participation mechanism itself making it more difficult, if not impossible, to maintain an engaged role of citizens.

iii. A Path Toward Compromise, not Consensus

The path to generate consensus among people’s political views on the issues of national concerns or the “common good” can be impractical. Besides posing a challenge to public participation in terms of citizens’ apathy, broad political, social or economic issues also run a greater risk of creating diversion and aversion among the people, especially in a highly polarized society. Tocqueville, in fact, asserted the reason why high-profile or broad issues will not produce effective public participation due to its tendency to intensify social conflicts driven by participants’ biases, political alliance and emotion.74 Its danger lies in the unlimited scope and imprudent application of public participation. Overload of information and extreme publicity concerning a national issue often cause citizens to be “exposed to so many opinions and so many facts that they are reduced to choosing at random”75 as opposed to their sense of rationality. This is the scenario that wide open national issues tend to produce: confrontation and hostility.

73 Held, supra note 6, at 268.
74 Stephan Holmes, Tocqueville and Democracy, in THE IDEA OF DEMOCRACY 28 (David Copp, John Hampton & John E. Roemer eds., 1993) (“In the heat of the struggle each partisan is driven beyond the natural limits of his own views by the views and excesses of his adversaries, loses sight of the very aim he was pursuing …”)
75 Id.
Many are sensitive matters which somehow, to great amount of people, serve as an implication for their political alliance that will only exacerbate their inability to accept their internal differences (ideas or political views). The current approach may presume that participants will enter into a forum with an impartial, open mind concerning their solutions, but it is hardly the case, given Thailand’s recent political situation.

How can a specific, individual-related issue open up people’s minds? The argument is drawn from a distinctive characteristic that the concept of individuals’ life, liberty and security possessed. Unlike general political issues, *its dramatic impact on people’s lives* can more easily call upon communal sympathy and understandings. A hearing process which *invites and responds to* affected individuals is crucial to a path to reconciliation. A guarantee of a responsive process to individuals’ fundamental justice is a way of recognizing the differences and diversity of needs that are so crucial that they cannot simply be denied of their existence. The approach does not try to accommodate every single interest, but to ensure that the interests affected are acknowledged and articulated in search of compromise and understandings among equal citizens.76 This follows: “[a] richer understanding of process of democratic discussion results if we assume that differences...function as a resource for public reason rather than as divisions that public reason transcends”.77 The pressure for consensus, particularly required for issues of national concerns, is generally a suppression rather than a transformation of a conflict between individual interests and civic virtue. As previously asserted, the liberal mode of participation which narrows down the issue of public consultation will seek to generate compromise, rather than consensus based on mutual respect and understandings.

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76 Carol C. Gould, *Diversity and Democracy: Representing Differences*, in *DEMOCRACY AND DIFFERENCES* 172-174 (Seyla Benhabib ed., 1996). Bonnie Honig, *Difference, Dilemma, and the Politics of Home*, in *DEMOCRACY AND DIFFERENCES* 261(Seyla Benhabib ed., 1996) (“[w]hen Both oughts are compelling, and the situation that stages their conflict is inescapable. In such cases, I think if constructively at all, in terms of acting for the best and this is a frame of mind that acknowledges the presence of both the two oughts”).

under the principle that one’s individual rights cannot prevail when such an assertion infringes upon another’s. The decision one makes will require him to be grounded upon a moral principle (which can sometimes even be one’s personal preference). It can help generate community awareness through developing citizens’ compassion and mutual understandings. This process forms a basis for harmony which allows people to fully participate in their daily politics, and to relate to each other in positive ways. With the right mechanism, the country can be led away from internal diversion and toward the rule of law. Argued by Richard Arneson, in Liberal Democratic Community, liberalism may present individual conflicts in the short run, but it protects all citizens’ stake “in the maintenance of an open society for goal formation”78 as a building block for tolerance and wide individual liberty.

iv. Developmental Driven

Both John Rawls and Jürgen Habermas believed that the priority of basic liberal principle must be given since its protection provides the framework for the exercise of free public reason, the framework in which citizens’ reasonableness and rationality thrive on. This concept of political justice, by giving people a sense of security in their affected rights through a guarantee of a responsive public hearing, enables them to express and transform their understanding of the good through political interactions in the long run.79 Public participation may oftentimes be seen as a conflicting principle of individualism that primarily seeks to protect individual’s preferences and freedoms rather than to promote consensus on public issues.80 Nonetheless, the process of public participation that is based on the concept of fundamental rights to life, liberty and security will encourage individuals “to view one another as being entitled to universal moral respect

78 Richard Arneson, Liberal Democratic Community, in NEMOS: DEMOCRATIC COMMUNITY, supra note 27, at 209.
80 Benhabib, supra note 22, at 77.
and egalitarian reciprocity”\(^{81}\) enabling the protection of fundamental justice for all. The issue oftentimes brings the scenario in which a person comes to realize how his personal interest encompasses others with whom he is associated with. What I view as my livelihood may also be others’, and together is the community’s. This type of self-interest can generate a share understanding among those who bear the same fate. A collective goal need not be “common”, but can be an interest all can share.\(^{82}\) The process, therefore, does not only induce the desire of an individual to speak up, but also brings about the recognition of moral rights among the affected citizens in that particular community. Dialogues in the liberal mode, I must argue, helps humans understand each other’s circumstances, prioritize pains felt by him and the members of his community, and develop sympathy toward one another. The liberal mode of participation that focuses on the very fundamental issues thus encourages the deliberation of one’s personal needs; a process that allows individuals to discuss, to share, to be informed, and to form a rational choice capable of making a joint decision.\(^{83}\)

Participation in politics “called upon citizens to weigh interests not his own; to be guided…by another rule than his private partialities; to apply, at every turn, principles and maxims which have for their reason of existence the common good”.\(^{84}\) I can only validate the argument that political participation is believed to hold this intrinsic value for the development of individuality when the type of political participation can truly unleash individual energies, and render a meaningful process. It is, therefore, a matter of

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\(^{81}\) Id. at 78.
\(^{82}\) Supra note 77, at 68.
\(^{83}\) Along this line, Richard Arneson even argued for the necessity of the deliberation of an individual’s basic preference to discover one’s desire (which can sometimes be based on his moral ground) and to form a rational choice. Arneson, Liberal Democratic Community, in NEMOS: DEMOCRATIC COMMUNITY, supra note 27, at 203-204.
designing a process that will induce and draw the people to come together in the first place to make such transformation happen.

**VI. Patching Up Pieces**

Social issues that have rampaged in the Thai society are not novel problems of democracy. In fact, Thailand seems to pick up all the possibilities (unfavorable conditions) that could leave public participation the least feasible alternative - citizens’ passivity in national issues, serious social tension and ineffective administration. Despite its sharp teeth, the Thai Constitution, to my understanding, is only half-way operational, and has not yet effectively enforced these mechanisms. Instead of fostering the quality of citizenship and democracy, public participation has widened the gap between the most experienced and the less capable by further encouraging a sense of apathy while disconnecting the affected constituents from the system. In addition, the broad realm of public consultation has presented threats to the effectiveness of governmental functions in such a way that the means of direct participation does not serve its original purpose, but is merely a shield in a battlefield of politics.

To this end, if the existing machinery (public participation) cannot serve its function, and may in fact worsen the social conditions, it is time not for the abandonment, but the readjustment. Different models of democracy as mentioned each have great features to offer. It is unnecessary to be critical of one, and not another, and to solely rely upon a single model. Participatory democracy has laid a strong foundation under the current Constitution, but to make it work may require a seed of liberalism and a balance in elitism’s claim (effective administration) to finally achieve the ideology of republicanism (a sense of community and citizenship). As much as narrowing down the sphere of public participation to a very fundamental issue must be undertaken, a responsive mechanism must be guaranteed. Greater emphasis should be placed on the
necessity to define and delimit the sphere of politics to unleash, direct and foster individual energies in the civil society into the right channel. Cutting down issues does not only mean allowing the government to focus on, and respond to a very fundamental one, but also creating greater trust among the people and of the people in the political process. John Stuart Mill also pointed out that there is a way to incorporate and transform individual liberty into a building block for utilitarianism, the greatest good of all.

In sum, this is not simply a proposal to a legal reform, but also a cultural one. When a Constitution gets ahead of the people, it is our task to slow the process down to allow them to move along. To leave it up to the people to catch up with the system, to my belief, is a major flaw since this can be another cycle of political development in the absence of the “necessary will” of the people (that is, the will to undertake the right political action) to entail a proper function of democracy, which may lead us back to where we started. Promotion of political equality cannot be made simply by adopting a new political structure, but also cultural reform through creating a new social discipline. We surely do not wish that this instrument to be just an empty process only to fulfill the definition of a democratic nation.

85 A triumph liberal way of thinking, “a sense that limiting excesses of government and protecting individual rights are of greater concern than translating immediate popular sentiment into public policy”. Marc F. Platter, From Liberalism to liberal Democracy, in DEMOCRACY: A READER 68 (Larry Diamond & Marc F. Platter, eds., 2009).
86 SUWANNATHAT-PIAN, supra note 34, at 4 (“Democracy is alive if and when its principle and process are truly put into practice”).
Chapter IV: On the Separation of Powers (The State’s Organs)

I. Introduction

The common understanding of executive efficiency which can sometimes be narrowly interpreted as administrative “convenience” led to the emergence of various forms of democratic mechanisms to ensure greater diligence on the part of the government, and to prevent the abuse of power as a result of the branch having all the powers and accessible resources at hand. The emphasis of the people’s broad participatory rights in the political decision-making process as introduced in Chapter III was one of the examples that affected the priority of the administrative efficiency of the executive in the governing process. The concern is nevertheless conceivable because the term “convenience” can result in the disregard of the public views and representation (the involvement of legislature) simply to get things done, and the tendency toward power monopolization by that particular branch in the absence of political barriers. The notion of checks and balances introduced under the separation of powers doctrine has therefore been argued to counter such effects, and to create accountable and responsible governance rather than to facilitate the political process, in other words, the function of administration.

Against this backdrop, this chapter will present another perspective in regard to the relationship between the separation of powers doctrine and the administration efficiency that should be in a positive manner by promoting both efficiency and accountability qualities in the governing process. And it is not necessary that we must give up one quality for another. In fact, the emphasis on the central role of the executive in the realm of foreign affairs is to respect the division of powers under the principle of checks and balances. The interference by other branches (checks), although legitimized

\footnote{LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS 35 n. (1990) (citing Myers v. United States, 272 U.S. 52, 293 (1926)).}
under the separation of powers principle, cannot exceed the necessary level because efficiency requires a sufficient level of the executive autonomy in the foreign affairs conduct along with the consideration of judicial deference under particular circumstances. My argument by no means suggests that check mechanisms must be deprived for the benefit of the executive branch’s political independence. These roles, functions and responsibilities of each branch are carefully divided and prescribed under a constitution. My position here is only to point out that it is crucial for this instrumental framework to ensure both political autonomy and accountability of the public institutions. Because when the constitutional structure allows too much boundary crossing among branches, it can undermine the autonomy and undercuts the effective function of the political departments, which constitutes an element of our democracy.

This chapter will introduce the concept of the separation of powers doctrine and its relevance to the preservation of the executive’s foreign affairs authority (Section I) by examining the structure of the Thai and the U.S. Constitutions and the operation of the two systems under this principle which demonstrate the predominant roles of the executive in foreign relations (Section II). Arguably, although the structure of the Thai Constitution allows a broader exercise of the executive’s foreign power, the U.S Presidential role in the realm of foreign affairs is nonetheless rather prominent in practice than textually stipulated. However, there is a certain aspect of the Thai Constitution that may have made its implementation a challenge to this tradition. These are the increasing

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2 Although the President exercises a broad foreign affairs power derived from Article II, his power is not exclusive as the Senate’s coordinate power of “advice and consent” is required in treaty policymaking, either by participating in negotiations, by providing advice on foreign policy, or by using its veto power to force the President senatorial policy. John C. Yoo, Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding, 99 COLUM. L. REV. 1955, 1963 (1999). See also, Arthur Bestor, Respective Roles of Senate and President in the Making and Abrogation of Treaties-The Original Intent of the Framers of the Constitution Historically Examined, 55 WASH. L. REv. 1, 117-20 (1979). The Thai Constitution, on the other hand, vests the executive with a broad treaty power with a few exceptions. Jaturon Therawat, Roles of the Parliament in Treaty Making Process under the Thai Constitution 2 (Nov. 21, 2008) (Working Paper, on file with the King Prajadhipok’s Institute), available at http://www.kpi.ac.th/kpith/index.php?option=com_content&task=view&id=264&Itemid=9
roles of the legislative and judiciary interventions that have threatened the effective function of the executive in the treaty-making process. Against this unconventional practice, there are good rationales behind the proposition of centralized executive foreign affairs authority. The institutional structure, expertise, efficiency and credibility are the leading qualities that make the branch a good fit for the foreign affairs administrator (Section III). At the same time, in the absence of sufficiently strong domestic implications, these justifications also suggest limited responsibility of the legislature in the realm of foreign relations. And last but not least, the consideration of limited judicial review to support the primary authority of the executive in this area will be examined (Section IV). Although the judiciary is considered an appropriate body to enforce our constitutional process, there are certain factors like decisions that involve foreign policy determination, the allocation of state organ powers, and important individual rights concerns that can come into play in determining an appropriate level of judicial involvement. These are thus key elements to the improvement of a balanced interaction among the institutional branches in the area of foreign affairs.

II. The Separation of Powers Principle

Advanced by Montesquieu, the separation of powers doctrine is also known as the system of “checks and balances” among the three branches of government, namely the legislature, the executive and the judiciary, which is designed to divide government functions, and eliminate the concentration of power.\(^3\) The framers’ constitutionalism was

\(^3\) Elliot L. Richardson, *Checks and Balances in Foreign Relations*, 83 Am. J. Int’l L. 736 (1989). The term "trias politica" or "separation of powers" was coined by Charles-Louis de Secondat, baron de La Brède et de Montesquieu, an 18th century French social and political philosopher. Under his model, the political authority of the state is divided into legislative, executive and judicial powers. He asserted that, to most effectively promote liberty, these three powers must be *separate and acting independently*. An Overview on the Separation of Powers, National Conference of State Legislature, http://www.ncsl.org/LegislaturesElections/OrganizationProcedureFacilities/SeparationofPowersOverview/tabid/13543/Default.aspx. The search to divide government by function was also undertaken by the work of John Locke in his Second Treatise of Government to distinguish between the legislative and executive powers. Montesquieu also adopted Locke’s understanding of the executive power as “composed of a foreign affairs power”. *Yoo, supra* note 2, at 1993.
committed to limited government through this governing method to ensure that such powers only come to exist through the prescription of a constitution which assigns functions and allocates powers to each branch. The legislature holds the power to regulate through making, amending and abrogating laws. The executive branch has the duties to execute the laws, take care of the daily administration, and also serve as the guardian of the economy and internal security. And the judiciary has the primary function to enforce the laws, and resolve disputes. These governmental powers and responsibilities are to be set apart, and exercised independently to allow effective checks among these institutions to occur.\(^4\) As Montesquieu observed, the executive and the legislative powers, when falling into the same hand, can lead to a tyrannical form of government.\(^5\) Thus, the basic idea of the doctrine is to ensure the independence of the branches and the decentralization of powers.

The interaction among these branches is deemed crucial not only to the effectiveness of the check system, but also “the practical working of government”.\(^6\) The term “practical working” was, however, argued as operational and feasibly functional rather than a “mere convenience” of a particular branch.\(^7\) Although Justice Brandeis’ opinion in \textit{Myers v. United States} suggested the preclusion of the efficiency argument as the primary objective of the separation of powers doctrine which should aim at protecting against the abuse of power,\(^8\) the efficiency of governmental functions may at least be perceived through the independence of the three institutions in the deliberation of their own judgments and decisions. The argument for administrative efficiency and effectiveness as I advocated in the previous chapter is necessary, and does not fall to the

\(^4\) Richardson, \textit{supra} note 3. \textit{See also} HENKIN, \textit{supra} note 1, at 7.
\(^5\) Richardson, \textit{supra} note 3, at 737.
\(^6\) \textit{Id.} at 736.
\(^7\) \textit{Id.} (citing O’donoghue v. United States, 289 U.S. 516, 530 (1933)).
\(^8\) Justice Brandeis wrote “the doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power”. HENKIN, \textit{supra} note 1, at 35 n. (citing \textit{Myers v. United States}, 272 U.S. 52, 293 (1926)).
same level as the claim of “convenience”. These terms (effectiveness and efficiency) have been defined by United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) as one of the eight primary characteristics of good governance and the principle of democracy.\(^9\) Efficiency thus bears a much greater quality than mere convenience by fostering a political condition that could yield a responsible and responsive administration.\(^10\)

Along with the principle of separation of powers, governmental functionality should therefore be taken into consideration, and balanced against the need for governmental checks. Although, the primary objective of institutional independence is to enable each branch to effectively police one another rather than to facilitate the interaction among the branches,\(^11\) the checks system however cannot be so overbearing that it impedes with the government’s necessary functions or its primary authority. In fact, a practical approach as opposed to a rigid one was adopted to enable the realistic operation of government administration throughout the American history.\(^12\) In the maintenance of balance and appropriate checks, a flexible approach which refers to sufficient discretionary power to be exercised by a particular branch without interference of another as a matter of decision-making is adopted.\(^13\) Thus, the powers properly belonging to one branch should not constantly be directed and disrupted by other

\(^9\) See Chapter I, Section III, A

\(^10\) According to dictionary definitions, “efficiency” means “performing or functioning in the best possible manner with the least waste of time and effort” by “having and using requisite knowledge, skill, and industry”. The term also connotes being competent and capable. “Convenience”, on the other hand, bears merely the character of being “at hand, favorable, easy, and comfortable for use”. Thus efficient administration refers to the condition in which the political branch can exercise its power in its best capable manner to serve public needs with little consumption of time, energy and resources. The convenience of administration may only require government works to get done with not much of an effort as well as the quality of work.

\(^11\) Yoo, supra note 2, at 1992 (“By establishing a separation of powers, Locke sought to subject the power to regulate individual conduct to rules that would ensure accountability and fair process”).

\(^12\) MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 36-37 (1990).

\(^13\) “Functions have been allowed to courts as to which Congress itself might have legislated; matters have been withdrawn from courts and vested in the executive; laws have been sustained which are contingent upon executive judgment on highly complicated facts... Enforcement of a rigid conception of separation of powers would make modern government impossible”. Id (citing The Federalist No. 37 (J. Madison)). See also Marbury v. Madison, 5 U.S. 137, 165-166, 170 (1803).
departments. This flexibility reduces the potential collision among these institutions and
the restraint of the executive’s power. In light of the modern treaty practice, the current
arrangement may have gone too far to the extent that the curtailing of the executive’s
authority in the realm of foreign affairs gave rise to several political and social issues as
laid down in Chapter I and III. Thus, for Thailand, which has long maintained the
tradition of having the executive as the leading organ in the conduct of foreign policy, its
new constitutional framework that has diverted the treaty-making practice from a
practical approach (in the procurement of administrative effectiveness) is becoming a
subject of controversy.

In my view, this functional consideration is needed in order to preserve the quality
of the executive administration. Strenuous checks from the legislature and the judiciary
can pose a potential threat to the effectiveness in the formulation of foreign policy and
the conduct of foreign relations. There is also the danger of the legislature’s failure in
giving careful consideration to several different issues, which will undermine the
underlying function of the branch itself. And because the purpose of the separation of
powers doctrine is to create the system in which three branches can effectively police one
another’s usage of power, restoring the constitutional balance among the branches may
also deem necessary to preserve this objective.

The consequences of the principles of separation of powers can be frictions and
result in inefficiencies. And it is the price that people have to pay to ensure that
government is acting in the best interest of the people, as one may argue. But the question
is whether it is necessary that national interests and democratic values in the conduct of
foreign affairs can only be attained and maintained through the adoption of excessive

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14 As Madison suggested, the most crucial task, in his view, is “to provide practical security for each
against the invasion of the others” The Federalist No. 48, at 250 (J. Madison) (emphasis added).
15 John C. Stennis & J. William Fulbright, Senators, Lecture at American Enterprise Institute for Public
Policy Research: The Role of Congress in Foreign Policy (July, 1971), in The Role of Congress in Foreign
Policy, 1971, at 5. See also Henkin, supra note 1, at 58.
legislative and judiciary interventions to control the exercise of the executive’s foreign power. These interests, I must argue, will rather be best preserved when the executive, legislature and judiciary operate as partners within the framework of the constitution. The interaction must not simply be an attempt by each branch to assert its own power. The resolution is rather to secure legislature consultation and judicial reviews in a proper balance, and to maintain mutual respect among the branches.\textsuperscript{16} Under the constitution, the executive is vested with certain political powers enabling it to have broad discretion on matters concerning diplomacy and foreign relations. The central roles of the executive and the consideration of judicial limits in foreign affairs are crucial to the effectiveness of these executive functions. Constant interference of other branches, in the name of national interests, can yield the opposite outcomes like embarrassment, indecisive foreign policy, loss of political supports and economic benefits or even severance of foreign relations. Thus, the argument against administration efficiency cannot be sustained when efficiency does not simply mean “convenience” for a particular branch, but has significant implications for vital national interest and the maintenance of our democratic values.

As a matter of principle, democracy should be invoked to guide the construction of our Constitution by establishing the institutions and procedures that will “promote maximum attention to the will of the people…”\textsuperscript{17} Along this line, for the operation of the separation of powers doctrine to promote this democratic objective by providing a support for a constitutional foundation, a respect of the division of powers must be observed. This goes back to my original argument reasoning why effective administration is crucial for the government to be more responsive to its people and to act in the best


\textsuperscript{17} HENKIN, supra note 1, at 37.
interest of the country. This underlying rationale should be taken into consideration as a
guiding principle to our constitutional procedures, and to our treaty-making process.\textsuperscript{18}

\section*{III. Constitutions under the Separation of Powers Doctrine (Roles and
Responsibilities of the Political Organs in the Realm of Foreign Affairs)}

\subsection*{A. Thailand’s Experience: The Executive’s Foreign Power in the Historical Context}

As partially introduced in Chapter I, Thailand’s treaty-making experience was
overwhelmingly executive authoritative. Throughout the Thai history, Thailand had
maintained a long tradition of Kingship under which the Kings took their leads in the
country’s, which was not limited to the conduct of diplomacy and foreign relations, but
the overall public affairs. Under the absolute monarchy system, foreign affairs power was
vested entirely in the monarch who was the sole authority in the pursuit of foreign
relations and treaty-makings.\textsuperscript{19} They, themselves, were rulers, ambassadors and
diplomats. They made decisions whom to establish and cultivate friendly relations with.\textsuperscript{20}
Trade and exchange of diplomacy, especially under the reign of King Narai (1656-1688),
made Ayudhya exceptionally one of the most powerful and prosperous kingdoms in the
seventeenth century.\textsuperscript{21} It was so astounding that the royalist French remarked as "there is
no state that is more monarchial than Siam."\textsuperscript{22}

\textsuperscript{18} 	extsc{Henkin, Supra note 1, at 38 ("For the large twilight zone where text is silent, where original intent is
uncertain, where history is ambiguous, the principles and the values of democracy may be determinative").}


\textsuperscript{20} “King Ramkhamhaeng of Sukhothai (1279-1300) was proficient in the art of cultivating friendly
relations. He has been often described as a brilliant diplomat”. The period was proclaimed the golden era of
the Sino-Thai trade relations. \textit{Id.} For records of Thailand’s past foreign relations, see \textsc{Leigh Monroe, National

\textsuperscript{21} The age of commerce and prosperity first arrived in the early seventeenth century. The kings welcomed
new knowledge, exchanged embassies with the Netherlands, France and Persia as well as borrowing

\textsuperscript{22} \textit{Id.} at 15 (citing \textsc{Francois Caron & Joost Schouten, A True Description of the Mighty Kingdoms
of Japan and Siam} 128 (John Villiers ed., 1861) (1671)). \textit{See also}, Sompong Sucharitkul, \textit{National Treaty
Law and Practice: Thailand}, in National Treaty Law and Practice 687, 703 (Duncan B. Hollis et al., eds.
2005).
Although, through administrative reforms in the early Ayudhya period, the
governing system was divided into four separate departments having the department of
treasury (also known as “Krom Phra Khlang”) oversee foreign affairs and policy, the
final determination of foreign policy and the treaty negotiations, including the reception
of foreign envoys were still rested with the King. A centralized and functionally
specialized administrative organization was created.23 This tradition had been carried
over to the Bangkok period (Ratanakosin, 1782).24 The responsibilities for the conduct of
foreign affairs, especially the initiations and the conclusions of treaties, were solely
administered by the department of treasury and its sub-division (Krom Tha), which later
became an independent body assuming the status equivalent to that of a Ministry.25

In sum, the powers to conduct foreign policy, relations and the overall affairs had
predominantly been exercised by the executive under the prerogative of the King. The
long tradition of having the focal role of the divine monarch in the administration
certainly has a certain degree of influence upon Thailand’s current political culture and
social structure.26 Despite the declining political role of the monarchy, administering
foreign power through one primary organ remains the core of the Thai bureaucracy. After
all, the power to conclude a peace treaty, armistice or other treaties with other countries
or international organizations is the prerogative of the King who exercises his executive

23 See Chapter III, Section IV, A. Stennis & Fulbright, Senators, Lecture at American Enterprise Institute
for Public Policy Research: The Role of Congress in Foreign Policy (July, 1971), in THE ROLE
OF CONGRESS IN FOREIGN POLICY, supra note 15. WILLIAM J. SIFFIN, THE THAI BUREAUCRACY:
INSTITUTIONAL CHANGE AND DEVELOPMENT 20 (1966). The centralized administration was formulated by
King Trailok who tried to transform the political structure by drawing from Khmer practice. FRED W.
24 Despite the efforts of modernization, the centralized power of monarchy was displaced by office-holding
elites as the core of bureaucracy while the monarch continued its role in legitimizing politics. RIGGS, supra
note 23, at 92.
25 Krom Tha (meaning “port” in Thai used to deal with port activities) has ever since gained its new status
as the Ministry of Foreign Affairs of Thailand. Supra note 19. SIFFIN, supra note 23.
26 See Chapter III, Section IV, A (describing social structure and political culture as sources of political
inequality).
power through the Council of Ministers pursuant to Section 190. Thus, the historical context may establish the tradition and practices, but in the continuation of political modernization, it is the Constitution that prescribes the power structure, and designates the division of labor for the public institutions.

**B. Foreign Powers Vested under the Thai Constitution**

Not until the first Constitution of Thailand (June 24, 1932) had the treaty-making practice been formalized while the role of the monarch become more or less than a symbol of the supreme authority. Although the treaty-making process has been changed back and forth throughout a series of Constitutions, the tradition that remains unaltered is the predominant role of the executive that takes up the primary responsibilities in the realm of foreign affairs. The plenary power of the executive in the conduct of foreign relations may be implied under the Chapter of Council of Ministers (IX), but its plenary treaty power has been clearly worded pursuant to Section 190.

It may be true that the parliament still enjoys a certain amount of control over the areas that involve international relations such as through its budgetary appropriation or war declaration authorities. There was, however, little evidence that the parliament sought to exercise its control or exert its influence through these channels. While the legislative authorization concerning budget spending can be overridden by the executive under certain circumstance, the war declaration which had barely been issued by the parliament was secretly nullified by the executive during the Second World War. Thus,

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27 CONST. (2007), Ch. 1 §3, (Thail.) (“The sovereign power belongs to the Thai people. The King as Head of the State shall exercise such power through the National Assembly, the Council of Ministers and the Courts in accordance with the provisions of this Constitution.”)

28 MONROE, supra note 20, at 177.


30 BAKER & PHONGPAICHIT, supra note 21, at 135-139. Sucharitkul, supra note 22, at 695.
arguably the participation of the legislature in the shaping of a national foreign policy remains limited. This discretionary power is still well preserved within the sphere of the executive.

Under the power granted by the Constitution, the legislature’s primary duties are to legislate and enact organic laws as well as annual appropriation bills which make it the central authorities in the authorization of the country’s budgets, spending and finance. This specific power may also imply its ability to allocate and control governmental budgets concerning foreign affairs. Matters such as the budget allocation for treaty negotiations or the amount of foreign aids and international organization membership fees to be incurred must be eventually considered and approved by both Houses. Nonetheless, the legislative control of foreign affairs in terms of national spending does not go beyond the time of normalcy such as the “state of war” or “arm conflicts”. Section 169 clearly provides certain flexibilities by granting special powers to the Council of Ministers in the exercise of its foreign affairs power “to transfer or relocate the expenditure determined for any Government agency or State enterprise for use in a different item from that previously determined in the Annual Appropriations Act” In such event, the only obligation that the executive has towards the legislature is its report to the National Assembly without any authorization required.

Other areas of the legislature’s foreign affairs participation come from Section 189 and 190 of Chapter IX which provide for the powers to declare war and to make treaties respectively. The war declaration provision requires that the prerogative to declare war be subject to the approval of the national Assembly with “votes of not less than two-thirds of the total number of the existing number of both Houses”. However, the war declaration clause has rarely been invoked, and did not come up since the Second

31 CONST. (2007), Ch. 8 § 168, 169 (Thail.).
32 Id. § 169.
33 Id. § 189.
World War during which formal approval was granted. During the war period, although a declaration was issued, it was never officially delivered or even secretly refused to deliver to the U.S. government by the Thai ambassador, Seni Pramoj and the senior statesman, Pridi Panomyoung.\textsuperscript{34} The decision taken up by H.E. Pramoj rendered the war declaration null and void, which had saved the country from being the defeated nation and being treated as the U.S.’ enemy. H.E. Pramoj was later invited to return to become a Prime Minister in Thailand who fronted the peace negotiations.\textsuperscript{35} And again the incidence carries significant implications for the executive role in the shaping of foreign policy and the control of foreign affairs.

Other significant diplomatic functions that are silent under the Thai Constitution are normally assumed to be the sole responsibility of the executive. The absence of the textual stipulation does not impair the executive’s exercise of its foreign affairs power or deprive it from these essential functions. The period during the 1930s marked another crucial diplomatic mission of the government to resolve a dispute concerning territories lost to other states by the treaty of 1900s during the colonial period.\textsuperscript{36} Led by the military wing in the People’s Party, the Thai delegates travelled to Paris to present their map and to reclaim the territories.\textsuperscript{37} The attempts to unify the country and strengthen its image while making other nations recognize Thailand as an independent nation were undertaken as part of the government campaign. How the government wanted foreign nations to

\textsuperscript{34} The decision of the Thai ambassador in Washington, Seni Pramoj, to withhold the declaration of war from delivering to the U.S. government led the U.S. to refrain declaring war on Thailand. The group called the Free Thai Movement (Seri Thai) comprising of Thai students in the U.S. was formed with the assistance of Seni to resist the Japanese. At the end of the war period, the Japanese surrendered. It was the dramatic, righteous decision of the ambassador that saved the country. The declaration of war was deemed illegal, null, and void. It also repudiated all agreements made with Japan by the formal government. Barbara Leitch LePoer, Thailand: A Country Study, Library of Congress (1987), http://countrystudies.us/thailand/. See also BAKER & PHONGPAICHIT, supra note 21, at 135-139.

\textsuperscript{35} H.E. Pramoj invitation to become the Prime Minister of Thailand at the time was due to the fear of the British retaliation and the threat of its domination aftermath, especially when Thailand was seen as a valuable rice supplier for the devastated colonial territories. His return was thus to strengthen the Thai position and U.S support in the opposition of any return of colonial influence. BAKER & PHONGPAICHIT, supra note 21, at 137.

\textsuperscript{36} Id. at 131-133.

\textsuperscript{37} Id. at 131.
perceive Thailand is arguably our foreign policy. The executive by assuming this strong role throughout the Thai history has become the forefront of a foreign policy shaper, and has continued to do so in the realm of foreign affairs through diplomatic consultations and treaty making.

Despite the understanding that the executive is not the sole organ that undertakes responsibilities concerning the making of treaties, it has nevertheless been the primary branch that undertakes all of the treaty negotiations. This treaty power is clearly granted to the Council of Ministers under Section 190. 38 Although, the treaty clause accompanied certain conditions that would subject specific treaties to the supervision of the legislature and a public hearing, these are rather treated as exceptions to the executive plenary power. 39 In addition, a series of the Thai Constitutions suggested the preliminary role of the Parliament in the treaty-making process. 40 It can also be deduced from the fact that the provisions on such prerogative of the King to conclude the treaties have always been stipulated under the Chapter dealing with the Council of Ministers, and that the treaty-making-power is vested in the Executive Power, while the Legislative Power intervenes only in a form of an approval or disapproval to the conclusion of the treaties under limited circumstances. And apparently, these cases were rather seen as exceptional, and did not arise as often to trigger the requirement of the parliamentary approval. 41 All in all,
the executive retained the authorities and the primary responsibilities in initiating negotiations, concluding and even terminating treaties and international agreements.

Up until recently, this tradition has been altered by the increased participation of the parliamentary and judiciary roles in the treaty-making process. Such change took place through constitutional reforms by broadening the scope of the legislature’s supervision on treaties and the judiciary policing power on the government’s observation of the constitutional process. Treaties that will create certain conditions in addition to those providing for a change in the Thai territories or the jurisdiction of the State or requiring the enactment of an Act for its implementation must follow a specific treaty-making procedure. Thus, the authority to make treaties which was primarily and originally vested in the executive must now be shared with the Parliament under additional specified circumstances whereas the Constitutional Court can exercise its jurisdiction over the question of the validity of the treaty in question. 42

These substantial changes have affected the traditional role of the executive in the treaty-making process. 43 The broad language under the new treaty-making provision

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42 Although it may be true that, in the absence of the new provision, the Constitutional Court may still hold a judicial power to decide on the issue concerning the allocation of powers between political branches in accordance with its general jurisdiction under Section 266 of the 1997 Constitution, but the introduction of the additional types of treaty will also mean expanding the judiciary policing power to assure the conformity of the executive branch to the Constitution. Topothai, supra note 29, at 14. See also CONST. (1997), Ch. 8 §266 (Thail.) (repealed 2006).

43 These obligations are reflected under Section 190 of the 2007 Constitution as follows;

A treaty which:

1. Provides for change in the Thai territories or extraterritorial areas over which Thailand has sovereign rights or jurisdiction in accordance therewith or in accordance with international law
2. Requires the enactment of an Act for the implementation thereof
3. Has extensive impacts on national economic or social security, or
4. Generates material commitments in trade, investment or budget of the country.

Prior to undertaking a treaty negotiation of any treaty specified under paragraph two,

1. The Council of Ministers shall provide information and cause to be conducted public hearings, and shall give the National Assembly explanations on such treaty.
2. For this purpose, the Council of Ministers shall submit to the National Assembly a framework for negotiations for approval.
3. When the treaty under paragraph two has been signed, the Council of Minister shall, prior to the declaration of intention to be bound thereby, make details thereof publicly accessible…
referring to treaties that are subject to legislature and judiciary checks seems to wither away the executive powers in the making of international commitments,\textsuperscript{44} in particular Article 216, paragraph 5 which binds the decision of the Constitutional Court upon the National Assembly, Council of Ministers and other State organs.\textsuperscript{45}

Nevertheless, those special categories of treaties should still be treated as an exception rather than a rule (a general application to all types of treaties) considering our history and practices in the treaty-making process. Under the current constitutional structure, the executive still retains plenary powers in the conduct of foreign affairs, whereas only under certain circumstances where its role can only be limited and intercepted by other branches. Clearly, the original intent of the constitutional text was not meant to alter the executive’s primary role in the conduct of foreign relations, and was expected only to increase accountability and transparency of the administration in the area where vital national interests could be at stake. However, the general and vague language referring to special categories of treaties is rather problematic as it has created potential shifts in the balance of powers between the executive and the legislature through advancing legislature’s roles in the uncommon area of treaties that have inadvertently been interpreted by the Constitutional Court to fall under the special categories.\textsuperscript{46} The problem of this potential shift of balance of power that the Thai Constitution might create has a strong implication on the principle of separation of powers, which will require us to address through the adoption of the centralized executive

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\textsuperscript{44} The language of Section 190 has been widely criticized for its imprecision and vagueness which create substantial obligations on the executive’s side altering its traditional role in the realm of foreign affairs. It was also seen as an erosion of the executive’s treaty-making power which was not intended, but inevitably consequential. Therawat, \textit{supra} note 2.

\textsuperscript{45} “The decision of the Constitutional Court shall be deemed final and binding on the National Assembly, Council of Ministers, Courts and other State organs”. \textsc{Const.} (2007), Ch. 10 \textsection 216 (Thail.).

foreign power (CEFP) and the consideration of judicial limits to restore the efficient and practical function of the executive branch.

C. The U.S. Experience: Foreign Powers Vested under the U.S. Constitution

Although there is a sharp contrast between the U.S. and the Thai constitutions structurally and traditionally, it can be said that the two countries share common treaty experiences and practices in terms of the presence of the executive’s prominent role in the realm of foreign affairs.\(^{47}\) The active role of the President in the conduct of foreign relations in the past has created both criticism and recognition. There certainly are good reasons, despite the structural limitation of the U.S. Constitution\(^ {48}\), why the executive has successfully maintained its primary role in the conduct of foreign affairs. Unlike the Thai Constitution which explicitly grants plenary power to the executive while providing specific exceptions for the involvement of the legislature, the division of labor among branches under the U.S. Constitution is subject to greater controversy,\(^ {49}\) especially concerning the legislature and the executive roles in the formulation of foreign policy.

It has been argued that the U.S. Constitution grants Congress substantial powers in the area of foreign affairs.\(^ {50}\) The sources of Congressional powers in this realm principally came from, for instance, the commerce clause (duty to collect taxes and to


\(^{48}\) Trimble, *The President’s Foreign Affairs Power*, in *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION*, supra note 47, at 40 (arguing the President prerogative in the realm of foreign affairs is mostly about influence rather than law since legally Congress has virtual plenary authority over all aspects of foreign affairs).

\(^{49}\) Justice Jackson refers the area of foreign affairs as “the twilight zone” in *Youngstown Sheet & Tube Co. v. Sawyer* where there is a large uncertainty concerning the distribution of authorities between the President and Congress. HENKIN, supra note 1, at 18. GLENNON, supra note 12, at 10-11 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 635 (1952) (Jackson, J., concurring) (“[P]residential powers are not fixed, but fluctuate, depending upon their disjunction or conjunction with those of Congress”).

regulate foreign commerce), the declaration of war clause and the treaty clause (advice and consent of Senate). There are also other expressed Congressional powers that imply its involvement in the realm of foreign affairs. The President, although acting as a Commander-in-chief under the Constitution, is not the only sole organ in the conduct of foreign relations. His decisions are contingent upon Congress authorization of military and foreign aid spending. Congress may prohibit or limit the President’s directly by legislation or denying of funds through appropriation clause. The ability of the President to direct and control foreign affairs matters seems to have been limited by conditions imposed under these clauses, which subject him to the scrutiny of the legislature.

Despite several restrictions on the foreign affairs powers of the President imposed by the Constitution, this understanding does not necessarily reduce the executive’s essential role in the foreign administration. Under Article II, section 2 of the U.S. Constitution, the President can make treaties (with the advice and consent of two-thirds the Senate). He is the Commander-in-Chief of the armed forces. He also appoints ambassadors (with Senate advice and consent), receives ambassadors and other officers including those in the conduct of foreign affairs. These functions were, however, argued by Professor Henkin, as “duties” or assignments rather than “powers”. Even if they were powers, these are only good for conducting foreign relations, and not to formulate foreign

51 U.S. CONST. art. I § 8, cl. 3 and 11, art. II, § 2, cl. 2 (respectively). GLENNON, supra note 12, at 16.
52 The implied foreign affairs powers include the power to tax and spend for the common defense and the general welfare, to coin and regulate foreign coins, to raise and support army, and to make laws necessary and proper to carry out their powers. See U.S. CONST. art. I § 8, cl. 1, 5, 12 and 18. See also HENKIN, supra note 1, at 18-19.
53 Congress can pass legislation directly affecting foreign policy upon its own initiatives or upon the recommendation of the executive. Each year, Congress authorizes and funds programs that directly affect the relations of the U.S. with other nations. Stennis & Fulbright, Senators, Lecture at American Enterprise Institute for Public Policy Research: The Role of Congress in Foreign Policy (July, 1971), in THE ROLE OF CONGRESS IN FOREIGN POLICY, supra note 15, at 2-3, 8-10. See also HENKIN, supra note 1, at 32.
54 U.S. CONST. art. II § 2, cl. 1, 2. See also HENKIN, supra note 1, at 19.
Yet, it seems that the line between conducting foreign relations and shaping foreign policy is rather thin. How one can conduct foreign relations without having abilities to direct or influence foreign policy is questionable. After all, the authority to recognize or disestablish foreign relations with another nation is part of a national foreign policy. In addition, although the treaties clause requires the advice and consent of the Senate, it is the President who makes treaties, and the power to make treaties is the power to negotiate, to communicate and to articulate policy intentions. Furthermore, whether the treaty will be undertaken is entirely within the President’s discretion. Therefore, the argument that the conduct of foreign relations bares no relations to shaping foreign policy does not carry much weight. At the very least, it should be acknowledged that the powers vested under Article II have strong implications for the President’s role in the shaping of foreign policy.

Although the Constitution enumerates and allocates some foreign affairs powers (commerce, war and treaties) to the political branches, many powers that are indisputably foreign affairs in nature are not stipulated, these include the making of foreign policy. In such a case, these powers may also be implicitly inherent in the President from the fact that Article II, section 1 of the Constitution vested all the executive power in the President whereas Article I, section 1 conferred upon Congress legislative powers “herein granted” under the Constitution. Thus, under this argument, the Presidential power is not only limited to those expressly enumerated, but will also include independent and

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55 HENKIN, supra note 1, at 37-38.
56 GLENNON, supra note 12, at 165.
57 “It is the President who makes treaties, if the Senate consents; the Senate cannot make a treaty. The President need not make a treaty even if the Senate or Congress demands it”. LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 37-38 (Clarendon Press 1996)(1990).
58 GLENNON, supra note 12, at 148 (quoting United States v. Curtiss-Wright Corp., 299 U.S. 304, 310 (1936)) (“The President’s power as ‘sole organ of the federal government in the field of international relations…would seem to include the authority to decide on behalf of the United States to terminate a treaty that no longer serves the national interest…”).
substantive powers to determine the condition of the nation in its foreign relations.\textsuperscript{59} The Court in \textit{U.S. v. Curtiss-Wright Export Corp.} in fact supported the presidential plenary power by claiming that President is “the sole organ of the nation in its external relations”\textsuperscript{60} Such reading that entrusts with the President all executive authorities with a few explicit exceptions \textsuperscript{61} that give Congress direct controls over his decisions may coincide with the understanding of the Thai constitutional structure, which confers a large amount of foreign affairs power to the executive.

Whichever reading may be, it is undisputable that presidential powers in the conduct of diplomacy are extensive.\textsuperscript{62} This is also because “[d]iplomacy requires a long term perspective, and Congress tends to be influenced by short-term interests”.\textsuperscript{63} Diplomatic matters are thus usually deferred to presidential leadership. The President’s sole and exclusive authority over diplomacy ranges from recognizing states and governments, maintaining diplomatic relations, conducting negotiations to initiating

\textsuperscript{59} HENKIN, supra note 57, at 39. \textit{See also}, A. HAMILTON, WORKS 76, 81 (Hamilton ed. 1851). Ariel N. Lavinbuk, Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court’s Docket, 114(4) Yale L.J. 855, 865 (2005) (quoting Marbury v. Madison, 5 U.S. 137, 165-66 (1803)) (“By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience…”).

\textsuperscript{60} Harold Hongju Koh, Congressional Controls on Presidential Trade Policymaking after I.N.S v. Chadha, 18 N.Y.U. J. INT’L L. & POL. 1191, 1193 (1986)). Plenary presidential power means “one that is not susceptible of congressional limitation”. GLENNON, supra note 12, at 20 n.98 (The maintenance of the executive exclusive authority in the international field is to accord the branch “a degree of discretion and freedom from statutory restriction…”).

\textsuperscript{61} HENKIN, supra note 1, at 37. \textit{See also} THOMAS JEFFERSON, WRITINGS 5: 162 (P. L. Ford ed.,1892).

\textsuperscript{62} Alexander Hamilton believed that the responsibilities and powers lay with the President, except as expressed in the Constitution. HENKIN, supra note 1, at 22. \textit{See also} Theodore Roosevelt’s stewardship theory. THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 271-272 (1913). Despite the President’s broad range of foreign affairs power, this by no means suggests that his power is unrestrained and without limit. Only in a few cases had any court invalidated an act of Congress on the ground that it violated general presidential foreign affairs power. As Justice Jackson stated in his concurrent opinion in Youngstown Sheet & Tube Co. v. Sawyer, the President may never act to the contrary of an Act of Congress. GLENNON, supra note 12, at 13. The scope of the executive power is also limited when it comes to treaty interpretation. “The President’s semantic denomination of his act cannot by itself control the procedure constitutionally required”. GLENNON, supra note 12, at 134.

\textsuperscript{63} Trimble, \textit{The President’s Foreign Affairs Power, in FOREIGN AFFAIRS AND THE U.S. CONSTITUTION}, supra note 47, at 42 (arguing on the executive usurpation of congressional prerogatives).
informal decisions or actions in the construction of foreign policy and so on. These are presidential realms which are not subject to congressional interference. Congress may, however, influence the executive by requiring it to take certain values into account in formulating foreign policy position. The President’s concurrent power with Congress must of course still be acknowledged. But to deny the significant role of the executive in this realm is to deny reality. It should rather be understood that the President makes foreign policy by conducting foreign relations, negotiating international agreements and treaties, whereas Congress executes the policy by giving effects to the concluded treaties (enacting legislations and implementing treaties), and by appropriating funds to support the executive decisions.

The negotiation function and the ability to control official communication with foreign governments become additional key elements to presidential leadership in the realm of foreign affairs. Although treaties are subject to advice and consent of the Senate, the Senate was originally expected to act in an executive capacity whose body is smaller and less representative than the entire Congress. Furthermore, treaties are

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64 HENKIN, supra note 1, at 32. United States v. Pink, 315 U.S. 203 (1942) (recalling President Franklin Roosevelt’s recognition of the Soviet Union in 1933).

65 Trimble, The President’s Foreign Affairs Power, in FOREIGN AFFAIRS AND THE U.S. CONSTITUTION, supra note 47, at 45.

66 Michael J. Glennon, Foreign Affairs and the Political Question Doctrine, in FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 98, 112 (Louis Henkin et al. eds., 1990). When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. When the President acts in absence of either a congressional grant or denial or authority, he can only rely upon his own independent powers. This is the zone of twilight “in which he and Congress may have concurrent authority”. But the President may act in external affairs based upon his independent authority without congressional authorization, but not to the contrary of an Act of Congress. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring). However, the presidential foreign relations power may extend to action inconsistent with the act of Congress when there is a presence of emergency. Dames & Moore v. Regan, 453 U.S. 654 (1981).

67 HENKIN, supra note 57, at 83.


69 Not until Amendment XVII had the Senate been elected by popular votes, the framers’ intent by having not specified the entire congressional role suggested that the treaty-making process would be undertaken by the President and a small Congressional body which is less accountable and less democratic in character. HENKIN, supra note 1, at 49. For amendments history, see http://www.senate.gov/civics/constitution_item/constitution.htm#amdt_17_%281913%29.
certainly not the only means taken by the President to generate the U.S. international obligations and foreign policy deliberations. An executive agreement has served as another channel of communication which can presumably be drawn from plenary executive diplomatic powers which was left out from the U.S. Constitutional process.\textsuperscript{70} This power to relying on his sole authority to make certain executive agreements has been argued to derive from the “Executive powers”. Whether this power is legitimate is a subject of controversy, but what is certainly the case is that executive agreements have ever since taken substantial roles in the U.S. foreign relations, and almost replaced a formal treaty-making process.\textsuperscript{71} Despite a substantive distinction that has been drawn between a treaty and an executive agreement to restrict the making of executive agreements,\textsuperscript{72} over the past sixty years, the decline of a formal treaty making process which requires a great deal of Congressional roles suggested the expansion of presidential authority in the conduct of foreign affairs.

Looking beyond the constitutional text and into the historical context, Alexander Hamilton early set forth on the view of the executive power in the conduct of foreign relations by referring to “the grand design of the Constitution” which presumably vests all the responsibilities of foreign relations in the President under the “Executive power”

\textsuperscript{70} Although presidential agreements are not mentioned in the Constitution, “the framers clearly understood that nations make some agreements that are not treaties, and they could not help but anticipate tacit, informal understandings by the President…” HENKIN, supra note 1, at 55. The Restatement states that the President “may make an international agreement dealing with any matter that falls within his independent powers under the Constitution”. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 303(4)). Constitution only refers to “treaties” that require the advice and consent of the Senate, and not international agreements. GLENNON, supra note 12, at 178-180 (“The Supreme Court has upheld the use of executive agreements to carry out what appears to be plenary presidential power…”).

\textsuperscript{71} These include military commitment in 1953 that was made in the form of an executive agreement, peace treaties that have been altered by subsequent executive agreements, and other formal treaties such as the North Atlantic Treaty Status of Forces Agreement whose supplementary agreements were simply approved without ratification by the U.S. Stennis & Fulbright, Senators, Lecture at American Enterprise Institute for Public Policy Research: The Role of Congress in Foreign Policy (July, 1971), in \textit{THE ROLE OF CONGRESS IN FOREIGN POLICY}, supra note 15, at 49-60. See also HENKIN, supra note 57, at 219.

\textsuperscript{72} A treaty is referred as “the proper instrument for contracting important, substantive agreements” whereas an executive agreement is generally understood as “an instrument for the conduct of routine and essentially nonpolitical business with foreign countries”. Stennis & Fulbright, Senators, Lecture at American Enterprise Institute for Public Policy Research: The Role of Congress in Foreign Policy (July, 1971), in \textit{THE ROLE OF CONGRESS IN FOREIGN POLICY}, supra note 15, at 49.
whereas Congress only possesses specific foreign affairs powers granted by the Constitution. The Constitution may confer certain foreign powers to both executive and legislative. But making treaties, declaring war and peace, approving expenditures are certainly not the only matters concerning foreign affairs. In the absence of the textual authority, the executive’s role has arguably continued to fill in the gap.

Despite the uncertainties of textual interpretations and the framers’ intent concerning the allocation of foreign affairs powers, experiences have provided us with some answers. Throughout the American history, we have witnessed the President’s foreign affairs power “took root and grew” while “Congress contributed to the steady growth...” There certainly are factors that gave rise to the centralized executive foreign power phenomenon, which remind us why the executive should be the primary body that articulates our foreign policy and conducts our foreign relations. This question will be examined in the following section as to why this is the case, and should be the case for a successful implementation of foreign policy. President Roosevelt recognized this important function of the executive as he once asserted that the President himself can determine foreign policy…, can communicate that policy as ‘sole organ’, can implement it as ‘the executive’, and can enforce it as Commander in Chief”. This rationale also has a significant implication for the respect of the division of labor among the institutional branches which is deemed crucial to support the important functions of the executive, the maintenance of foreign diplomacy, and the procurement of national interest.

73 Hamilton’s broad interpretation of the presidential foreign relations power was nevertheless opposed by James Madison who favored presidential enumerated foreign powers. Hamilton made the argument in support of President Washington’s authority to declare neutrality of the United States in the war between England and France. Hamilton read the executive power clause in Article II of the Constitution as a grant to the President of all executive power and insisted that executive power included the control of foreign relations. Henkin, supra note 1, at 21-22 (emphasis added).

74 It has been said that the growth was due to Congress’ acknowledgement of the President’s diplomatic expertise and its own sense of inadequacy in terms of information and experiences. Id. at 28.

75 Id. at 29.
IV. The Centralized Executive Foreign Powers (CEFP)

Despite the fact that certain constitutions such as the Thai Constitution allocates substantial and considerable amount of foreign affairs power to the executive, there is a conviction that the legislature should still maintain a significant role in the conduct of foreign relations to preserve the system of checks and balances that would protect “against undue concentration of power and unwise decision”, which basically is what the principle of separation of powers is intended to guard against. That being said does not suggest that legislature can and should penetrate in every foreign policy decisions that the executive undertakes because what the principle of separation of powers aims at preserving is also the essential function and autonomy of each branch. The power properly belonging to one branch ought not to be administered or interfered by the other. The excessive control of the legislature can certainly impede an effective administration as well as generating powerful influence of the legislative branch in area of foreign affairs. By the same token, the absolute independence of the executive in the exercise of foreign affairs power, in the absence of any control or check from other institutions, will create an issue of accountability and transparency within the political system. Therefore, the solution, suggested by Senator Stennis, is rather to secure legislature consultation in a proper balance, and maintain mutual respect between the two branches for the successful implementation of foreign policy. Legislation’s participation will be required under important circumstances, but cannot exceed the necessity that its role overrides the executive’s function. Imbalanced interference is a lack of proper interaction which weakens the principle of separation of powers. What is “proper” and

77 Supra note 14.
how much is “balance” certainly deals with the question of where these constitutional boundary lines should be drawn among the three institutional branches.

A. Limited Legislative Functions in Foreign Affairs

Constitution normally grants powers to the legislature to primarily deal with domestic issues rather than foreign policy. And, in the realm of foreign affairs, how much the executive should defer the matter or seek advice from the legislature often depends on the degree of impact felt by the domestic. Certain circumstances prescribed by the Constitutions such as military spending abroad or war declaration for instance, may arguably demand legislative controls primarily because these activities require substantial extraction of people’ taxes which affect local spending. Thus, the legislature as a representative body of the people’s interests should at least be able to address how those taxes may be spent in the area where little return is expected to the people and the country’s economy. This interpretation, however, may be a broad application of the legislature’s role in foreign policy decision-making by stretching the link of domestic impacts. There is a difficulty for such a broad justification as any minimal connection to be made with domestic matters is an excuse for the legislature to step in, and take control over the decision. A stronger connection may be required to warrant the necessity of the

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79 GLENNON, supra note 12, at 30. Yoo, supra note 2, at 1994 (pointing out William Blackstone’s analysis on the executive’s federative power that foreign affairs “was the quintessential executive function”). The executive authority is the “federative power” necessary to govern “the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth”. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT §143-146 (Regnery ed., 1956).

80 The same is true with the Presidential role in domestic affairs. The mere fact that the act is connected to foreign affairs does not necessarily make it an “executive power”. Cf., MICHAEL RAMSEY, THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS 107 (2007). Stennis & Fulbright, Senators, Lecture at American Enterprise Institute for Public Policy Research: The Role of Congress in Foreign Policy (July, 1971), in THE ROLE OF CONGRESS IN FOREIGN POLICY, supra note 15, at 39 (citing THE PAPER OF THOMAS JEFFERSON, vol. 15, 397 (Jelian P. Boyd ed., 1995)) (“We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay”). In 1969, the Senate adopted the non-binding “National Commitments Resolution” declaring that the President could not commit the armed forces or financial resources of the United States without Senate consent or congressional approval. However, the attempt to regulate the executive agreement committing of arm forces only went as far as requiring periodical reports from the President. HENKIN, supra note 1, at 58. See also S. Res. 85, 91st Cong., 1st sess., Cong. Rec. (1969).
At a closer case, certain international commitments that have direct impact upon individuals’ fundamental interest or the livelihood of local communities, which will be further discussed in Chapter V (concerning the treaty-making standard), should provide a stronger justification for the legislature’s involvement in the process. Nevertheless, such authorization does not suggest the legislature’s absolute control over the conduct of foreign relations. The legislative role in foreign affairs has limitation. Without significant domestic implications, the role of legislature in the formulation of foreign policy and the conduct of foreign relations can diminish. The ability to direct and control external affairs may fall outside the legislature’s realm of responsibility. And, this is also due to the view that it is not in the legislature position “to conduct a ‘day-to-day’ diplomacy and foreign policy business of the nation”.

In my view, the issue of the legislature’s constitutional boundary in the realm of foreign affairs ultimately will require us to weigh internal impact, especially when it involves individuals’ fundamental interest against the needs of the executive to maintain its efficient function in the conduct of foreign relations. Drawing a definite boundary among the branches in a fuzzy area like foreign affairs is a challenging, if not impossible task. But again, to confirm my previous point, when a clearer line has been drawn, the executive administration will not be constantly disrupted, and will only be subject to

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81 It must also be acknowledged that domestic connection is not the primary rationale for legislature’s participation in important foreign policy such as war declaration or military spending. It is rather the power granted under a constitution which involves budgetary appropriation authority of legislature that, in fact, dictates its role. Thus, my argument is not intended to prove that the constitution is wrong in granting such authority to the legislature since this is an appropriate branch, as being a representative body of the people, to possess the authority. My point was rather if the “domestic impact” rationale is to be made as a sole justification for the involvement of the legislature in the conduct of foreign affairs, a strong sufficient connection must be shown to prevent excessive interference of the executive’s function.

82 Pursuant to Locke, Montesquieu and Blackstone’s thinking, it is especially the case that the line between the executive’s treaty-making power and the legislative control over domestic regulation is to be drawn. Yoo, supra note 2, at 1997.

83 Id. at 1991 (quoting JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 147 (Regnery ed., 1955)) (“Foreign affairs, by contrast, ‘are much less capable to be directed by antecedent, standing, positive laws’ because ‘what is to be done in reference to foreigners’, since it was dependent on their actions, ‘must be left in great part to the prudence of those who have this power committed to them’”). Stennis & Fulbright, Senators, Lecture at American Enterprise Institute for Public Policy Research: The Role of Congress in Foreign Policy (July, 1971), in THE ROLE OF CONGRESS IN FOREIGN POLICY, supra note 15, at 23.
scrutiny under the situation in which there is a real demand for it. Legislature consultation can certainly play an important role in such circumstance.

The participation of the legislature may be crucial in the conduct of foreign affairs to help protect citizens’ interests against adverse impacts that may have resulted from the country’s commitment abroad. Such a condition gives a strong, legitimate reason for the involvement of this body in which citizens’ interests are collectively represented. Arguably, in the treaty context, the legislative role in the making of a treaty should still be limited, if not entirely abstained, in the absence of a strong direct domestic impact, because this check mechanism (extensive participation of the legislature), while attempting to shield the domestic from these potential harms, would also prevent political and economic opportunities that could have gained through the country’s pursuit of international treaties. Thus, the arguments for broad foreign affairs power for the executive are still understood as necessary to expedite treaty relations in the fast-moving global environment, to maintain the integrity of the national foreign policy and to avoid serious international embarrassment.

**B. Why Foreign Affairs Should Be the Matter of the Executive?**

Justice Sutherland rendered his opinion in *U.S. v. Curtiss-Wright Export Corp.* that “[h]e, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials…” 84 These are the quality and characteristics that the executive possesses, which gives the branch the advantage in the pursuit of foreign relations. The Court in *U.S. v. Curtiss-Wright Export Corp* was aware of presidential plenary power in external affairs through the recognitions of this quality. The primary arguments that had been made for the centralized executive foreign

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84 GLENNON, *supra* note 12, at 27 (citing *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).
policymaking (CEFP) took into account the executive’s important characteristics. These include its institutional structure (which is known for its “unitary political entity with indivisible national interest” and also designed to insulate from external interference), its leadership character, its capacities and expertise (by possessing experience, resources and secret information), its policy evaluation capabilities (that the legislative may lack due to other overwhelming tasks), and its efficiency.\textsuperscript{85}

\textbf{i. Institutional Structure}

Foreign policy issues, in general, are considered national problems which are more efficient to be tackled by “one voice”. The approach also requires compromises of competing interests to promote the overall national one.\textsuperscript{86} In terms of structural efficiency, the internal organization of the executive institutions fosters this condition by allowing it to function independently, and thus gives it the ability to articulate and deliver foreign policy in one voice. The legislature, on the other hand, representing various interests ranged from individuals to corporate entities, accounting for various initiatives, can find itself caught up with responsibilities to respond to various demands, thus make it more difficult to generate a coherent position.\textsuperscript{87} For instance during the post-Vietnam War period, congressional reforms driven by congressional interest and activism in foreign policy ironically left Congress “too decentralized and democratized to generate its own coherent program”.\textsuperscript{88} The structural reforms inside Congress also accompanied


\textsuperscript{86} Trimble, \textit{The President's Foreign Affairs Power, in FOREIGN AFFAIRS AND THE U.S. CONSTITUTION, supra} note 47, at 41.

\textsuperscript{87} George, \textit{Democratic Theory and Foreign Policy, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY, supra} note 85, at 59-63. Suggested by Professor Koh, the growing domestic pressure to enact protectionist legislations has driven Congress to take a more active role in the control of U.S. trade policy, and thus making it more difficult for the President to respond to the requests of the U.S. trade partners concerning the liberalization of its markets. Koh, \textit{supra} note 60, at 1228.

\textsuperscript{88} Koh, \textit{Why the President Almost Always Wins in Foreign Affairs, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY, supra} note 47, at 161. Glennon, \textit{supra} note 12, at 30 (1990) (citing J. Sundquist, \textit{The Decline and Resurgence of Congress} 306 (1981) (“Congress can act negatively to disrupt the policy the President pursues, but it cannot act affirmatively to carry out a
other issues such as overlapping functions and a lack of coordination among the committees from both houses.\textsuperscript{89} The internal hierarchy of the executive has continued to benefit foreign policy formation and execution. The ability of the branch to easily form a consensus allowing its decision to be easily solidified and quickly dispatched is a crucial factor for the executive to act responsively and efficiently in the field of international affairs, whereas the legislature may find it difficult to arrive at a decision in a timely manner, especially in times of crisis.\textsuperscript{90}

The structural efficiency argument, however, can be countered by the fact that such a system will only promote unaccountable executive foreign policy making, especially in a treaty process. To the critics, the legislature serves as the body of public expression and interests. The approach of the multi-branched participation in the process can therefore help lessen the likelihood of unpopular policies which can incur costs in credibility.\textsuperscript{91} Although it is important that various domestic interests represented by the legislature should reflect in foreign policy and the treaty texts, the accommodation of all the constituents would be unrealistic. This expectation can generate internal conflicts, weaken foreign policy, and hamper the efficiency of the administration.\textsuperscript{92} As mentioned, the parameter of foreign affairs is larger than what people normally assume.\textsuperscript{93} Even in the realm of a treaty-making, what is considered as a “treaty” to be subject to the scrutiny of the legislature and the public domain can be broad \textsuperscript{94} and can prolong the entire process

\begin{footnotesize}
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\item \textsuperscript{89}GLENNON, supra note 12, at 30.
\item \textsuperscript{90}Id. at 28. HENKIN, supra note 1, at 27 (“Unlike Congress which can act only informally, by statute or resolution, the President can act quickly and informally, often discreetly or secretly”) (emphasis added).
\item \textsuperscript{91}GLENNON, supra note 12, at 123.
\item \textsuperscript{92}Congressional reforms led to the creation of various committees opening for hearings, votes and intense lobbying by ethnic groups, foreign governments and commercial organizations, which in the end weaken the “majority-building efforts” of the President. Id. at 31.
\item \textsuperscript{93}HENKIN, supra note 1, at 27 (“Foreign policy, then as now, consisted of much more than making treaties or legislating tariffs...the conduct of foreign relations was a day-to-day process, continuous and informal...”).
\item \textsuperscript{94}For a variety of treaty definitions, see Chapter V, Section II, A.
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when involving the legislative control and public participation in every one of them. Seeking consultations in the treaty process must, therefore, be maintained in moderation and in a reasonable manner by taking into account the level of domestic impacts and the internal structure of the legislature to prevent conflicts and fracture in the foreign policy interests. The argument for strenuous checks after all undermines the ability of the executive to come up with a concrete position that represents the overall public interest while overlooking the significance of what really is the nation’s long-term interest.

ii. Appealing Characters

The qualities that make the executive the best suited in the conduct of foreign affairs have long been widely recognized. A belief in the executive leadership in foreign affairs was held firmly by Alexander Hamilton as he stated that the “energy in the executive is a leading character in the definition of good government”.95 There are other characters praised by scholars who feel that foreign affairs should be the matter of the executive. Professor Arthus Maass, for instance, referred the character of the President to be “a powerful magnet, constantly attracting proposals…” which makes him as equally good as a primary initiator of legislation.96 These are the qualities that can appeal to foreign governments of a particular negotiation position. Such a character also facilitates the executive’s capacity to centralize and coordinate the foreign policy decision-making process, and can energize and direct policy through speed and efficiency.97 Thus, in an international crisis, this is the organ that has the leadership quality (energy, expertise and the capacity) and credibility that the legislature may not have to handle the problem.98

95 Koh, Why the President Almost Always Wins in Foreign Affairs, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY, supra note 47, at 159.
96 Glennon, supra note 12, at 28-29. Cf., Siffin, supra note 23, at 27 (suggesting charisma as an important source of royal authority in the context of monarchal absolutism which had been asserted in many forms of rituals).
98 The role of the executive was even more prominent during the 1930s depression as it held the power to negotiate trade agreements and re evaluate trade policy to help relieve the country’s economic conditions when Congress itself failed to deliver effective trade regime carried through the infamous Smoot-Hawley
This is an important character that contributes to establishing a country’s international credibility and good foreign relations.

**iii. Expertise**

Both Thailand’s and the U.S.’ foreign affairs experiences have demonstrated the leading roles of the executive branches in the undertaking of significant international events. The experiences gained by the branch make their expertise undeniable. The expertise that has uniquely been developed during both in time of peace and crisis is also viewed as a necessary key element to the success of the conduct of foreign policy. This massive professional bureaucracy has been claimed to derive from its ability to access to vast information and resources. Senator Stennis once commented in his lecture concerning the President competence in the war affairs that he found it “very difficult to believe that it is really wise or proper for us to convert the Senate of the United States into a war room and try to direct battles, prescribe tactics, control strategies, draw boundaries, dictated fixed withdrawal dates, and otherwise usurp the responsibilities and prerogatives of the President and our military leaders”. Along this line, Justice

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Tariff Act of 1930. Koh, supra note 60, at 1194. Despite the fact that Congress has power to collect taxes and duties and to regulate foreign commerce, the President still holds the key function, which is power to negotiate tariffs as Congress itself does not possess such authority. Under the “New Deal” doctrine, institutional changes that would allow certain freedoms for government to deal with multiple social and economic issues were necessary. In their view, the existing system prevented government from reacting flexibly and rapidly “to stabilize the economy and to protect the disadvantaged from fluctuations in the unmanaged market”. Sunstein, supra note 97, at 423-424.

Presidential leadership in foreign affairs has continued, especially throughout the warfare period, which marked America as the world’s hegemonic power. At the end of Vietnam war, the role of the President in the establishment of multilateral political and economic order is arguably expansive. Koh, Why the President Almost Always Wins in Foreign Affairs, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY, supra note 47, at158. Article 46 of Vienna Convention by seeking to uphold the stability of international treaty structure also implies the executive authority that can obligate the nation to be bound by an international instrument. It stated that “although a treaty obligation may be invalid within a state because of its failure to comply with constitutional requirements, the international agreement is unimpaired”. Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679 (1969), art. 46.

George, Democratic Theory and Foreign Policy, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY, supra note 85, at 60.

Despite his belief in the Congress and the President co-determination roles in the war-making powers, Congress usually did defer the authorities to the President to take all necessary measures in time of crisis. Stennis & Fulbright, Senators, Lecture at American Enterprise Institute for Public Policy Research: The Role of Congress in Foreign Policy (July, 1971), in THE ROLE OF CONGRESS IN FOREIGN POLICY, supra note 15, at 21.
Sutherland stated in *U.S. v. Curtiss-Wright Export Corp.* believing in the President’s foreign policy discretion. In his opinion, “[t]he President…manages our concern with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged…”  

For Thailand, at the turn of the twentieth century, the growing of the global market economy and free trade led the executive branch to continue to manifest its expertise through various types of international commitments ranged from regional to multilateral levels. 103 These international initiatives had primarily been undertaken by the executive leading agencies such as Ministry of Foreign Affairs, and Ministry of Commerce. “As the breadth of our treaty obligations has broadened, their depth has increased as well”. 104 Recent developments in the world trading system also brought technical issues and unanticipated problems, for instance, rules of origin (ROO), non-tariff barrier to trade (NTB), Sanitary and Phytosanitary measure (SPS) that are far from common to domestic problems. These are new sets of rules which now comprise more than one-third of a nation’s economic activity. 105 Thus, the executive’s superior capacity, knowledge and skills because of its issue orientation, accessibility to resources and time are determinative factors that make it a better branch to generate effective responses to external challenges. 106 The legislature, on the other hand, cannot be expected to develop

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103 Founded in 1967, the Association of Southeast Asian Nations (ASEAN) was formed through the initiatives of the five foreign ministers – Thailand, Indonesia, Malaysia, the Philippines and Singapore. The discussion took place in such a casual manner as it was referred as “sports-shirt diplomacy”. “It was by no means an easy process: each man brought into the deliberations a historical and political perspective that had no resemblance to that of any of the others”. See ASEAN History, http://www.aseansec.org/20024.htm. At the multilateral level, Thailand joined the World Trade Organization in 1995 followed by a series of bilateral free trade agreements. For more information, see http://rtais.wto.org/UI/PublicAllRTAList.aspx.

104 Yoo, supra note 2, at 1957.


106 New challenges are no longer limited to domestic issues and are not subject to the control of a nation state. These international issues such as global debt crisis and terrorism forced the U.S. into a reactive global posture, and giving the president superior institutional capacity to initiate government action. Koh,
the same level of expertise since the domestic duties at hand do not typically leave them sufficient time to do so.\textsuperscript{107} The emergence of new international issues has arguably put the executive branch into the leadership position, and will continue to do so through the demand of the nation’s competency, speed and diplomacy.

But of course democracy cannot consistently demand levels of expertise that is out of reach of citizen participation or legislature supervision. As I stressed in Section IV, A concerning the legislative function in the area of foreign affairs, the legislative role will become more important as domestic issues are increasingly touched upon. The difficulty remains when the line between internal and external affairs becomes more blurry, since “globalization has made even disparate parts of the world more tightly knit”.\textsuperscript{108} Almost every international contact, if involving some sort of obligations, can arguably have domestic impacts, except at different levels. But at what level is sufficient to require the executive to seek a second opinion must be determined. Thus, the issue concerning the standard of public participation and legislative involvement in the treaty-making process will be dealt in the next chapter to address the boundaries. My assertion regarding the quality of the executive branch in terms of its expertise neither seeks to embrace the idea of granting absolute power to the branch nor opposes public involvements in the matter of foreign affairs. My argument rather focuses on the rationale of why the executive should be trusted and should serve as the leading organ in the promotion of our national interest. For one thing, this department is equipped to cope with global challenges. And for another, with sufficient deference from other branches, this political branch will be allowed to respond to social needs more effectively when demanded. Citizens’ and

\textit{Why the President Almost Always Wins in Foreign Affairs, in The Constitution and the Conduct of American Foreign Policy, supra note 47, at 161.}

\textsuperscript{107} George, supra note 85, at 61.

legislature expertise are still required, but not at every level, and definitely not in the manner that should obstruct government performance or decrease the level of administration efficiency to the point where it can no longer serve its own function and democracy.

iv. Effectiveness and Efficiency

Although the significance of administration “efficiency” seems to be overlooked in the justification of the centralized executive in the realm of foreign affairs, especially when driven by the concern of governmental accountability, the issue of efficiency is going to be my central argument in the proposition of the executive centralized authority in the exercise of foreign affairs power since this is the factor that can, in fact, improve the democratic condition of the governing system.

As mentioned, the executive branch has the institutional advantage which allows the body to effectively respond to all kinds of international issues. In fact, foreign policy should not entirely be a matter of the executive simply because it is convenient for the branch. But foreign affairs must be the matter of the executive because it is effective and efficient to be addressed through this organ. In his concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, Justice Douglas acknowledged efficiency as a distinctive quality possessed by the executive branch. He stated that “[a]ll executive power – from the reign of ancient king to the rule of modern dictators – has the outward appearance of efficiency. Legislative power, by contrast, is slower to exercise…the ponderous

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109 It must be noted that administration convenience does not deliver the same quality as efficiency. Efficiency means “performing or functioning in the best possible manner with the least waste of time and effort; having and using requisite knowledge, skill, and industry; competent; capable…” Convenience, on the other hand, refers to an act that is favorable, easy, or comfortable and barely requires efforts or skills. http://dictionary.reference.com. Although, a method maybe convenient to generate a decision, it does not necessarily make it efficient if it does not provide the qualities such as skill, knowledge and competence, but speed.
machinery of committees, hearings, and debates are...cumbersome, time-consuming, and apparently inefficient".110

How executive efficiency is compared to that of the legislature is quite clear. However, such quality can be easily underrated, especially when countered by other values such as accountability and transparency in the conduct of foreign affairs. But the concern of efficiency should not be taken lightly as the lack of it could cause a stall in the country’s administration, especially when handling by an inefficient body such as the Senate which was once described as “the graveyard of treaties”.111 Taking an instance of the Genocide Convention which took the U.S. forty years to ratify, instead of acting upon a treaty, the Senate simply stockpiled it.112 In fact, most senators agreed that their role in the treaty-making process should be limited.113 Every international agreements should not be required to submit for advice and consent since “it would be literally impossible to give all of them thoughtful consideration”.114 And because many would be a routine nature of which the large number would result in Senate’s lack of attention to details.115 Such involvement certainly would neither make the government more accountable nor make the system any more efficient. Even in the case of executive agreements which required the executive branch to submit reports periodically to Congress, it was doubtful whether the agreements were seriously scrutinized at all making the mechanism simply a hollow threat which basically served no purposes.116

110 Koh, Why the President Almost Always Wins in Foreign Affairs, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY, supra note 47, at 159 n.4 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 629, 629 (1952)).
111 Glennon, supra note 12, at 30 (“Congressional committee debates are not always useful in creating foreign policy”).
112 Id.
114 Id.
115 Id.
116 Henkin, supra note 1, at 58.
The administration quality such as efficiency is not a light matter, and should be considered along the line with maintaining the accountability and openness of a government. As introduced in Chapter I (internal challenge), this element will matter in the long run since its shortage can affect the capacity of the government to be responsive to the people’s needs. Efficiency remains one of the leading characters that the executive possesses in conducting foreign relations, and is required to have in administering domestic affairs. Besides improving the democratic condition, efficiency is the quality that brings about external gains economically, politically and diplomatically. In the age of globalization, protecting domestic interests is as important as ensuring the potential benefits that the country could secure from the cultivation of external relations.

v. Credibility and International Embarrassment

The issue of “efficiency” is not only a matter of domestic concerns. This quality of the executive is a key factor that helps establishing the credibility of a nation and diplomatic courtesy, and is what makes the executive predominant in the field of foreign policy.\(^\text{117}\) The nature of the executive is therefore crucial to the maintenance of international relations. The process of the foreign relations conduct must be driven by both domestic and international considerations. In the conduct of a country’s foreign diplomacy, jeopardizing its international relations should be avoided. This is because the country’s good international relations are also what the country’s economy and political stability depends upon.\(^\text{118}\) That being said, by no means, suggests that foreign policy

\(^{117}\) The uncertainty of the “advice and consent” condition in the treaty-making process in terms of its timeline has complicated the negotiation stages. A sharp bifurcation of a treaty making process between the presidential stage and the Senate stage frustrated Presidents, annoyed foreign governments, and troubled U.S. foreign relations. HENKIN, supra note 1, at 50.

\(^{118}\) Good international relations of course is not the sole determinative factor that guarantees a country’s political stability, but can be one of the conditions. Taking the example of several regional agreements such as the European Union (EU) and Association of South East Asian Nations (ASEAN), both have forged and taken the benefits of good international relations to promote political stability and security of the regions. Whereas this regional arrangement’s benefit was recognized by the U.S. as a strategy to unite and stabilize Western Europe after World War II, the ASEAN comprehensive objectives to include economic, cultural and social cooperation among members were viewed as long-term solutions to establish political stability.
should only generate positive interactions. Countries oftentimes employ economic sanctions, trade retaliations and even the use of military force to gain their positions. However, foreign policy should be conducted in the manner that would allow the country to achieve its objectives at most. And if the goal of the country is to promote its economic prosperity and stability through pursuing international agreements, then we should agree that upsetting a partner to the agreement is to be avoided. This process clearly requires a competent body to ensure that the country’s foreign affairs are being handled effectively and professionally to avoid the issue of credibility and international embarrassment. In a diffuse global economy, the country must constantly manage relations with foreign governments. This responsibility demands special qualities that the legislature finds it hard to meet due to its internal structure. Most importantly, developments in the global communication and interconnection have increasingly made countries lean toward bilateral and multilateral agreements as a way of delivering its foreign policy message and asserting its position in the world stage. Any disorganization, delay or incoherence in a position is a reflection of the country’s incompetency, and can definitely affect its credibility and reputation.

Credibility remains one of the major issues in the multilateral trade forum that the executive must constantly manage to maintain under excessive participation of the legislature. For instance, the Kennedy Round of the General Agreements on Tariffs and Trade (GATT) negotiation gave the U.S. an uneasy position and humiliation through the attempted control of Congress on the non-tariff concessions. The string attached (subsequent approvals) effectively diverted the U.S. negotiation positions from what its trading partners understood it would honor. This reaction of course produced “an


international fall out”. The U.S. trading partners then “grew increasingly reluctant to negotiate nontariff barrier agreements with U.S. officials, whom in their eyes, lacked negotiating credibility because of their accountability to an unpredictable Congress.”120

The control mechanism created by the 1984 Act which permitted a veto from a single Committee of Congress in a negotiated agreement also sabotaged most agreements politically by denying a potential trading partner the assurance of the other party’s prompt positive response (guaranteed legislative approval).121 The mechanism was seen as a negotiation killer that rendered other nations hesitate to enter into further deals. Sharing the same fate, the required procedure (public participation and legislature approval) under Section 190 of the Thai Constitution was triggered, and almost killed the nearly complete Japan-Thailand Economic Partnership Agreement (JTEPA) that took up to three years of negotiations.122 The claim of the constitutional process violation, had it been successfully challenged, would have required the agreement to be renegotiated, which would in turn undermine the Thai government’s credibility while inevitably shaking its international relations with Japan.

Justice Sutherland emphasized that the central role of the executive branch in the conduct of foreign affairs is necessary to avoid any serious international embarrassment.123 The common “embarrassment” scenario have been described by the fact that the executive might begin an international initiative “only to have Congress change its mind after that policy had been undertaken”.124 The participation of the legislature might be viewed as needed to legitimize the process, but its extensive role, in

120 Id. at 1200.
121 Id. at 1217-1218.
123 Serious embarrassment is to be avoided by according the President “a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved” . GLENNON, supra note 12, at 23 (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)).
124 The example of this “rug pulling” reflected in the Iran Contras and the Vietnam War during which Congress had initially authorized the Presidential acts, then later unauthorized them (lethal aid prohibition and the termination of war). Id. at 24-25.
many cases, has been proven to be rather disruptive than constructive to the system. As commonly
known, the Senate role is to advice the President as to the kind of treaty should look like to be acceptable. Oftentimes there are conditions attached such as reservations, amendments, understandings that would require further renegotiation. The result was “a sharp bifurcation of the treaty process between the presidential stage and the Senate stage, which frustrated governments, annoyed foreign governments and troubled United States foreign relations”. The U.S. treaty process has also been criticized by foreign governments as making it impossible to do diplomatic business, and that it gave no chance of any predictability on the treaty approval. The uncertainty of the country’s position may appear to the eye of the world community as “irresolute, divided, [and] undependable”.

Thus, ensuring a positive interaction between the political branches is deemed crucial to the efficiency of the internal administration and the country’s external relations (credibility, reliability and reputation abroad). The relationship should be in a collaborative and respectable manner while keeping in mind that the central role of the executive branch is sometimes required in the preservation of foreign relations. An attempt to secure internal accountability by placing heavy controls over the executive may come at the expense of the country’s accountability abroad.

It is therefore important that the executive maintain the quality of its administration. And to do so, it must possess a certain level of autonomy to ensure

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125 Often times, the condition was used as a political tool to attack the integrity or credibility of the government. As the case of the Committee veto reflected, the Committee members do not need to give any reason why a particular agreement is rejected. They may even vote “to disapprove out of a desire to hold a particular agreement hostage…” Koh, supra note 60, at 1217. See Farnsworth, 12 Senators Opposing Reagan on Canada Trade, N.Y. TIMES, April 16, 1986, at D5, col. 4 (“The irony is that the Committee is not angry at the Canadians, but rather at the Administration, which refuses to enforce trade laws”). See also Shribman & Pine, Reagan Gains Canada Trade Victory as Senate Effort to Impede Talks Fails, Wall St. J., Apr. 26, 1986, at 5, col. 3.

126 HENKIN, supra note 1, at 50.

127 Id.

128 GLENNON, supra note 12, at 25.
flexibility, specialization as well as the consistency of the policy in the administration.\footnote{129} Surely one could argue why a country should give priority to external courtesy, and pay less attention to its own. Nothing in the Constitution prohibits the legislature from acting disruptive or from making changes of its considerations back and forth. And indeed, sometimes the country’s foreign relations must be sacrificed for the sake of (as a critic may call) a good policy.\footnote{130} But one should keep in mind that we do not live in isolation. We are part of the global system. Our internal well-being is contingent upon our external relations. After the Cold War period, economic diplomacy has increasingly gained its prominent role by drawing countries together to channel their energy toward building global peace and economic prosperity.\footnote{131} Foreign policy, especially trade, is claimed as a strategic approach that has connected “policies on domestic economic growth to international relations with foreign nations”.\footnote{132} Diplomacy is not thus simply being considerate to foreign governments, but also to our people who benefit from these political and economic ties. International embarrassment and credibility therefore are not simply matters of the country’s image, but its economic opportunities, social connection and political gains in the world stage. To avoid these losses, flexibility in the administration is needed for the executive branch to assure the partners of its competence, and to increase its ability to employ trade negotiation in conjunction to other foreign policy mechanisms.

In any case, the autonomy of the executive in the conduct of foreign affairs does not suggest that the legislative role should be completely excluded as argued in the

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\footnote{130}{GLENNON, supra note 12, at 26 (quoting A. Schlesinger, “Why Not Question the Presidency?” N.Y.TIMES, Jan. 2, 1987, at 25)) (“When an Administration of foreign policy is incoherent, duplicitous and dedicated to rash and mindless policies, what indeed is so awful about a crippled Presidency? Surely a crippled Presidency is far better for the nation and for the world than an unchasten and unrepentant one”).} 
\footnote{131}{Linarelli, supra note 129, at 203.} 
\footnote{132}{Id. at 204. See also Michael Kantor, Trade Central to America’s Future in the World, Address before the National Press Club, Washington D.C. (May 5, 1993), in 4 DEP’T. ST. BULL., May 17, 1993.} 
\end{footnotesize}
previous section, especially when substantial domestic impacts are involved. My argument for the central role of the executive branch in the realm of foreign relations only requires that the role of the legislature be reasonable and consultative rather than prohibitive, while respecting the executive’s policy determination when needed. The relationship between the branches should be in a mutual respect to promote the efficiency of the administration, which is the approach that would foster the overall interests of the country.

V. Judicial Review in Foreign Affairs

Balancing the interaction among the branches is the key to the maintenance of the administration effectiveness and to the success of foreign policy implementation. Limitation of a judicial role under certain circumstances is also one of the factors that would promote the central role of the executive branch in the undertaking of foreign policy. With this respect, this section will address the relationship between the executive and the judiciary branch to examine how the restraint of judicial review can enhance this quality of administration while reducing the potential shift in the balance of powers.

A. Judicial Roles and Limits in Foreign Affairs

The concepts of judicial abstention and deference, although distinguishable, share the implication of limitation in judicial review.\textsuperscript{133} Whereas judicial abstention refers to a circumstance in which a court can exercise its discretion and equitable powers pursuant to the Constitution and statutes, but declines to decide a legal action over which it has jurisdiction, judicial deference, on the other hand, refers to a willingness of a court to reach the merit of a case, but only defers certain political issues to the competent branches in respect of their authorities. Furthermore, judicial abstention often involves the issue of allocation of powers where a laundry list of factors is to be considered, while

\textsuperscript{133} Judicial review refers to the power of the courts of a country to examine the actions of the legislative, executive, and administrative arms of the government and to determine whether such actions are consistent with the constitution.
these factors are not mentioned in the context of judicial deference. Despite the fact that these concepts are two different animals, there is yet “the explicit interaction between abstention and deference when courts adjudicate on constitutional foreign affairs controversies”. The two concepts at least suggest that the court should be limitedly involved in certain areas such as those concerning policy considerations such as national security, economics or national expenditure. And, it was rather the degree of the court’s involvement that should differentiate the two concepts; one in which deference is absolute (abstention), and another in which deference is partial (deference). This section, however, is not meant to focus on the analyses of the judicial deference and abstention applications per se, but only to look at the justifications for limited judicial roles in the realm of foreign affairs through an understanding of the relationship between the two concepts.

Under the U.S. jurisdiction, the concepts of judicial abstention and deference have been developed, and are commonly applied in the realm of foreign affairs. Despite the fact that Article III, section 2 of the U.S. Constitution vests the judicial power in Article III courts to decide all cases arising under the Constitution, laws and treaties, the courts...
have sometimes removed themselves to a backseat and have not played a major part in the governance of the matter of foreign affairs.\textsuperscript{139} This is the area that oftentimes involves a minimal role of the judiciary.\textsuperscript{140} These concepts thus implicates the courtesy of the Court to accord the government a certain policy space for believing that the governmental act may be in pursuant to the national security concerns or national interest in relation to other nations.\textsuperscript{141}

B. The Absence of Judicial Restraint and its Problems in the Thai Context

Judicial restraint, particularly “judicial abstention” may be an unfamiliar concept under the Thai Constitution as the Constitutional Court has been able to exercise its power to decide on the question of the distribution of powers among governmental organs pursuant to the power granted under the Constitution (its general jurisdiction).\textsuperscript{142} Through the general provision, the Court was able to determine whether the international document (presumably a treaty) undertaken by the executive branch can bypass the legislature approval as appeared in its Ruling No. 11/2542 (1999).\textsuperscript{143} The Thai authority:--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states…”). \textit{But see} RAMSEY, \textit{supra} note 80, at 324 (explaining how the issue of standing in foreign affairs can limit a judicial challenge under this jurisdictional grant Article).\textsuperscript{139} The courts have responded to the cases that involved U.S. foreign policy in various ways. Under some situations, courts have accorded complete deference to the position expressed by the executive. In others, courts give that position great weight from persuasive to relevant evidence. And there are circumstances that court have abstained from deciding such issues at all. Jonathan Charney, \textit{Judicial Deference in Foreign Relations, in FOREIGN AFFAIRS AND THE U.S. CONSTITUTION} 98 (Louis Henkin et al. eds., 1990). In \textit{Goldwater v. Carter}, the Court declined its role in determining whether the action of one branch exceeds its authority to commit. DAVID GRAY ADLER & LARRY N. GEORGE, \textit{THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY} 38 (David Gray Adler & Larry N. George eds.,1996). During the war period, the political question doctrine has routinely been invoked by the U.S. Courts in response to the challenges to the constitutionality of the war (the Vietnam, Korean, Grenada and Panama wars) which were initiated without congressional authorization. Nevertheless, the political question doctrine traditionally generates more activity in the lower courts, where it has recently been applied to a wider range of foreign affairs disputes, such as: controversies over the allocation of foreign affairs powers. Nzelibe, \textit{supra} note 134, at 948.\textsuperscript{140} HENKIN, \textit{supra} note 1, at 69.\textsuperscript{141} \textit{Id.} at 70-71.\textsuperscript{142} See \textbf{CONST. (1997)}, Ch. 10 §266 (Thail.) (repealed 2006). \textbf{CONST. (1991)}, Ch. 10 §207 (Thail.) (repealed 1997).\textsuperscript{143} Summary of the Constitutional Court, May 25, 1999, Ruling No. 11/2542 (Thail.), http://www.constitutionalcourt.or.th/download/Summary_desic/42/Summary_desic_eng/e11_2542.pdf (requested the Constitutional Court to rule on whether or not a letter of intent to seek technical and
Constitution of 2007, however, is known as the first Constitution that specifically grants the Constitutional Court the power to resolve disputes concerning the types of treaty that must be subject to the special process under Section 190.\textsuperscript{144} In addition, Section 214 grants the Constitutional Court general jurisdiction to resolve “the case where occurs a conflict as to the powers and duties between at least two organs being the National Assembly, the Council of Ministers or constitutional organs that are not Courts...”\textsuperscript{145}

Most importantly, what these provisions confer upon the Court is the power to address the conflicting claims of competence between the political departments. The difficulty arises when this grant of power involves the determination by the Court as to how the foreign affairs powers should be allocated, even in the departure of the original intent of the Constitution which grants the executive a broad range of foreign affairs power. The shift in the balance of powers can occur when the authorities of the executive in the foreign affairs conduct can be limited or expanded according to the Court’s interpretation of the treaty in question.

The ability of the government to undertake its full autonomy in the pursuit of any international agreement depends heavily upon the determination by the Court on the type of the document involved. A sharp contrast in the Court decisions with regards to the executive’s obligation to submit an international agreement to the legislature for prior approval is demonstrated in the two cases; one concerning the letter of the recognition of Preah Vihear Temple enlisted by Cambodia as a World Heritage Site (hereafter “Preah Vihear Temple”) and the other concerning the letter of intent to seek technical and financial assistance from the International Monetary Fund (hereafter “IMF”).

\textsuperscript{144} “In the case where there arises a problematic issue under paragraph two, the power to make the determination thereon shall be vested in the Constitutional Court...” \textit{CONST.} (2007), Ch. 9 §190, ¶ 6 (Thail.).

\textsuperscript{145} \textit{Id.}, Ch. 10 § 214.
In the IMF, the Constitutional Court held that the letter of intent was simply “an explanation of the policies and operations of the government” required as part of the application process in order to exercise its rights to withdraw sums from the IMF. It also bore no character as a “treaty” for its being only a unilateral act of the Thai government since the IMF did not treat such letter of intent as a binding obligation between the two parties. Although there was an obligation to obtain Parliamentary approval on the modification of its solvency law within a specific timeframe, the failure to meet such dateline constituted no breach of contract, according to the Court. The underlying decision of this case suggested that unless the document is not treated as a “treaty” by the Court in the first place, there is no need to look into other elements. This narrow interpretation certainly accords the government a large space in the exercise of its foreign affairs powers.

On the contrary, the Court in Preah Viherah Temple ruled that the joint communiqué signed between the Thai and the Cambodian governments in the recognition of Preah Viherah Temple enlistment as a World Heritage Site by Cambodia was a type of treaty, which rendered it unconstitutional for failure to go through the process required under Section 190. Despite the fact that the declaration would not “affect each country's rights on surveying and demarcating the common border” and only serve as a friendly support of the enlistment to strengthen the diplomatic relations between the two countries, the Court nevertheless held that the document was intended for legally

146 Supra note 143.
147 Id.
150 In summary, the Joint Communiqué contains six provisions as follows: 1. Thailand is in full support of the government of Cambodia in its enlisting Preah Viherah Temple as a World Heritage Site in accordance with the map arranged by Cambodia. 2. Cambodia acknowledged that the enlistment will not include the buffer zone located in the northern and eastern side of the temple. 3. The enclosed map under the first
binding effects since it contained the obligations of the Thai side, specifically the forth provision which specified the joint planning management to preserve the character and cultural aspects of the Temple and the surrounding areas. The Court went further to treat reservations under the fifth provision as evidence of a binding agreement where both parties mutually agreed that nothing in the joint communiqué shall affect each country’s rights on its border claims (as opposed to evidence of a simple understanding that intended no whatsoever legal effects concerning borders’ delimitation and settlement).  

The inconsistency in the Court’s rationale can, in fact, makes it hard for the executive to predict whether it has an independent authority to undertake and conclude a certain international agreement. At one time, the executive acted as a primary guardian. And at another time, its role was inadvertently switched to an assistant to a treaty making process. The problem here is the Court’s rationally in differentiating Thailand’s obligations under both international documents. Although both cases contain certain obligations that Thailand must undertake, the Court basically treated the supposedly collaboration of the two nations in the protection of the ancient Temple to maintain its culturally distinctive aspects as a “breachable” obligation while, in the IMF, rejecting that there could be any breach of Thailand’s obligation to amend its solvency law within the specific timeframe stated in the letter of intent. And due to this mistaken recognition of

\[\text{paragraph shall be the original map including the “Schema Directeur pour la Zonage de Preah Vihear” and other core zones.} \]

4. While awaiting for the decision of the joint committee in the demarcation of the common border, the two countries will collaborate to preserve the value and the unique character of the temple in accordance with the international standard. Such joint management plan shall be submitted along with the Temple enlistment which is designated for the consideration on February 1, 2010. 5. The enlistment shall not affect each country's rights on surveying and demarcating the common border. 6. Thailand and Cambodia are deeply thankful to the Director-General of UNESCO, Mr. Koichiro Matsuura, for his kind facilitation in the enlistment process. Supra note 148, para. 1.4.

151 Id. para. 1.5(3).

152 The Constitutional Court decision concerning the Joint Declaration between Thailand and Cambodia does not practically reverse the effectiveness of the Signatory of the Ministry of Foreign Affairs. Topothai, supra note 29. However, the fact that the Court in Preah Viherah Temple demanded that the communiqué undertaken by the Thai government be withdrawn yet could not prevent Cambodia from enlisting the temple since the Cambodian government was going to proceed regardless strongly showed that there was really no contractual obligation on the Thai side or any breach that would have resulted in any sort of reparation to be furnished by Thailand to Cambodia.
the legal obligation, the joint communiqué was considered an international “treaty”\textsuperscript{153} making the Court look into other elements of the treaty such as the territorial or jurisdictional impacts potentially made by the treaty to determine the executive’s authority in the treaty-making process.

It is, in fact, understood that once an international undertaking is considered as a “treaty”, other elements that would require a treaty to be subject to a complicated constitutional process can easily fall into it.\textsuperscript{154} Such a broad treaty characterization of the Court certainly will affect the executive discretionary power in the conduct of foreign relations. A treaty that is meant to support diplomatic relations is no exception to the scrutiny of the legislature. Not only did the decision of the Court to demand that the Thai government withdraw the communiqué imply the diminished authority of the executive in the conduct of diplomacy, it also jeopardized Thailand-Cambodia foreign relations by putting the Thai government in an awkward position with Cambodia.

Although, under the Thai Constitution, the obligation of judicial restraint is out of the question, it yet seems that its consideration could be a way out of this frustration. The power to resolve the issues regarding the competence and constitutional functions of political branches now rests with the Constitutional Court. Aside from its general jurisdiction pursuant to Article 214, the power of the Constitutional Court to require treaties to be subject to Parliamentary approvals and a public hearing is also an implication for the ability of the judiciary to manage the distribution of powers among the political organs. And the foreign affairs power is no exception. The expressed language in the Constitution led some critics to invoke the traditional analysis of the separation of

\textsuperscript{153} The Constitutional Court employed an analytical method on the meaning of “treaty” pursuant to the Vienna Convention. Supra note 148, para. 1.5.

\textsuperscript{154} Remarked by Professor Jaturon, the vagueness of Section 190 will create all kinds of claims since “it does not matter whether the changes under Section 190 are for the worse or for the better and also when many changes can affect the economic or social lives of the people”. And thus, there is no doubt that many treaties will likely be subject to parliamentary approvals and public hearings. Therawat, supra note 2, at 2.
powers doctrine to justify the current position of the Constitutional Court, through strict adherence to the constitutional text, in the determination of foreign affairs authorities.\textsuperscript{155} Nonetheless, the language of Section 190, paragraph 6 only confers the power rather than requiring the Court to resolve disputes that may arise thereof \textsuperscript{156} which could also suggest its ability to either entirely abstain from rendering a decision or defer the issue to the competent body where it sees fits.

Thus, although it must be acknowledged that one of the crucial functions of the Court is to police these constitutional boundaries by ensuring that the constitutional process is observed, we must not forget that such a process also runs the risk of entrusting the branch that may lack the resources, expertise and understandings to decide on the question that is purely political in nature while concerning the stability of our foreign relations.\textsuperscript{157} The question of what would be the appropriate role for the Court in the realm of foreign affairs must be addressed. And the extent of the Court to scrutinize governmental actions to assure their conformity with the Constitution will be examined in the following sections.

\textbf{C. Justifications for Judicial Limits}

As we have seen, the concepts of judicial deference and abstention are not unusual practices in the U.S. when the courts’ decisions might involve the determination of certain foreign policy or affect the allocation of powers of the political organs. But the

\footnotesize{\textsuperscript{155} Fritz Scharpf, Judicial Review and the Political Question: A Functional Analysis, 75 YALE L. JOURNAL 517, 520 (1966) (“An avoidance on such prudential grounds would, of course, also conflict with the basic assumptions of the classical theory, that the exercise of judicial review should be the necessary consequence of the Court’s postulated duty to decide all cases properly within its jurisdiction, and to decide constitutional questions whenever the outcome of the case should depend upon such a question”). Topothai, supra note 29, at 15 (suggesting that the adoption of Section 190 which grants the judiciary the power to render a decision concerning the type of treaty that must secure legislative approval was in accordance with the principle of the checks and balances).

\textsuperscript{156} Supra note 43.

\textsuperscript{157} Recalling Justice William Rehnquist’s opinion in \textit{Goldwater v. Carter}, he stated that when “basic question presented…is political”, it would be “nonjusticiable because it involves the authority of the President in the conduct of our country’s foreign relations…” RAMSEY, supra note 80, at 321 (quoting \textit{Goldwater v. Carter}, 444 U.S. 996, 1002 (1979)).}
next important questions to be addressed are the justifications for their applications, and their significances to the executive function through the argument for institutional competency.

Effectiveness and efficiency of the administration remained the key elements that encouraged the court to view its function as a proponent for governmental policy that has already been established. These are pragmatic concerns about the effective execution of U.S. foreign policy that demand that a salient role of the executive branch be accorded. Both democratic elements (effectiveness and efficiency) are the primary concerns that led courts to defer its judgment for the respect of the executive’s positions. The consideration of the effective administration in the conduct of foreign affairs can, in fact, be traced back to the framers intent. Through the replacement of the Article of Confederation with the Constitution, the framers had intended to empower the executive through the assignment of various foreign affairs responsibilities for the more effective implementation of foreign policy.

The belief of the courts in the presidential plenary powers in the area of foreign affairs that, in effect, made the courts defer its decision to the President by giving him “a broad discretionary authority to identify and define national interests and national security” may be explained by its lack of competence, expertise, resources and

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159 Charney, Judicial Deference in Foreign Relations, in FOREIGN AFFAIRS AND THE U.S. CONSTITUTION supra note 139, at 99. Lavinbuk, supra note 59, at 864-865 (addressing the revisionist position believing in a limited role of the judiciary in the realm of foreign affairs) (“Whatever judges may believe U.S. foreign affairs obligations to be, ‘[the propriety of... interposition by the court may be well questioned,’ particularly because ‘the judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided.”). 160 Charney, Judicial Deference in Foreign Relations, in FOREIGN AFFAIRS AND THE U.S. CONSTITUTION supra note 139, at 100.
161 Adler, Court, Constitution and Foreign Affairs, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY, supra note 158, at 44-45 (emphasis added). Ramsey, supra note 80, at 321-322 (2007) (quoting Justice Jackson in Chicago &Southern Air Lines Inc. v. Wierman S.S. Corp., 333 U.S. 103, 111(1948)) (“[B]ut even if courts could require full disclosure, the very nature of executive decision as to foreign policy is political, not judicial. Such decisions are wholly confined by our Constitution to the political departments of the government, executive and Legislative. They are delicate, complex, and
guidelines for resolution of foreign affairs matters, the fear of embarrassment that may
attend the judicial review against a presidential act as well as the view that the president
possesses superior diplomatic skills, information and better understanding of national
interest. Furthermore, the constant evolution in international norms may make it difficult
for the courts to properly define the scope of foreign affairs powers. These are, for
instance, the emergence of new kinds of international commitments or international
norms that may be of a non-legal character, but simply a share understanding among
international community.\footnote{Nzelibe, supra note 134, at 981.} These factors can, in fact, diminish the capacity of the courts
to resolve disputes concerning foreign relations.\footnote{Other factors suggested by Charney were questions concerning international law, independent judiciary (reflection of the biases of their culture and foreign policy), expertise in the law of the executive, access to the facts, international law is alien, important and uncertain effects, sole voice and flexibility. Charney, \textit{Judicial Deference in Foreign Relations, in FOREIGN AFFAIRS AND THE U.S. CONSTITUTION} supra note 139, at 101-106.}

As argued in Section III (B), there are reasons that render judicial reviews in
every government act or decision inappropriate in the context of foreign affairs.\footnote{RAMSEY, supra note 80, at 321(“Judicial involvement in foreign affairs controversies nonetheless carries a hint of inappropriateness, driven by an intuition that it is inexpedient and indeed dangerous for courts to undermine or second guess foreign policy decisions of the President and Congress”). \textit{Baker v. Carr} set forth alternative tests for the application of judicial abstention which is partially reflected in this analysis “when it is found a textually demonstrable constitutional commitment of the issue to a coordinate political department, a lack of judicially discoverable and manageable standards for resolving it, or the impossibility of a court’s undertaking independent resolution without expressing lack of respect due coordinate branches of government, or an unusual need for unquestioning adherence to a political decision already made, or the potentiality of embarrassment from multifarious pronouncements by various departments on one question”. \textit{Baker v. Carr}, 369 U.S. 186, 218 (1962).} And
there are circumstances that demand the applications of judicial abstention and deference,
especially when the court decides on the constitutional question concerning foreign
affairs that could go far beyond a mere determination of the rights and duties of the
litigants in the case.

\footnote{involve large elements of prophecy...and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry”). Lavinbuk, supra note 59, at 865.}
i. Judicial Abstention

Judicial abstention has traditionally been applied to the situation in which the “Constitution has committed the determination of the issue to another agency of government than the courts”. This is a classical concern of the separation of powers principle that where there is “a textually demonstrable constitutional commitment of an issue to a coordinate political department”, the court will entirely decline to rule on that particular issue. This concept has also been expanded to preclude the court’s determination of authorities among the political branches. A political question became the primary factor that rendered the case unreviewable by the court. Under this circumstance, the court, compelled by the question of competence and the allocation of powers among political branches, would abstain from rendering a decision without making further inquiry into the decision of a political branch.

The concept of judicial abstention should be considered in the Thai treaty context when involving the determination of the executive treaty-making authority. Despite the power granted by the Constitution, this does not mean that the concept is inapplicable as previously argued. Many of the factors that the court considered for judicial abstention in the case *Baker v. Carr* are framed in terms of institutional competence to conserve the judicial credibility and to promote the decision-making of the competent authority. Although critics of the judicial restraints may have pointed out the courts competence in judging the matters of foreign affairs can derive from their abilities to analyze highly

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167 The President was claimed acting unconstitutionally by depriving the Senate constitutional role in the treaty termination with Taiwan. The question of whether the Constitution allowed the President to terminate a treaty in connection with recognition in the absence of the Senate was then presented to the court. Although the court recognized that the question will only require the interpretation of the constitutional provision which is within the judicial function and competence, the court was not willing to decide whether one branch of the government has impinged upon the power of another. *Goldwater v. Carter*, 444 U.S. at 999.

vague and complex domestic legal issues, the problems presented in the Thai context which involved an aggressive role of the judiciary in foreign affairs may have less to do with the court’s “undiscoverable standard”, but more to do with the impact of its decision upon the stability of the country’s foreign relations. It concerns the nation’s established foreign policy and the conduct of international relations. The Preah Vihear Temple involves an important decision of the Constitutional Court to withdraw the executive’s foreign affairs authority, which has destabilized Thailand-Cambodia foreign relations. The Court’s decision by rendering a judgment against the validity of the Joint Communiqué has disregarded the government’s policy determination, and undermined the principle of mutual respects among the institutional branches while delimiting the foreign affairs powers that were originally vested in the executive.

ii. Judicial Deference

The concept of judicial deference could suggest a lesser degree of abstention in the sense that the court will at least reach the merits of the dispute, but deferring certain issues to the discretion of the concerned authorities. The concept again calls for institutional competencies or raises the question whether the court is more competent to use its own judgment than is another institution. Sharing judicial abstention’s justifications, courts typically are seen as more competent to evaluate the merits of facts

170 The term “judicially discoverable and manageable standards” was one of the factors set forth in Baker v. Carr for the application of judicial abstention, which refers to the concern of judiciary competence in the realm of foreign affairs due to its lack of institutional capacity to evaluate the relevance of evidence when their understanding of the applicable norms governing such evidence is incomplete.
171 Judicial deference derives from the famous case, Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) concerning the court’s deferral decision to an administrative agency on the statute’s interpretation. Although judicial deference is understood to be outside of foreign affairs context, “at least one commentator has argued that much of the judicial role in foreign affairs can be viewed through the prism of Chevron-type deference derived from administrative law”. Nzelibe, supra note 134, at 1000.
172 Gunn, supra note 136, at 484. There are other circumstances that courts would defer their decisions that this paper will not address since they are not the center of this chapter’s analysis. These are such as jurisdictional disputes within the federal system (the reluctance of federal courts to challenge the constitutionality of a federal law) or jurisdictional disputes in the international system. Id. at 485.
where “popular interests and political power ignore human and constitutional rights”, \(^{173}\) than making a judgment concerning political and economic decisions. It is thus sometimes less of the capability concern than appropriateness.

The judicial deference approach can play an important role in a situation where the court must address a substantive violation of an individual’s constitutional rights, but its review must be limited in terms of the extent those rights must be accorded due to the concern of government’s limited resources and important policy decision. This is especially important in the upholding of the people’s participatory rights that affirmative governmental action is required. This kind of right imposes duties on the government to resources for the right to be fully respected.\(^{174}\) Thus, the determination of the right to public participation (substantive requirements) can have a policy implication as to how a branch of government should manage its budget and resources. And it is questionable whether the judiciary should be able to judge, especially in the absence of a specific regulation or statute concerning the manner of a public hearing. And even if there is one, should the interpretation be deferred to the concerned bodies will require further analysis that is beyond the length of this dissertation. But in any case, matters involving political judgments, especially those concerning an assessment of the validity of claims on national resources may fall outside the judicial function, and can be ones of the factors that justify judicial deference.

For Thailand, the case of Japan-Thailand Economic Partnership Agreement (JTEPA) raised a very important issue concerning the ability of the court to define a

\(^{173}\) Id.

\(^{174}\) CECILE FABRE, SOCIAL RIGHTS UNDER THE CONSTITUTION 40, 42 (2000). Ran Hirschi, Negative Rights vs. Positive Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order, 22.4 HUM. RTS. Q. 1060, 1084 (2000) (“…all matters involving political judgments on the allocation of economic resources, the management of a valuable public asset…in which complex economic and social considerations and trade-offs were involved…the Courts should be less inclined to intervene…."

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public hearing standard in the treaty context.\textsuperscript{175} The validity of an international agreement does not only depend on following a proper process, but also observing the substantive requirements of a public hearing imposed by the judiciary. These factors can drive up the costs of judicial intervention on the administration of foreign policy.\textsuperscript{176} The burden that the government must bear to defend the means of participation it accorded to the public will be considerably high. And it is not necessary that the substantial requirements of the public consultation procedure will guarantee its effectiveness, if the public administration itself lacks such a quality. For these reasons, it will be necessary for the Thai courts to avoid prescribing absolute rules of conduct for a political branch under certain circumstances for the executive to maintain sufficient autonomy in the foreign policy decision.

Despite the fact that the Thai Constitution assigns the court a function to decide on cases regarding foreign affairs matters, there are yet factors to be considered in terms of the diminished degree of judicial involvement, especially when its decision concerns the determination of the political departments’ authorities, the judgment of policy considerations (having political or budget consequences), and in the absence of individual justice interest (fundamental rights). These factors are what I feel compelling and consistent to the principle of our constitutionality, which our judicial system should take into consideration in the area that concerns our international relations.\textsuperscript{177} The concerned

\textsuperscript{175} The primary challenge was the unconstitutionality of the agreement that did not afford the public sufficient means and time to participate in the making of the agreement. Saan Pokklong [The Administrative Court], Mar. 30, 2007, Ruling No. 178/2550 (Thail.), available at http://www.admincourt.go.th/50/s50-0178-o01.pdf.

\textsuperscript{176} One of the compelling justifications for a limited judicial review suggested by Chamey is the fear that the court decisions might have important and indeterminate effects. The argument calls into the question of the court’s effectiveness when applying the rule of laws that also involve foreign policy determinations and other factual considerations. Charney, Judicial Deference in Foreign Relations, in FOREIGN AFFAIRS AND THE U.S. CONSTITUTION supra note 139, at 104.

\textsuperscript{177} What I referred to as “our principle of constitutionality” is by maintaining the balance of powers among the political branches, and by keeping the legislature and the judiciary from excessively intruding into the executive’s sphere, especially in the realm of foreign affairs where the Constitution vested plenary power to the executive. For the U.S., the Supreme Court’s docket in fact showed the manner of the judiciary
factors will help enhancing the effectiveness of the executive administration by discouraging unnecessary judicial interference while reducing the potential shift in the balance of powers among the institutional branches. This functional consideration, while according the executive a certain level of autonomy to undertake its foreign policy decisions, will allow each branch to effectively perform a function in the area of its competence and in a manner that would foster our national interests.

D. Balancing Approach: Justifications for Judicial Involvement

The mere involvement of foreign policy or the allocation of powers cannot simply exclude the judiciary role from a legal dispute concerning foreign affairs since any slight connection to those considerations would justify the absence of the court’s role entirely in this realm. In the case of Thailand, there will be a question of where this line can be drawn since the making of treaty could all involve or at least affect foreign policy determinations in some ways. If this was the case, then the court would be completely excluded from the entire process. And there would be no room for the court to act as a guardian of constitutional rights in foreign affairs.

Thus, although it may be true that foreign policy determination in general is within the executive’s discretionary power, but the policy that substantially affects fundamental individual justice can trigger a better, justifiable role of the court. And it is, in fact, an important question to be addressed by the court rather than any other political organs which must serve as a guardian of the people’s constitutional rights.

Furthermore, stability, as one of its institutional qualities, may very well prove to be

\[\text{\footnotesize involvement in foreign affairs, although prevalent in the early days, is limited when affecting the function of the necessary political branches. Lavinbuk, supra note 59, at 895.}
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\[\text{\footnotesize 178 \"But it is erroneous to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance\" Goldwater v. Carter, 444 U.S. at 999 (citing Baker v. Carr, 369 U.S. 186, 211 (1962)).}
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\[\text{\footnotesize 179 RAMSEY, supra note 80, at 107 (casting doubts on the executive power amounting to altering individuals’ legal rights and duties in the domestic legal system).}
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important in a context where individual rights are at stake.¹⁸⁰ Thus, readjusting the scope of the treaty categories to that concerned with individual fundamental rights is highly relevant here since the change can make the court a more appropriate body to address the issues of individual fundamental interests rather than to evaluate governmental acts concerning the conduct of our foreign relations.¹⁸¹ There are strong implications of individual rights within the system of the separation of powers under which individuals harmed by government acts must be protected. Even in the area of foreign affairs where judicial deference has normally played its role in the U.S. jurisdiction, “the Court has, at least in one line of cases, enforced the standards of the Bill of Rights without any deference to the international responsibilities of the government”.¹⁸² Nevertheless, even when the courts actually do reach the merits of such a case, it does not mean that it cannot accord the political branches a significant amount of policy discretion. Thus, foreign policy that may implicate fundamental individual rights may not justify judicial abstention, but may validate judicial deference which has a certain degree of judicial involvement for a guarantee of the people’s important constitutional rights while allowing certain policy decision to be deferred to, and addressed by the political branches.¹⁸³ It is thus the function of the court to weigh individual rights claims against other national interest, including the effectiveness of foreign administration to determine the level of deference it should accord to the political branches. Through this approach, the courts would then promote the political branches’ (including itself) institutional

¹⁸⁰ Nzelibe, supra note 134, at 980.
¹⁸¹ Charney, Judicial Deference in Foreign Relations, in FOREIGN AFFAIRS AND THE U.S. CONSTITUTION, supra note 139, at 102 (“The Constitution establishes an independent judiciary primarily to protect aggrieved individuals harmed by the violations of the law… Their function is essential to the maintenance of the separation of powers among the branches and the protection of individual rights.”).
¹⁸² Scharpf, supra note 155, at 584. Nzelibe, supra note 134, at 1002 (“Although forays by the courts into foreign affairs are infrequent, the courts have not hesitated to adjudicate on the merits of claims with foreign affairs implications when individual rights or domestic property interests are at stake”).
¹⁸³ In Hamdi v. Rumsfeld, the government has argued that the courts should abstain from hearing these cases because they involve sensitive matters of national security and foreign policy. The courts that have considered this argument have rejected it, but have nonetheless concluded that considerable deference to the political branches’ judgment was appropriate. Nzelibe, supra note 134, at 1006.
competence over foreign affairs issues. “In such a framework, judicial abstention and
deference do not entail mutually exclusive categories, but rather reflect a continuum of
judicial involvement in foreign affairs”\textsuperscript{184}

The consideration of the factors mentioned may require that our treaty-making
practice under the Constitution be re-evaluated. Thus, a form of limited judicial review in
foreign affairs can be (i) the readjustment of the judicial intervention manner that should
take place early in the treaty process, and in collaboration with the other two branches to
determine if the treaty must undergo the special treaty process (to be elaborated in
Chapter V, Section II, D (i)-(ii)) as well as (ii) the limitation on the judiciary’s ability to
impose a public hearing standard (to be elaborated in Chapter V, Section II, D (iii)).
These proposals relate to the concepts of judicial abstention and deference in the sense
that (i) the prior-determination mechanism will provide a stronger basis for judicial
abstention in the constitutional challenge of a procedural violation once the executive’s
treaty authority has formally been established, and (ii) that political branches’
discretionary approach concerning the public hearing standard will require the application
of judicial deference in order to maintain an effective function of the public
administration. These notions of limited judicial review are necessary to broaden the
executive’s power in the area of its competency.

Preah Viherah Temple has become a bitter lesson for Thailand-Cambodia foreign
relations which can hardly be patched due to the decision of the Constitutional Court to
invalidate a friendly act of the Thai government toward Cambodia. What type of interests
is being protected here by the judicial process is unclear.\textsuperscript{185} However, it is quite clear
what we are losing in this battle. The ideas of limited judicial review in foreign relations

\textsuperscript{184} Id. at 1009.
\textsuperscript{185} The decision of the Constitutional Court could not prevent the Cambodia government from proceeding
with the enlistment of the Temple (even in the absence of the Joint Communiqué). The revocation of the
Thai government act requested by the Court only sent Cambodia a hostile message that Thailand is no
longer in support of the enlistment.
certainly has nothing to do with the concerns of judiciary insecurity and confidence (as some critics claimed), but rather has much to do with ensuring a proper method of securing our national interests and protecting citizens’ welfares in our system, even if it may sometimes require that the central role of the executive in the making of foreign policy decisions be preserved.

VI. Conclusion

The principle of separation of powers, although aims at preserving the accountability and transparency of a governing system, also reminds us of what it means for each institutional branch to be “separate”. Institutional competencies may not be part of the bargain (objective) of this principle, but are arguably byproducts that can help each department perform its function effectively. The effectiveness of the executive administration is far from what people understand as mere “convenience”. It, in fact, has significant contributions to the assurance of our national interest that can be attained through the maintenance of external relations. In terms of domestic challenge, this effectiveness quality is also required for an administration to be responsive to the people’s needs and concerns. It is, therefore, important that the executive be accorded sufficient autonomy in the exercise of its foreign powers as constitutionally intended. The possession of the adequate autonomy does not mean a grant of the executive’s absolute power that should receive no scrutiny, but rather calls for an appropriate level of

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186 Although, to some critics, the argument concerning the lack of judiciary’s competency may be overrated while making judges feel faithless in the judicial process in guarding our national interest, it should be acknowledged that having the judiciary decide on every issue concerning foreign relations can be politically damaging since the courts sometimes find it difficult to maintain its impartial judgment against foreign governments. HENKIN, supra note 1, at 69-91 (for criticism of political question doctrine).

187 The ability of the executive to decide its own competence in the realm of foreign affairs is also crucial to the maintenance of an effective administration. The proposal of an “oversight committee” which should be composed of the executive, legislative and judicial officials to determine the types of treaty that are subject to the constitutional process prior to undertaking any treaty negotiation will be incorporated into the treaty-making model presented in chapter V. The idea is also influenced by the concept of judicial deference in the sense that the determination of the foreign affairs conduct is executive-based.
legislative and judicial interventions, which is still required to secure the legitimacy of our political process pursuant to the principle of separation of powers.

Foreign affairs are considered sensitive areas of politics that may demand for coordination and mutual respect among the institutional branches in the upholding of our national interest and the maintenance of institutional competencies. This rationale affirms the significance of executive autonomy and limited involvements of the legislature and judiciary through the justifications of strong domestic impacts and individual rights implications. Specifically, the Thai Constitution, unlike the U.S. Constitution, does not vest the entire treaty-making powers in the legislature. Its required approval merely concerns specific types of treaties, and what is left is within the plenary powers of the executive. The treaty-making power is generally preserved, although not exclusively, for the executive for various legitimate reasons such as a tradition, institutional advantages and the concerns of foreign relations. Thus, the excessive roles of other branches in the treaty process can create shifts in their functions while undermining the competence of the branch that has the primary responsibility.

The notions of judicial limits in foreign affairs may be unfamiliar in the Thai legal context, especially when the power to police constitutional boundaries is clearly granted to the branch under the Constitution. But the consideration of the concepts can be practical, given the conditions and dynamics of today’s international politics in which flexibility and policy space must be sufficiently accorded to the executive in order to address the exigencies of the country in the international realm. The manner of judicial intervention is therefore important to maintain this balance. The current approach may entail the Court to cross into the area of foreign policy decision which falls outside the judicial function and contributes to the shift in the balance of powers. This dislocation of

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188 Nzelibe, supra note 134, at 977-80.
powers can threaten the foundation of constitutionalism and the integrity of our Constitution. Judicial limits should thus also be understood as a support system for the separation of powers principle in the sense that “[w]here the Constitution assigns a particular function wholly and indivisibly to another department, the federal judiciary does not intervene”. 189

The intervention of the Constitutional Court in the Pra Vihear Temple case which involved the Court’s review in the government’s foreign policy decision is an example of a devastating result that shattered diplomatic relations between Thailand and Cambodia when it rendered the decision that the friendly posture of Thailand is unconstitutional, and that such a position must be withdrawn. The embarrassment, the severance of diplomatic relations, hatred among the people of the two nations and the loss of many more economic opportunities, in my view, are sufficiently justifiable for the consideration of judicial limits (both in terms of the level and manner of intervention). In the support of this argument, the rationale in Dames & Moore v. Reagan reflected the court’s willingness to go along with the government policy instead of judging it for the reason that “[i]f the Court had rule against the Iranian pact. Chaos and confusion would have resulted and a carefully crafted diplomatic package would have been unraveled”. 190

By conclusion, the way in which the current Thai Constitution was drafted may be complicated for the application of judicial limits in foreign affairs since the Constitution clearly designates the role of the Constitutional Court to resolve issues concerning the extent of the executive and legislative roles in the treaty-making process. Under such a construction, the judiciary’s obligation to police the constitutional boundaries may be hard to be relieved, but can be re-adjusted. My argument comes nothing close to suggesting a complete abandonment of this judicial role in the foreign affairs area or

189 Scharpf, supra note 155, at 538 (quoting Baker v. Carr, 369 U.S. 186, 246 (1962)).  
190 Adler, Court, Constitution and Foreign Affairs, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY, supra note 158, at 46.
encouraging the usurpation of power by the executive because such an approach will only undermine the system of checks and balances as well as the function of the court, as the guardian of the people’s constitutional rights.  

My proposal only asks to re-create a balanced role for each branch in order to meet the internal and external challenges described in Chapter I. How the role of each institutional branch should be readjusted and coordinated in the realm of foreign affairs, particularly in the treaty-making process to maintain balance in the executive’s autonomy will be further discussed in the following chapter (Chapter V).

Chapter V: Democracy and the Treaty Practice Reform through a Comparative Perspective (The Public and State Roles)

I. Introduction

The derivation of a treaty-making model requires this chapter to answer three primary questions; (i) what the proper scope of public participation should be in terms of the type of participation involved, and the kind of treaty to be subject to the constitutional process under Section 190 (which has also partially been analyzed in Chapter III), (ii) what the proper role of the legislature should be in the treaty process in terms of the type of legislative check, and the kind of treaty to be subject to its scrutiny, and (iii) what the proper roles of the courts are in terms of the level of deferential review they should accord to other branches (which has also been considered in Chapter IV).

These questions will be addressed through examining treaty-making practices among the various civil and common law countries. The surveyed countries include France, Germany, the United Kingdom (UK), India, Switzerland, New Zealand and South Africa.

The analysis will be made in the following order. Section I provides the meaning of a “treaty” according to each country’s terms and definitions, followed by the study of how the surveyed countries approach these three primary questions. Although the search for the meaning of a treaty is not the primary focus of this analysis, it is deemed crucial to the determination of the executive’s treaty power in certain jurisdictions as the definition can affect the ability of the executive to conclude a treaty. Under Section II, this survey study will be incorporated into the analysis concerning the three particular areas of proposed reforms through readjusting the roles of the public, legislature and judiciary in the treaty-making process. Each question will be consisted of two sub parts, namely (i) assessing the surveyed countries’ treaty practices, and (ii) asserting the standard (adopting the approach) through my analysis. Section III will provide a complete derivative model by taking into consideration the assessments of the surveyed countries’ treaty-making
experiences, cultural arguments in Chapter III (the adoption of liberalism), and structural arguments in Chapter IV (the maintenance of institutional competence) to achieve fuller democracy in the treaty-making process. Therefore, the primary objective of the analysis is to argue neither for the facilitation of the executive administration nor its monopolization of foreign affairs power, but rather to generate a practical approach in order to secure effectiveness and responsiveness in the machinery of our public administration in the realm of foreign affairs.

II. Comparative Perspective

It is unquestionable that participatory rights of citizens can serve as a “mechanism for enhancing the democratic tenor of public decision-making”. The method of participation can come either through representation (legislature) or direct means (referendum). In a large society where direct participation by citizens is deemed less practical, the role of legislature may increase to better serve this democratic goal. The judiciary, at the same time, has the power to enforce to ensure that this right is being observed. These mechanisms are meant to improve the quality of political decisions by guarding against the corruptive practices of a government and by securing intellectual and constructive inputs of participants. Opportunities to directly or indirectly participate in policy decision-making process are, therefore, crucial to the abilities of individual or groups to defend and improve their interests.

Despite all the wonderful aspects, this self-governing principle can sometimes collide with citizens’ own interest in having a responsive and effective government, especially in the area of external affairs where national interests are also contingent upon the country’s well-established foreign relations. The strenuous checks from the public and institutional branches upon the executive (as described in Chapter I), although in theory

can strengthen the people’s interests, do not always guarantee such a result when the checks can have substantial impacts upon domestic as well as external relations administrations. Aside from the need to secure the accountability and transparency of the government, an effective function of the executive in handling treaties with foreign governments must also be taken into consideration. Thus, the first question to be addressed in this section as to what should be the scope of the public participation in the treaty context will be drawn from the surveyed countries’ experiences combined with the analysis provided in Chapter III.

Many jurisdictions generally have broad categories of treaties that are subject to close supervision. However, their scrutinizing mechanisms in the treaty process are based on final rather than prior legislative approvals and mandatory public consultations in addition to this legislative check. The complicated process established in Section 190 certainly requires us to narrow down the scope of the treaty categories and to determine a proper participation mechanism in order to ensure that those in need of special attention properly receive one. The comparative perspectives will help us understand how the value of public participation is carried out in practice in the context of a treaty-making process. And this understanding will also help us shape its scope and define its limits to enable the effective function of this participatory mechanism.

A. The Constitution of a “Treaty”

The Thai Constitution does not provide a legal definition of a “treaty”.

It must also be noted that, under the Thai treaty-making practice, unlike the U.S. system, the term “international agreements” and “treaties” are interchangeable.
the meaning of those specified in Section 190.\(^3\) Thus, the power to interpret and define treaties is entirely vested in the Constitutional Court.

According to the Thai jurisprudence, a treaty means any type of international agreement in written concluded between states or international organizations intended for legal effects among the parties in accordance with international law.\(^4\) The court, in fact, treated mutual obligations borne by the parties (if breached would entitle the other to certain judicial remedy) as a core element of a treaty. In the case of the International Monetary Fund (hereinafter “IMF”) under which the Thai government tried to seek a financial assistance from the IMF through the submission of the letter of intent, the court rejected the plaintiff’s argument stating that the document, if anything, constituted no more than “an explanation of policies and the operation of the government” bearing simply “the characteristics of being a unilateral act by the Thai government in request of the exercise of its rights in its capacity as a member State to utilize the general resources of the IMF”.\(^5\) The court distinguished treaties from unilateral acts, which in its view lacks the binding legal effects of both sides. The letter of intent, according to the court’s analysis, is a non-binding instrument in which no sanctions would have been imposed had the Thai government failed to deliver its promises stipulated in the letter of intent. It can be understood that any binding agreement certainly accompanies significant legal implications which can potentially have adverse impacts upon the people, and thus requires greater scrutiny before it can take effects. Contractual obligations created by a

\(^3\) CONST. (2007), Ch. 9, §190 ¶ 3 (Thail.).
\(^5\) Summary of the Constitutional Court’s decision, May 25, 1999, Ruling No. 11/2542 (Thail.), available at http://www.constitutionalcourt.or.th/download/Summary_desic/42/Summary_desic_eng/e11_2542.pdf (requested the Constitutional Court to rule on whether or not a letter of intent to seek technical and financial assistance sent by the government to the International Monetary Fund was a treaty that had to be approved by the National Assembly under section 224 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).
written agreement between the parties, therefore, have become the primary factor that the court considered in the construction of a treaty.

In addition, the courts have increasingly relied on the elements of the treaty definition provided under the Vienna Convention on the Law of Treaties (1969) (hereinafter “VCLT”). Despite being a non party to the VCLT, its customary status has long been recognized by the Thai judiciary. The courts, in fact, have adopted and incorporated into their interpretation the treaty definition provided by Article 2(1) of the VCLT which defined a treaty as “an international agreement concluded between States in a written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”. It should be noted that the intent for the legal binding effects of the parties is missing from the VCLT definition. And, thus the contractual obligations created between the parties is an additional element that is being recognized by the Thai judiciary. In conclusion, there are four primary elements that the Thai courts have elaborated in the constitution of a treaty. These are (i) legal consequences of the obligations (ii) in a written form (iii) concluded between states or international organizations and (iv) under the governance of international law.

The majority of states have virtually adopted these similar elements pursuant to the VCLT treaty definitions. Canada, for instance, recognized treaties as a source of the international legal obligations binding upon the state, and treated the VCLT as a basis of the Constitution. Switzerland, in the same manner, recognizes any form of agreements

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6 Id. See also Anthony Aust, Modern Treaty Law and Practice 14 (2d ed. 1985) (suggesting that the criteria set in the VCLT have become customary international law).
8 Australia, Canada, China, Germany, Japan, Mexico, the Netherlands, for instance, have domestic definitions that are compatible with the VCLT definition. Duncan B. Hollis, A Comparative Approach, in National Treaty Law and Practice 10 (Duncan B. Hollis et al., eds. 2005).
9 Maurice Copithorne, National Treaty Law and Practice: Canada, in National Treaty Law and Practice 91-92 (Duncan B. Hollis et al., eds. 2005).
intended by the parties for binding legal effects to be governed by international law as a treaty.  

The creation or change of legal obligations pursuant to public international law is primarily required in order for a treaty to form under the Netherland constitutional approach. This position has, in effect, generally excluded policy or cooperative agreements from constituting a treaty to be submitted for parliamentary approval.

In summary, although Thailand provides no distinction between “treaties” and “international agreements”, its definitional approach is still considered conventional by incorporating the international law definition (VCLT). The title of the instrument is also proven to be less important than the intent of the parties when considering whether the instrument in question has legal binding effects. The constitution of a treaty is therefore relevant since it is one of the factors that can determine or even delimit the scope of the executive authority in the treaty process. The next section provides the discussion of another treaty component that must be taken into consideration in the allocation of the treaty-making power.

B. Special Categories of Treaties

Despite the prerogative of the executive in the treaty-making realm, one cannot deny that the executive cannot exercise such an authority without limitation. In many states, the system of checks and balances enables state legislature (or in rare cases, public consultation) to approve certain types of treaties prior to its implementation or its entry into force. These categories ranged from as broad as those with political and economic implications (i.e. territory cessation, having significant financial obligation) to the ones that may have personal impacts (i.e. affecting individual rights). The surveyed countries

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10 Luzius Wildhaber, Adrin Scheidegger & Marc D. Schinzel, National Treaty Law and Practice: Switzerland, in NATIONAL TREATY LAW AND PRACTICE 627, 642 (Duncan B. Hollis et al., eds. 2005).
12 Hollis, A Comparative Approach, in NATIONAL TREATY LAW AND PRACTICE, supra note 8, at 35. See also Pierre Michel Eisemann & Catherine Kessedjian, National Treaty Law and Practice: France, in
in this section, namely France, Germany, India, the UK, Switzerland and South Africa all place an emphasis on the treaties that have substantial implications on individual rights.

The issue can get more complicated when the constitutional process, such as that of Thailand entails checks from the public and the legislature prior to the initiation of an important treaty negotiation, which is to be distinguishable from the practices of many jurisdictions. Thus, securing the effectiveness of this process may require us to narrow down the treaty type since, given these additional requirements, a broad common treaty category as reflected in many jurisdictions will certainly cast all kinds of treaties into this demanding process, which will prolong the process of treaty negotiation while potentially leaving the important ones unattended. To redefine the treaty scope, the surveyed countries have at least suggested that those that potentially threaten individuals’ rights to life, liberty and security - the utmost interests guaranteed under the Thai Constitution - should primarily be warranted in the treaty context. This is also a liberal approach that I argued for in Chapter III.

Arguably, public participation can become more significant as the government conduct increasingly affects individual fundamental rights to life, liberty and security. In the U.S. treaty-making context, sole executive agreements without proper checks is seen as a threat to the principle of democracy and constitutionalism, “especially when an agreement entails lawmaking and affects individual rights”. The impacts on an individual fundamental justice, which bears the basic characteristic of human rights, can provide a strong basis for the participatory right of an individual in a policy decision. As argued by Jonathan Charney, there are strong implications of individual rights within the

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NATIONAL TREATY LAW AND PRACTICE: FRANCE, GERMANY, INDIA, SWITZERLAND, THAILAND, UNITED KINGDOM 1, 6 (Leigh Monroe et al., eds.1995).
13 CONST. (2007), Ch. 9, §190, (Thail.) (amended 2011).
14 In the Switzerland model, LUZIUS WILDBACHER, TREATY-MAKING POWER AND CONSTITUTION: AN INTERNATIONAL AND COMPARATIVE STUDY (1971) (emphasis added).
system of the separation of powers under which individuals harmed by government acts must be protected. Even in the area of foreign affairs where judicial review has limitedly played its role in the U.S. jurisdiction, “the Court has, at least in one line of cases, enforced the standards of the Bill of Rights without any deference to the international responsibilities of the government” where important individual rights are at stake. These are the cases that individuals’ political participation is undeniable, and should be given priority.

i. Assessing Treaty-Making Practices

France (Civil law)

Under the French Constitution of 1958, Article 53, Section VI specifically provides that special types of treaties require parliamentary approval before these treaties can take effect (prior to ratification or approval by the executive). Such a process (the intervention of the Parliament) can also be replaced by direct consultation of the citizens in accordance with Article 11. According to Article 53, peace treaties, trade agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or

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16 Charney pointed out the crucial function of the court in upholding the constitutional rights. And matters such as foreign affairs when implicating individual rights and fundamental justice should be subject to closer scrutiny. Jonathan Charney, Judicial Deference in Foreign Relations, in FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 98, 102 (Louis Henkin et al. eds., 1990) (“The Constitution establishes an independent judiciary primarily to protect aggrieved individuals harmed by the violations of the law… Their function is essential to the maintenance of the separation of powers among the branches and the protection of individual rights.”).


19 1958 CONST. art. 53 (Fr.).

20 Id. art. 11 (“The President of the Republic may, on a recommendation from the Government when Parliament is in session, or on a joint motion of the two Houses… submit to a referendum… which provides for authorization to ratify a treaty….”). Pierre Michel Eisemann & Raphaëlle Rivier, National Treaty Law and Practice: France, in NATIONAL TREATY LAW AND PRACTICE 253 (Duncan B. Hollis et al., eds. 2005).
acquiring of territory, may be ratified or approved only by an Act of Parliament. The operation of this clause prevents these treaties from taking effect until such ratification or approval has been secured. In addition, the consent of the population affected by the ceding, exchanging or acquiring of territory must be obtained.

Despite the broad scope of the legislative approval required by the Constitution, special attention has been paid to the case in which individual rights have been deprived. Although the cession and acquisition of territory, in many jurisdictions, is a common type of treaty that simply requires legislative approval after the treaty has been concluded, the direct impact upon an individual’s livelihood and his community resulted from the transaction are the type of interest that the Constitution protects. Therefore, additional process for the concerned individuals must be accorded. Thus, the issue requires us to look beyond territory ceding and acquisition, and to take into consideration citizens’ fundamental interests that are substantially at stake in any type of treaty negotiation. This protective approach has also been adopted more or less in the treaty practice of Germany.

**Germany (Civil law)**

Germany, following the lines of the parliamentary system, also has particular types of treaties that require the participation of Parliament in their conclusions. According to the German Constitution (The Basic Law), these are the treaties affecting the existing legislations or requiring a new law, affecting the existence of the state and its territorial integrity, independence, status and sovereignty. Although the Federal

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22 GRUNDEGEGETZ [GG] [Constitution] art. 59(2) (F.R.G.) (“Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply mutatis mutandis”). Parliament’s consent to a treaty is given in a form of an accessory law enacted by both chambers of Parliament. The procedure of approval is varied depending on the type of treaty. The conclusion and modification of treaties on the European Union, for instance, may require only an enactment of an ordinary federal law. For others that require the law of approval, additional process may be needed.
Constitution provides no mandate for the federal government concerning direct participation of the people in treaty-making process, public consultations may be required where the interested groups so requested that their special interests be taken into consideration in the conclusion of the agreement.\textsuperscript{23} However, for the facilitation of the administration, this process rather takes place through representative civic bodies such as chambers of commerce, associations and other public interest groups.

**India (Common law)**

For India, the treaty-making power is exercised and regulated by the executive.\textsuperscript{24} The Indian Constitution, in contrary to France and Germany, does not require parliamentary approval (Union Parliament) \textit{before} agreements are concluded or enter into force.

Despite this plenary power, the concern of individual rights is affirmed and expressed in conjunction with the exercise of the executive’s treaty-making power. Thus, implementing legislations are necessary to give effect to certain categories of treaties relating to cession of Indian territory, affecting the existing laws or restricting or infringing upon individual rights.\textsuperscript{25} Treaties such as the Geneva Conventions for the

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\begin{enumerate}
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\item The President is the chief executive of the Union of India, and the executive power is vested in him. 
\textsc{India Const. art. 52 § 5}. K. Thakore, \textit{National Treaty Law and Practice: India}, in \textsc{national treaty law and practice}: \textsc{france, germany, india, switzerland, thailand, united kingdom} 349 (Duncan B. Hollis et al., eds. 2005).
\item Maganbhai Ishwarbhai Patel v. \textit{Union of India}, A.I.R. 1969 S.C. at 784 (“If, in consequence of the exercise of executive power, rights of citizens or others are restricted or infringed, or laws are modified, the exercise of (executive) power must be supported by legislation”). \textsc{India Const. art. 253, § 6} (“Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body”). Article 253 is to be read in conjunction with “the Union List” (the Seventh Schedule), clause 14 concerning the power to make and implement treaties of the legislature that covers “treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries”. Thakore, \textit{National Treaty Law and Practice: India}, in \textsc{national treaty law and practice}: \textsc{france, germany, india, switzerland, thailand, united kingdom} 79, 81 (Leigh Monroe et al., eds.1995).
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Protection of War Victims 1949, the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963, the International Convention on the Suppression and Punishment of the Crime of Apartheid 1973, the Convention for the Suppression of Unlawful Acts Against Safety of Civil Aviation 1971 are subject to this requirement due to their natures that have significant implications for fundamental individual rights.  

In addition, treaties or agreements that are matters of public importance may be considered in Parliament on a motion moved by the concerned minister. This process can take place after the treaty has been signed or ratified. The Indian Constitution, although does not generally require parliamentary approval for treaties prior to their conclusions, still ensures that treaties affecting individual rights must be brought to the Parliament attention who acts as a screening body before they can take effect in the domestic realm.

**Switzerland (Civil law)**

Despite the unique treaty referendum process (to be further discussed in the section on the public hearing standard), the emphasis on individual rights in the Swiss treaty context may not be as strong in the sense that they were not explicitly expressed under the treaty categories required for further action of the Parliament. Individual rights were rather assumed as matters of major importance that generally fall within the ambit of the Federal Assembly’s (Parliament) authorization prior to their entry into force.

Aside from enacting legislation and rendering budget decisions in connection with international agreements, the primary role of the Federal Assembly in influencing foreign

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27 *Id.* at 97.

28 The Federal Assembly is the Swiss Parliament which consists of two Chambers: the National Council and the Council of States. The two Councils are on an equal level. See, [http://www.parlament.ch/e/wissen/parlamentswissen/Pages/parl.aspx](http://www.parlament.ch/e/wissen/parlamentswissen/Pages/parl.aspx). Switzerland adopted the negative list approach for the Federal Assembly foreign relations power under which all treaties are subject to parliamentary approval, except those of a technical, administrative or executive nature, and of minor importance. Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution fédérale de la Confédération Suisse [Cst] [Constitution] April 18, 1999, SR 101, RO 101, art. 166, ¶ 2 (Switz.) (“[the Federal Assembly] shall approve international treaties, except where by statute or international treaty the Federal Council alone is competent.”).
policy is also to approve these international agreements of which the Federal Council’s power (the executive) alone is not sufficiently competent. The agreements that the executive alone can conclude are (i) agreements the Federal Assembly had authorized in advance whether explicitly or implicitly, (ii) purely administrative or routine agreements of minor importance (i.e. no individual rights affected), and (iii) urgent agreements that must require a provisional entry into force, yet to be subject to subsequent parliamentary approval - mostly treaties of commerce.  

The international agreements of minor importance or “petty agreements” are described as those of a purely administrative or technical in nature, and do not primarily aimed at individuals. The observation of individual rights in the Swiss treaty-making process is thus emphasized through the implication of treaties of major significance of which the executive cannot solely execute without the necessary parliamentary approval.

**United Kingdom (Common Law)**

The United Kingdom (UK) embarked on a dualist system under which no treaty can give effects without receiving the cooperation of Parliament, notably in the form of legislation enactment. Under the UK system, a treaty that has impact upon private rights cannot escape the external check since it is explicitly expressed as the category that requires Parliamentary approval. The consideration of individual rights in the treaty process is therefore within the Parliament’s supervision. And thus, treaties that affected

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29 Luzius Wildhaber, Adrin Scheidegger & Marc D. Schinzel, *National Treaty Law and Practice: Switzerland*, in *National Treaty Law and Practice: France, Germany, India, Switzerland, Thailand, United Kingdom* 140 (Leigh Monroe et al., eds.1995). The categories of the agreements that the Federal Council had power to act alone were revised by the International Law Division of the Federal External Affairs Department and the Federal Office of Justice in 1987. 51 VPB No. 58, 369-85, at 381 (1987).  

See also Federal Statute Concerning External Trade Measure, June 25, 1982 SR 946.201 (empowering the Federal Council to conclude international agreements concerning external commerce, services and payment transactions).


31 Ian Sinclair & Susan J. Dickson, *National Treaty Law and Practice: United Kingdom*, in *National Treaty Law and Practice: France, Germany, India, Switzerland, Thailand, United Kingdom* 223, 229 (Leigh Monroe et al., eds.1995).
individual rights cannot take effect until a formal legislative action has completed. Treaties requiring legislative action are those; (i) modifying or adding to the existing law or statute, (ii) endowing additional power to the Crown, not previously existed, (iii) affecting private rights, (iv) creating a direct or contingent financial obligation upon the UK, and (v) providing for an increase in the powers of the European Parliament.\(^\text{32}\) The safeguard of individual rights is reinforced by an additional consultation process with the legislature prior to ratification as well as the enactment of legislation. Such mechanism, also known as “the Ponsonby Rule”, provides the Parliament an opportunity to consider and evaluate the desirability of the treaty content.\(^\text{33}\) Thus, a formal legislative action may only bring the treaty into force, but it is the particular consultative process that pays due consideration to the concerned citizens.

South Africa (Common law)

It can be said that South Africa has similar approach to the Swiss treaty practice in terms of limited open list for treaties that can be solely performed by the executive branch. The positive list entails all treaties to be subject to parliamentary approval, except those listed under section 231(3) of the South African Constitution.\(^\text{34}\) These international agreements that are not subject to parliamentary approval are those of a technical, administrative or executive nature or agreements that do not require ratification or accession.\(^\text{35}\) The role of legislature in the treaty-making process, nevertheless, does not come up until after the decision to conclude an agreement has been reached.

\(^{32}\) Ian Sinclair, Susan J. Dickson and Graham Maciver, *National Treaty Law and Practice: United Kingdom, in National Treaty Law and Practice* 727, 734 (Duncan B. Hollis et al., eds. 2005).

\(^{33}\) Id. at 738. Ponsonby Rule, A. McNair, *The Law of Treaty 68* (1961) (requiring any required ratification treaty to be laid before the Parliament for a period of twenty-one sitting day before the instrument of ratification is submitted to the Secretary of State for Foreign and Commonwealth Affairs).

\(^{34}\) Section 231(3) provided exceptions to the approval of the National Assembly given that an international agreement is “of a technical, administrative, or executive in nature, or an agreement [that] does not require either ratification or accession…” *S. Afr. Const.* 1996.

\(^{35}\) Id. N.J. Botha, *National Treaty Law and Practice: South Africa, in National Treaty Law and Practice* 581, 587 (Duncan B. Hollis et al., eds. 2005). The Manual on Executive Acts of the President of the Republic of South Africa has played a major role in guiding state departments to draft and submit
Despite the absence of the expressed language in the treaty approval requirement concerning individual rights, it is to be assumed that the term “technical, administrative or executive” agreements enabling the executive to execute the agreement alone practically excludes any agreements with major political, economic and social significances as well as those affecting individual rights.\textsuperscript{36} Therefore, under the South African approach, the concern of individual rights’ impact was simply addressed in the treaty category that has significant social implication, without further specification.

\textbf{ii. Asserting a Law-Making Standard}

The conventional treaty-making process, which normally has neither mandate for public consultation nor legislative approval prior to a treaty negotiation, may provide an explanation why many jurisdictions are able to cast broad categories of treaties to be subject to the final legislative approval. For Thailand, which has a more demanding treaty process, following this conventional practice may not be practical, if not unfeasible. However, it is noteworthy that the treaty practices of these surveyed countries recognize individual rights as a matter of high importance that deserve special attention and close supervision. Narrower treaty categories are deemed necessary under the current treaty approach. And by shifting the focus of Section 190 treaty provision to the issue that concerns individual rights, we may achieve more than a practical function of the mechanisms established in this Section, but also the assurance of a responsive governmental administration.

As I explained the significance of adopting the liberal approach in Chapter III, my additional justification for borrowing an element of a legislative process to provide a minimum ground for Section 190 treaty category was also due to the fact that the demand documents to the President properly and in accordance with the constitutional process. Manual on Executive Acts of the President of the Republic of South Africa, Office of the President, Ch. 5 § 5.5, at 24 (March 1999).

\textsuperscript{36} Botha, \textit{National Treaty Law and Practice: South Africa}, in \textsc{National Treaty Law and Practice}, \textit{supra} note 35, at 588.

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on the level of accountability in the making of a treaty that Section 190 has set may be
close to that of the law making procedure. Thus, any activity or commitment the
executive branch made externally that may personally subject individuals to must be first
addressed and properly heard. Treaty consultation with the public under Section 190
certainly is a unique process that heightens public scrutiny on the executive’s exercise of
its foreign power. Although an argument had been made concerning the opposite nature
(difference) of the treaty and that of domestic legislation that the latter was rather
“introverted”, what should not be distinguished between the treaty-making and the law-
making processes is the impact of individual fundamental justice that must be addressed
regardless of the context in which it was involved.

In the context of Canadian governmental regulations, the areas in which a
maximum level of individual and public participation has been arguably required are
those concerned with the right to life, liberty and security of individuals. According to
the Canadian Charter of Rights and Freedom, the notion of fundamental justice
particularly refers to the most basic human rights to life, liberty and security of the person
dealt within section 7. Manicom v. County of Oxford provides an example of which
fundamental justice of individuals or groups is being affected by the cabinet decision-
making process in the location of the waste disposal site. The constitutional challenge in

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38 The distinction was made based upon the nature of treaty referendum that may involve the predilections of two or more states, and may not be afforded the same level of internal pressure. WILDHABER, supra note 14, at 103.
39 Supra note 1. See also CONST. § 7 (1982) (Can.) (Oceanalaw).
40 Supra note 1, at 945.
41 Manicom v. County of Oxford concerns a dispute between a Township of South-West Oxford and the County of Oxford over the latter’s decision to locate a waste disposal site within the Township despite considerable local opposition. The proposed site was located on a height of land, and was in close proximity to the centre of the community. The County applied to a Joint Board appointed under the Ontario Consolidated Hearings Act to consider the environmental and planning impacts of the application. After a lengthy public hearing which resulted in a concern of public health and environmental issue, the Joint Board rejected the application. The County then appealed to the Ontario Cabinet. The cabinet appealing
this case was thus based on the denial of participatory rights for the *most affected* local individuals. The fundamental principle and the goal of democracy were thus being undermined by excluding participatory rights of citizens in the case which the life, liberty and security interests of the people were clearly at stake. And why this is important and more effective to engage people, especially in such a situation has already been elaborated through my lengthy arguments in Chapter III. The approach will provide us with a more specific standard that would help balance the government workloads while better responding to the internal (citizens’ demands and social harmony) and external challenges (the country’s credibility, diplomacy and national interest).

This approach narrows down the principle of public participation to the area where persons’ welfare, health and safety have been directly deprived. It is also specific enough to ascertain a standard that will allow the holding of a public forum to attend to individuals’ injuries without causing undue delay of necessary government actions. This conclusion does not, however, suggest that public participation should be excluded at a higher level such as foreign affairs, the area in which the threats toward citizens’ life, liberty and security is less imminent. Rather, it should serve as guidance when determining the participatory rights of citizens in any international commitment. The countries such as France, India and the UK have specifically spelled out individual rights as one of the treaty categories that cannot take effect unless implemented through an internal process, whereas Germany has a special channel to address the issues for those who believed their interests were adversely affected. Fundamental individual rights should at least be a minimum mandatory standard for public participation to create trust and to provide the people with a sense of security within the governing system, and to

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process that gave rise to the issue of constitutionality brought the plaintiffs to file a complaint with the Ontario High Court. *Id.* at 946 (emphasis added).
avoid overstretched the participatory right to the extent that it would hamper the quality of the public administration which also means the interest of the people.

The assertion of a law-making standard by requiring a public hearing in a case of individual fundamental rights’ infringement goes along the line with the adoption of the liberal approach here. The goal is not only to legitimize government policy decision in foreign affairs, but also to increase the effectiveness of the public participation mechanism itself by making sure that individual energies will be positively unleashed into the system in which responsive and effective administration can be warranted. The potential direct impact that the treaty’s obligations may have upon individuals’ fundamental rights should trigger the same mechanism as the law-making process since the law-making power (which amounts to altering individuals’ rights and duties, even if done to further foreign policy objectives) is certainly beyond the executive constitutional boundary. Individuals’ right to life, liberty and interest should stand as one of the core elements in the requirement of the direct public participation in the treaty realm.

This liberal approach, thus, is not only restricted to treaties that are commercial in nature (as those introduced in Section 190), but will cover any type of international agreement that threatens the well-being of individuals and their local communities. Public participation is particularly important to this new treaty category (concerning fundamental individual rights) which must be created in addition to other important treaties. The approach will be further summarized in Section III (the Derivation of a Treaty Model).

I believe this specific requirement will bring out the best of the people’s intellects, understandings and empathy toward the community they live in rendering public participation serve its fuller function. And to make public participation in the treaty-making process works, we must ask if our constitutional mechanism operates in a way

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that would allow our political ideology – democracy- to flourish. As a matter of a
democratic principle, citizens’ participatory rights should not be denied even in the area
that is far-fetched from individual’s fundamental interests, but can be weighed against the
government’s interest in having an effective administration which is also in the best
interest of the people.

C. Seeking Appropriate Legislative Role

The roles of public participation in the legislative process suggested the minimum
standard that individuals’ participatory rights must be warranted. The role of direct public
participation in the treaty-making context, which may not be as widely recognized, can
also be strengthened by the participation of legislature.\(^{43}\) By increasing the accountability
and openness of the executive in the early process, this approach may help cut back the
extensive judiciary role in the treaty process that had sometimes caused policy disruption
and frustration to the executive.

Many of the civil law countries such as France, Germany, India and Switzerland
share the common treaty practice in terms of the executive responsibilities in negotiating,
signing, ratifying and terminating a treaty. The only substantive distinction among them is
the extent to which the executive may commit the nation internationally without
parliamentary approval.\(^{44}\) Treaty-making practice may range from a highly secured mode
requiring extensive legislature roles to a minimally involved form. Switzerland’s treaty-
making procedure, for instance, requires widespread consultation of political parties and
interested groups prior to the initiation of new legislation of international treaties. India’s

\(^{43}\) For instance, under New Zealand’s common practice, the executive remains the supreme authority of the
treaty-making process. With this respect, “the Executive does not require the Parliamentary approval to
negotiate, conclude or ratify treaties. The current political structure and institutional arrangement thus allow
Parliament to take a role only when the Executive provides its opportunity to do so. The Parliament
practically has limited role in the making of treaties, which is to implementing them by incorporating
treaties into New Zealand’s domestic law. Mark W. Gobbi, *Enhancing public participation in the treaty-

\(^{44}\) Leigh Monroe, *Introduction to NATIONAL TREATY LAW AND PRACTICE: FRANCE, GERMANY, INDIA,
SWITZERLAND, THAILAND, UNITED KINGDOM* at ix, x (Leigh Monroe et al., eds.1995).
parliament, on the contrary, almost plays no role in approving agreements, despite the power granted under its Constitution.\textsuperscript{45}

Despite the variation of models concerning the extent of the countries’ legislative roles in the treaty-making process, legislature participation, in a number of states, is based on strong political, economic and social implications that a treaty may have.\textsuperscript{46} It is, however, uncommon for the legislature to take part or consult with the executive during the on-going treaty negotiation.\textsuperscript{47} Thus, the legislative role is somehow limited within the constitutional framework to facilitate effective and feasible governmental functions.\textsuperscript{48} In Germany, although legislature is allowed to attend a treaty negotiation at the invitation of the Federal Government,\textsuperscript{49} this participatory role clearly serves no more than an observatory one, and does not entitle the legislature as a co-decision maker in the treaty negotiation. The particular negotiation process, therefore, is simply meant to keep the legislature informed and to secure coordination between political branches while entailing no parliamentary control the way the implementation process does.

Thus, generally speaking, the roles of the legislatures in the countries of my study, namely France, Germany, India, Switzerland, the UK, Japan, South Africa and New Zealand have been cut short to facilitate the treaty negotiation process while enabling effective check mechanism before the international agreements can take effect domestically. In spite of the unique treaty referendum process, Switzerland yet adopts a

\textsuperscript{45} Id. at xii.
\textsuperscript{46} Duncan B. Hollis, \textit{A Comparative Approach}, in \textsc{National Treaty Law and Practice}, supra note 8, at 34-35.
\textsuperscript{47} Id. at 30.
more flexible approach by requiring that legislative approval be secure only after the
conclusion of the negotiation has been reached.50

i. Assessing Legislative Roles

The following section divided the participation of the countries’ legislatures into
three different stages; namely prior to a treaty negotiation, during the negotiation and
prior to its entry into force. The presence of the legislatures’ actions in different stages
can help us rationalize their roles and significance in each stage, and enable us to generate
an applicable approach.

(a) Prior to Treaty Negotiation

In most countries, the requirement of legislative action at the initiation of a treaty
negotiation is uncommon or even absent. For the countries such as France, Germany, UK,
South Africa or New Zealand, the executives are vested with full powers to initiate and
negotiate without having the official involvement of the legislature at the beginning.51
These models demonstrate the predominant executive’s role in the early stage of a treaty-
making process by entailing the executive to determine its own responsibility concerning
the initiative of a treaty negotiation. Especially in Germany where treaty-making power
as part of the foreign relations power is in the sole hand of the executive,52 the ability of
the cabinet to make up their own decisions concerning a treaty framework at the

50 Monroe, Introduction to NATIONAL TREATY LAW AND PRACTICE : FRANCE, GERMANY, INDIA,
SWITZERLAND, THAILAND, UNITED KINGDOM supra note 44, at xi.
51 1958 Const. 52 (Fr.) (“The President of the Republic shall negotiate and ratify treaties. He shall be
informed of. Any negotiations for the conclusion of an international agreement not subject to ratification”).
GRUNDEGESETZ [GG] [Constitution] art. 59(2) (F.R.G.) (“Treaties which…relate to matters of federal
legislation shall require the approval or participation, in the form of a federal statute…”). See also
Regulations and Orders Relating to Treaties, reprinted in Treviranus & Beemelmans, National Treaty Law
and Practice: Federal Republic of Germany, in NATIONAL TREATY LAW AND PRACTICE, supra note 49, at
335. Sinclair, Dickson & Maciver, National Treaty Law and Practice: United Kingdom, in NATIONAL
TREATY LAW AND PRACTICE, supra note 32, at 727 (“[T]he treaty making power is vested in the Crown as
part of the Royal prerogative.”) See also McNair A., supra note 33, at 68. Under the 1996 Constitution, the
negotiation and signature of all international agreement is the responsibility of the national executive which
consists of the President and the Cabinet. S.AFR. CONST. §231(1) 1996. Supra note 43 (NZ).
52 Treviranus & Beemelmans, National Treaty Law and Practice: Federal Republic of Germany, in
NATIONAL TREATY LAW AND PRACTICE: FRANCE, GERMANY, INDIA, SWITZERLAND, THAILAND, UNITED
KINGDOM, supra note 22, at 43.
beginning of the treaty process is deemed crucial to its capacity to determine foreign policy guidelines. By the same token, under the UK system, the exercise of treaty-making power is the responsibility of the Secretary of State for Foreign and Commonwealth Affairs.\textsuperscript{53} This includes foreign policy formulation and treaty-making procedure. The Foreign and Commonwealth office operates as a central coordination with other governmental departments that has primary responsibility to initiate certain treaties negotiation.\textsuperscript{54}

India, on the other hand, suggests that the freedom of the executive in the exercise of its treaty-making power is conditional upon an absence of any legislation concerning the entry of the negotiation. This is because Parliament has exclusive power to legislate on foreign affairs.\textsuperscript{55} Nevertheless the treaty procedure is to be regulated by the executive.\textsuperscript{56} And, in practice, it is uncommon for parliamentary approval to be required prior to a negotiation, a treaty conclusion or even its entry into force.\textsuperscript{57}

For Switzerland, the Federal Constitution assigned no strict boundary between the Federal Assembly and the Federal Council in the realm of external affairs. By virtue of Article 166, the Federal Assembly must participate in the shaping of foreign policy and must supervise foreign relations.\textsuperscript{58} Although this loose constitutional framework renders

\textsuperscript{53} Sinclair & Dickson, National Treaty Law and Practice: United Kingdom, in NATIONAL TREATY LAW AND PRACTICE: FRANCE, GERMANY, INDIA, SWITZERLAND, THAILAND, UNITED KINGDOM, supra note 31, at 224.

\textsuperscript{54} Id. at 228.

\textsuperscript{55} INDIA CONST. art. 246 §11 (…[P]arliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule.”).

\textsuperscript{56} Id. art. 53. U.N. Doc. ST/LEG/SER.B/3, at 63-64 (Dec. 1952) (Memorandum of Apr. 19, 1951). The power is exercised by the Executive in pursuant to Article 53 of the Indian Constitution.

\textsuperscript{57} K. Thakore, National Treaty Law and Practice: India, in NATIONAL TREATY LAW AND PRACTICE: FRANCE, GERMANY, INDIA, SWITZERLAND, THAILAND, UNITED KINGDOM 81(Leigh Monroe et al., eds.1995).

\textsuperscript{58} Swiss Constitution has laid down an unclear standard on the distribution of foreign relations powers between the Federal Council (executive) and the Federal Assembly (legislature). Due to a loose constitutional framework (overlapping powers and responsibilities), the executive and the legislature have shared the treaty-making powers and mutually shape external relations. While the Constitution stated that “[t]he Federal Council shall conduct foreign relations…”, “[t]he Federal Assembly shall participate in shaping foreign policy, and shall supervise foreign relations.” Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution fédérale de la Confédération Suisse [Cst] [Constitution] April 18, 1999, SR 101, RO 101, art. 166, ¶ 1 (Switz.).
the legislature’s and executive’s powers and responsibilities overlap (while failing to specify at what stage the Federal Assembly must approve treaties), there is no definite answer to the extent of the legislature’s participation, and one of the five possibilities, theoretically, is the authorization in advance of negotiations since treaty-making is not an exclusive authority of one or another branch.59 Nevertheless, the Federal Council is the sole organ that represents the state, negotiates, signs and ratifies a treaty. The Federal Statute on the Federal Assembly may have been amended to increase the parliamentary participation in the treaty process at an early stage.60 But the legislative involvement is after the negotiation has been initiated and only to keep Parliament informed of any important developments in the negotiation process rather than to authorize the treaty content.

All in all, from these countries’ experiences, treaty-making powers whether solely vested in the executive or shared between the political branches have left the executives with a considerable amount of discretion at the initiation of the treaty process to provide flexibility in the shaping and guidance of foreign policy, which mainly are the primary responsibilities of the branch.

(b) During the Negotiation Stage

In these surveyed countries, it is quite uncommon for legislature to take part in the negotiation process, let alone the informal approval of the negotiated items. This is especially true in the countries that keep the treaty-making power quite centralized, typically in the hand of the Ministry of Foreign Affairs.61 In France, legislature does not

59 Other possibilities are (a) advance authorization, subsequent specific approval after ratification, (b) tacit approval in case the legislature does not expressly object in between signature and ratification, (c) approval between signature and ratification and (d) subsequent approval after ratification. Wildhaber et al., National Treaty Law and Practice: Switzerland, in NATIONAL TREATY LAW AND PRACTICE: FRANCE, GERMANY, INDIA, SWITZERLAND, THAILAND, UNITED KINGDOM, supra note 29, at 135.
61 Hollis, A Comparative Approach, in NATIONAL TREATY LAW AND PRACTICE, supra note 8, at 21.
receive official notification of proposed international agreements since negotiating the agreements is not within its authority.\textsuperscript{62} The ability of the legislature to participate in the on-going negotiation is limited through the submission of written or oral questions to the government concerning the particular agreement,\textsuperscript{63} whereas, in India, substantial legislature actions can take place even after treaty signing or ratifying through a motion moved by the concerned ministry in Parliament.\textsuperscript{64} In the South African model, parliamentary committees, strictly speaking, are not authorized to negotiate or renegotiate the terms of treaties, except inserting a reservation which marginalizes the legislature’s role during the negotiation process.\textsuperscript{65} In the same manner, Parliamentary approval for treaty negotiation is not required in the treaty practice of New Zealand. Under the current political structure and institutional arrangement, Parliament may partake only when the executive provides such an opportunity to do so.\textsuperscript{66} All in all, limitations on the executive’s exercise of its treaty power are rather imposed toward the conclusion of the negotiation by restricting the executive ability to consent to that particular treaty. The screening mechanisms may involve national legislative approval and public consent.

Nevertheless this common practice does not necessarily suggest that the involvement of the legislature during the treaty negotiation is insignificant because for some countries such as Germany and Switzerland keeping the legislature informed throughout the negotiation process may work to the advantage of the principle of separation of powers. In Germany, parliament members may attend important treaty negotiations at the invitation of the Federal government to improve its supervising

\textsuperscript{63} Id.
\textsuperscript{64} Thakore, \textit{National Treaty Law and Practice: India}, in \textit{National Treaty Law and Practice: France, Germany, India, Switzerland, Thailand, United Kingdom}, \textit{supra} note 57, at 96-97.
\textsuperscript{66} Id. at 587.
function under the Constitution while this procedure can lessen the tension between the branches. This type of legislature’s participation is also undertaken in the Swiss model. Whereas the Federal Council (the executive branch) still possesses the power to negotiate treaties under its Federal Constitution, the Committees on Foreign Policy of both chambers are allowed to send their own observers to attend international negotiations. The Federal Council also has a duty to inform the president of each chamber of the Federal Assembly regularly and thoroughly concerning the development of the on-going negotiation. Recommendations from the legislature may take place through this consultative process, but do not necessarily bind upon the Federal Council’s final decision. The Federal Council still retains its independent negotiation authority.

Despite the possible advantage of the approach in terms of increasing the transparency and accountability of the executive branch, the approach may work against the nature of treaty negotiation which requires a certain extent of confidentiality to preserve the country’s interest. Debates and discussions concerning the country’s position and concessions can compromise the country’s interests while putting the country at a disadvantage. Preservation of information during the negotiation stage may sound dubious, but it is also wise to keep in mind that even if this information was fully disclosed and openly discussed with the legislature, the process may not allow the legislature to directly control the executive’s decision since the legislature’s role is still limited to a consultative one. Despite a certain possible influence the legislature may have

68 Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution fédérale de la Confédération Suisse [Cst] [Constitution] April 18, 1999, SR 101, RO 101, art. 184, ¶ 1-2 (Switz.).  
70 Wildhaber et al., National Treaty Law and Practice: Switzerland, in NATIONAL TREATY LAW AND PRACTICE: FRANCE, GERMANY, INDIA, SWITZERLAND, THAILAND, UNITED KINGDOM, supra note 10, at 130.  
71 WILDHABER, supra note 14, at 103-104.
upon the executive’s decision, this benefit must still be weighed against the fact that the country’s position may have already been compromised by the process.

**c) Prior to the Treaty’s Entry into Force**

Every model of the surveyed countries establishes the mechanism to secure legislative approval after the treaty has been concluded, which is deemed the most crucial stage prior to its ability to take effect internally. The meaning of legislative actions in this section will include the power to form treaties both by its consent and the power to implement them (legislation enactment). Variations among these countries, however, concern the types of treaties that must be subject to the process of this final legislative action.

The majority of states have shown that not every type of treaties requires the legislature’s involvement in the final stage.\(^{72}\) And those that fall outside the requirement are also known as executive agreements of which the executive branch can solely rely on its authority to execute them. Executive agreements, for instance, have been categorized by treaties not requiring legislative implementation in India, treaties falling outside of categories that require legislative approval in France and Germany or treaties within the executive’s sole authority for Switzerland and the UK.\(^{73}\) On the other hand, the common types of treaties that require legislature’s involvement, as I observed, are those affecting the existing laws and those that are of major significance, and more than simply administrative, technical or routine agreements. The variation, once more, depends upon

\(^{72}\) There are, however, a few states that require legislative action to give effect to every treaty or international agreements. Columbia, for instance, required that all treaties entered into by the President must be submitted to Congress prior to ratification/enforcement. This powerful posture of Congress entitles it to approve or disapprove of treaties as well as postpone the enforceability of a treaty by questioning the treaty text. German Cavaleri, *National Treaty Law and Practice: Colombia*, in, NATIONAL TREATY LAW AND PRACTICE : AUSTRIA, CHILE, COLOMBIA, JAPAN, THE NETHERLANDS, UNITED STATES 69 (Leigh Monroe et al., eds.1999).

\(^{73}\) See Table 2, Hollis, *A Comparative Approach*, in NATIONAL TREATY LAW AND PRACTICE, *supra* note 8, at 24.
how each nation goes about the definition of “major significance” which can be as narrow as those having an impact upon individual rights.

In a simple analysis, two distinctive approaches concerning the requirement of the joint actions between the two political branches are applied among the countries. In one case, the ability of the executive to execute treaties independently is applied by a negative list approach meaning the plenary treaty executing power lie within the executive body, except those expressly listed that requires a joint action from both branches. This approach is undertaken by France, Germany, India and the UK which provides a broad range of the executive’s treaty-making power. And another case is in which the opportunity for the executive’s sole power to give effect to the treaties is given only when it is in accordance with the circumstances listed under the Constitution (positive list approach). These are the Swiss, the South African and the New Zealand models.

Unlike Switzerland, although, for South Africa, the role of the legislature in the treaty-making process does not come up until after the decision to conclude an agreement has been reached, both countries vest considerable amount of treaty approval authority in the legislature by enumerating the executive treaty-making powers. The ability of the executive to implement the treaty’s obligations is, therefore, limited through the enumerated list provided under both countries’ Constitutions and legislation. According to Article 231(3) of the South African Constitution, only “[a] n international agreement of a technical, administrative or executive nature or an agreement that does not require either ratification or accession, entered into by the national executive…” does not require an approval of the National Assembly and the National Council of Provinces to bind the

74 In South Africa, the legislature may not approve a treaty until after the conclusion of an agreement has been reached, and the Section 231(2) obligations have been confirmed by the Departments of Justice and Foreign Affairs. Section 231(2), (3) requires approval by resolution in both the National Assembly and the National Council Province for the conclusion of international agreements. Botha, National Treaty Law and Practice: South Africa, in NATIONAL TREATY LAW AND PRACTICE, supra note 35, at 586.
republic.\textsuperscript{75} Along this line, the Swiss Constitution grants the Federal Assembly a plenary power in treaty approval by stating that the Federal Assembly “shall approve international treaties, except where by statute or international treaty the Federal Council alone is competent”.\textsuperscript{76} Despite the absence of the specification concerning the types of treaties that the Federal Council can solely execute in the Swiss Federal Constitution, this task is rather carried out by a federal statute as stipulated in Section 166(2) of its Constitution. Accordingly, Article 7(a) of the Federal Statute on the Organization of the Government and the Administration provided a list of treaty categories of “minor importance” to be concluded by the Federal Council.\textsuperscript{77} Others are the agreements that the Federal Assembly had authorized in advance or urgent agreements requiring provisional entry into force (yet to be subject to subsequent approval).\textsuperscript{78} These provisions provide limited circumstances in which the executive may exercise its independent treaty power. The same principle is also applied to the country, with no formal written constitution, like New Zealand whose exceptions to the general requirement of legislation to make a treaty part of domestic law are those that do not affect domestic laws or the rights and duties of individuals.\textsuperscript{79}

\textsuperscript{75} S.AFR. CONST. §231(3) 1996.
\textsuperscript{76} Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution fédérale de la Confédération Suisse [Cst] [Constitution] April 18, 1999, SR 101, RO 101, art. 166, ¶ 2 (Switz.).
\textsuperscript{77} The Federal Statute on the Organization of the Government and the Administration, SR 172.010. See also BBI 1999, at 4827-29 (The Federal Council “has power to conclude international treaties of minor importance, namely: (a) agreements which neither impose new obligations upon Switzerland nor abandon existing rights, (b) agreements executing international treaties approved by the Federal Assembly, (c) agreements concerning matters which the Federal Council has power to regulate under domestic law…and (d) agreements which are primarily aimed at the authorities, settle questions of an administrative-technical character or do not imply significant financial consequences.”).
\textsuperscript{79} Gobbi, supra note 43, at 84-85 (Under certain circumstances, the executive organ can solely execute international treaties through the ratification process, mostly involving bilateral treaties that do not affect individual rights and duties). W.K. Hasting, New Zealand Treaty Practice with Particular Reference to the Treaty of Waitangi, 38 INT’L & COMP. L.Q. 668, 669-670 (1989) (In principle, legislation is almost always required to make a treaty part of domestic law. Nevertheless, “Parliament will quite often delegate its legislative authority to the executive, which is then empowered by statute to implement international obligations by way of regulation or Order in Council”).
Clearly, the powers of the executive to negotiate, sign and ratify treaties are not necessarily amount to the implementation of the treaty obligations in every case. The scope of this executive power, however, has been broadened in the countries that adopt the opposite approach.

Under the negative list approach, a clear majority of states grants the executive a prerogative power to conduct and conclude treaty negotiations. These countries, France, Germany, India and the UK, allow the executive to solely execute treaties, except those enumerated in their Constitutions, statutes or reflected in the common law tradition. Article 53 of the French Constitution of 1958, for instance, itemized treaty categories, namely peace treaties, trade agreements, treaties or agreements relating to international organization, committing the finances of the State, modifying provisions which are the preserve of statute and law, relating to the status of persons, and involving the ceding, exchanging or acquiring of territory that may be ratified or implemented by a joint action between the executive and the Parliament.\textsuperscript{80} Germany has both constitutional provisions and a statute that require participatory function of its Parliament in the final stage.\textsuperscript{81} In the same manner, Article 245 and 246 of the Indian Constitution provides specific circumstances in which the legislature’s role is deemed necessary in the treaty execution by conferring the exclusive power to the Union parliament to make any law affecting the territory, and implementing treaty and agreement with other nations.\textsuperscript{82} In the UK, in the

\textsuperscript{80} 1958 CONSTIT., 53 (Fr.).
\textsuperscript{81} GRUNDEGESETZ [GG] [Constitution] art. 59(2) (F.R.G.) (“Treaties which…relate to matters of federal legislation shall require the approval or participation, in the form of a federal statute…”). Regulations and Orders Relating to Treaties, reprint in Treviranus & Beemelmanns, National Treaty Law and Practice: Federal Republic of Germany, in NATIONAL TREAfy LAW AND PRACTICE, supra note 49, at 335 (providing a treaty list that affects the competence of the Lämder).
\textsuperscript{82} INDIA CONST. art. 245 (“… Parliament may make laws fir the whole or any part of the territory of India…”). Id. art. 246 (“[P]arliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule.”).
absence a written constitution, the common law tradition has provided a few exceptions to
the executive’s prerogative treaty-making power.\textsuperscript{83}

From the treaty practices of these surveyed countries, it can be concluded that not
every model requires legislature’s participation in the initial and intermediate stages of
the negotiation. This does not mean that the principle of separation of powers is
weakened, but rather strengthened through the respect of each branch’s political function
and a proper check mechanism. Every state does have a mechanism to secure certain
legislative action in the final stage of the negotiation, which has come to support my
understanding of how the legislature’s involvement in the last phase is the most critical
process. A number of states even showed the practices of having the legislature active
after the treaty’s entry into force, which is to ensure that the legislature is consistently
informed of the treaty’s effects.\textsuperscript{84}

The approach of procuring the legislative check in the final stage as consistently
found in the majority of states helps keeping the legislative involvement in the treaty
process in balance, while reducing the disruption of the negotiation process. The
distinction made among the treaties to be subject to the legislative action was also a
procedure to facilitate the effectiveness of the administration.\textsuperscript{85} Legislative authorization
at the very end as part of an implementation process may also serve as a pre-condition to

\textsuperscript{83} Sinclair, Dickson and Maciver, National Treaty Law and Practice: United Kingdom, in NATIONAL
TREATY LAW AND PRACTICE, supra note 32.

\textsuperscript{84} Hollis, A Comparative Approach, in NATIONAL TREATY LAW AND PRACTICE, supra note 8, at 37.
Considering the Indian model, after signature or ratification, treaties/agreements may be considered in
Parliament on a motion moved by the concerned ministry. Thakore, National Treaty Law and Practice:
India, in NATIONAL TREATY LAW AND PRACTICE: FRANCE, GERMANY, INDIA, SWITZERLAND, THAILAND,
UNITED KINGDOM, supra note 57, at 96-97. In South Africa, international agreements that are considered as
“technical or executive” in nature will come into force without parliamentary approval. Nevertheless, they
must still be tabled in Parliament within a reasonable time (as mere notification, and no possible rejection
can be made). Botha, National Treaty Law and Practice: South Africa, in NATIONAL TREATY LAW AND
PRACTICE, supra note 35, at 586.

\textsuperscript{85} It has been agreed that to subject “mundane treaties” to time-consuming process would clog up the
already overburdened parliamentary system. Botha, National Treaty Law and Practice: South Africa, in
NATIONAL TREATY LAW AND PRACTICE, supra note 35, at 587. See also M. Olivier, The Status of
International Law in South African Municipal Law: Section 231 of the 1993 Constitution, 19 SAYIL 1, 7-8
ensure that a treaty is in a clean state before it can take effect. This mechanism can induce the executive to generate a constructive approach in order to secure the legislature’s approvals as demonstrated in the New Zealand’s treaty reform proposal.

ii. Seeking Balance in the Legislature Role: New Zealand Treaty Reform Experience

Under the New Zealand treaty-making model, although treaties that are deemed important and require a change in domestic law are subject to legislative control before they can take effect, efforts have still been made to counterweigh the executive’s treaty power. Public participation was seen as another means to induce greater accountability in the treaty-making process, in addition to the legislative safeguard. Nevertheless, the emphasis on the ability of the legislature to supervise the executive’s treaty power prior to the treaty’s entry into force is still prevalent as it does not only serve as the ultimate safety net, but also a mechanism conducive to generating a forum of public discussion in a treaty realm. Citizens’ participatory rights are, therefore, rather encouraged and expected to naturally be created from the process in which a government attempts to secure parliamentary approvals of the treaty by using the previous public support. This approach, in fact, implies the crucial function of the legislature in the approval of a treaty in the absence of any explicit requirements of public participation in the treaty-making process. And according to this model, the legitimacy of the making of a treaty lies in the final stage of the legislative role by creating a condition for the government to seek greater consultations from the people.

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86 New Zealand has a mechanism to ensure the openness of its treaty-making process. Many of its treaty negotiation forums are open to public, particularly multilateral treaties. Only some that do not affect rights of individuals are subject to confidentiality. Those that are open to public encourage public involvement through invitations as observers and through media commentary on the progress of a negotiation. Gobbi, supra note 43, at 85. Hasting, supra note 79, at 672-673 (arguing for the increased role of the legislature in the final stage of the treaty-making process, which should also apply to treaties within the executive’s prerogative).
Under the New Zealand treaty practice, the legislative function assumes a greater role in legitimizing the treaty making conduct. New Zealand’s attempt to make changes to enhance greater participation in the treaty negotiation process went to address the relationship between the parliament and the executive rather than that between the government and the civil society. Even treaties that are deemed insignificant and do not require a modification of law were recommended to receive certain legislative action whether in a form of tabling or notification after its ratification. The additional requirement of parliamentary approval is presumed to generate sufficient incentives for the executive to ensure public involvement. Whereas a formal requirement of a public hearing conduct is absent, the public participation will be indirectly improved through the pressure that parliament can impose upon the executive. The readjustment of the executive-parliament relationship, which requires the executive to seek greater consultations with the legislature, was assumed to accord the public better opportunity to participate in the treaty-making process. The executive is also expected to extend its consultative practice with the public at the early stage because this public support could help secure parliamentary endorsement. Thus, the legislature can itself be the guarantor of the government’s obligation to include public participation. According to the proposed changes of a treaty-making process, the executive will be held directly accountable to the parliament, and indirectly to the people.

The point being made here is not that the Thais should adhere to this standard by adopting this traditional practice, and eliminating the explicit requirement of public

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87 The opportunity for greater parliament’s role in the current treaty-making process can be increased if the Executive were to execute a treaty containing a provision that the treaty shall only take effect upon Parliament’s approval; or the Governments decides to seek Parliament’s approval prior to ratifying a treaty. Gobbi, supra note 43, at 85 (emphasis added).
89 The readjustment of the balance of powers between the Parliament and the Executive reflected in the following manners; the ability of the House of Representatives to debate the Government’s annual budget (implications for a control over a foreign policy), offering all elected representatives an opportunity to form a negotiating position and the parliamentary approval of treaties. Gobbi, supra note 43, at 101.
participation in the treaty-making process. My intention is rather to point out that securing parliamentary approvals on both stages (prior to negotiation and prior to be bound) may be unnecessary and prolong the negotiation process since the current Constitution already secures direct civic participation within the procedure.\textsuperscript{90} Legislature may ensure direct accountability to the people given that it is the representative body of the people. But when the people can act to ensure that account themselves, it is even better while making the role of the legislature diminished. The crucial point to keep in mind is how to make the executive’s tasks as well as those of the legislature manageable to maintain well-balanced functions of the political branches.\textsuperscript{91} Thus, for Thailand in which a negative list approach (independent executive treaty authority, except those listed under the Constitution – explained in Chapter IV) has already been established, requiring a final legislative approval can be deemed sufficient to secure transparency and accountability in the treaty process. This later legislative control would mean securing a simple majority vote of the National Assembly on the enumerated treaties any time after the conclusion of the negotiation, but prior to the treaty’s entry into force (whether through ratification or legislation implementation). A time limit within which both Houses must make a decision must be imposed (i.e. 15 sitting days). This final legislative control mechanism will of course be applied to both special category (individual rights) that I proposed in Section B, and the traditional kinds (affecting territory and sovereign rights, and domestic laws of the country). The application of this approach can even be extended to those that generate material commitments in trade, investment or budgets of the country as seen under the

\textsuperscript{90} Legislature can have vital functional roles as a foreign policy co decision-maker for it is the focal point for the expression and organization of public opinion, and thus can reflect the collective judgment of a diverse people. The involvement of a legislature is arguably required in the treaty-making process where direct public participation is absent. MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 30-31 (1990).

\textsuperscript{91} Through this concern, the New Zealand treaty-making reform, in accordance with a \textit{National Interest Analysis}, even proposed an expedient route that, under special circumstances, the government may accede, approve or accept a treaty prior to tabling it to the House if it acts “in the national interests”. Gobbi, \textit{supra} note 43, at 105-107.
current treaty provision. The proposal of the model is therefore to take the quality of the administration into consideration which is also to act in the interest of the country, and in accordance with the principles of democracy and good governance.

**D. Seeking Proper Judicial Role in the Treaty Process**

Generally speaking, the role of the judiciary in the treaty process tends to be limited and is usually involved after the treaty has come into force. This is especially true when Article 7 of the Vienna Convention on the Law of Treaties (of which many states have adopted as a customary practice) provides the primary authority of the executive i.e. the Heads of State, Heads of Government and Ministers of Foreign Affairs to conclude treaties. The language of this international instrument purports to states’ distribution of their treaty making powers at the national level. As discussed in the earlier section, this tension is, however, relieved through states’ remarkable uniformity in vesting their treaty-making power in the executive. Nevertheless, the scope of the executive’s treaty-making power is varied from country to country depending on the conditions applied to limit the executive’s ability to consent to the treaty. Beside implementation measures which require the participation of legislature, judicial intervention in the legality of the treaty can be another common restriction upon the executive’s exercise of its foreign affairs powers.

The common role of the judiciary in a treaty process oftentimes involves judicial scrutiny on the constitutionality of the international agreement. In other words, judges must observe and enforces procedural limitations prescribed by the Constitution. The approach and the scope of the review are, however, varied among the countries. One

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94 WILDHABER, supra note 14, at 349.
primary distinction is the ability of the court to decide on the question of the
constitutionality of the international agreement. Countries with limited judicial mandates
are such as the Netherlands, Belgium and Switzerland. The Constitutions of these
countries, in fact, ruled out the possibility of the Courts’ inquiry into the constitutionality
of treaties or international agreements whether they were properly concluded without
legislative approval. On the other hand, this opportunity has been accorded to the French
and the Indian judiciary branches to determine the constitutionality of the executive’s act
in the conclusion of a treaty.

i. Assessing the Scope of Judicial Review: Judging the Constitutionality of a
Treaty

Both France and India provide a judicial procedure to ensure that treaties and
international agreements are made in conformity with the Constitution. For France, the
“Conseil Constitutionnel” has a similar function as a constitutional court. It may
exercise its power to ensure the conformity of the treaty and international agreement, and
the statute authorizing the ratification or approval of such agreements to the

95 The scope of review of the Dutch, the Belgian and the Swiss Courts are limited to observing whether an
agreement is properly published, and only extends to the publication of the agreement. Id. at 350-352.
According to the Dutch Constitution, the Courts are incompetent to judge the constitutionality of the
agreement. Grondwet voor het Koninkrijk der Nederlanden [Gw.] [Constitution of the Kingdom of
shall not be reviewed by the courts”). In Switzerland, the Swiss Federal constitution ruled out the
opportunity of the Court to determine on the constitutionality of the treaty due to the legal effects of the
statutes and general resolutions enacted by the Federal Assembly after the agreement that bind upon the
Federal Tribunal. Thus, the sole judicial authority is rather to reject the application of unpublished
agreements. Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution fédérale de la
Confédération Suisse [Cst] [Constitution] April 18, 1999, SR 101, RO 101, art. 189 (Switz.) (The
jurisdiction of the Federal Courts are limited to (a) complaints about violations of constitutional rights, (b)
complaints about violations of the autonomy of the municipalities…, (c) complaints about violations of
international or intercantonal treaties, and (d) public law disputes between the Confederation of Cantons, or
amongst Cantons.).

96 The Constitutional Council (Conseil Constitutionnel) is the highest constitutional authority in France. It
was established by the Constitution of the Fifth Republic on 4 October 1958, and its duty is to ensure that
the principles and rules of the constitution are upheld. Its main activity is to rule on whether proposed
statutes conform to the Constitution, after they have been voted by Parliament and before they are signed
into law by the President of the Republic. http://www.conseil-constitutionnel.fr/conseil
According to Article 54 of the French Constitution, the Conseil Constitutionnel has the power to declare that “an international commitment contains a clause contrary to the Constitution” rendering any authorization to ratify or approve such commitment ineffective. This hybrid judicial body, thus, has the primary function to observe that Article 53 treaties’ process is properly followed. Its authority is also extended to approving the statute that authorizes the international agreement pursuant to Article 61. In addition, “Conseil d’Etat” (the Supreme Administrative Court) whose primary duty is to observe the misuse of administrative power, the conduct of the bureaucracy or the executive action also has jurisdiction over the question of the treaty’s constitutionality through the examination based on the lack of proper procedure in the treaty ratification for treaties within the meaning of Article 53. India, in the same manner, assigned the role of the Supreme Court to decide on the type of treaty that needs an implementing legislation before giving its effects. Thus, the question of the validity of the treaty that was concluded without the legislative authorization can be raised in court.

It must be noted that, in the French context, the power of the Conseil Constitutionnel to rule against the treaty in question is limited to the period prior to the enactment of the statute or the ratification of the treaty pursuant to Article 61 which

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97 1958 CONST. 54 (Fr.) (“if the Constitutional Council…has declared that an international commitment contains a clause contrary to the Constitution, authorization to ratify or approve the international commitment in question may be given only after amendment of the Constitution”). For the Conseil’s decision on the interpretation of Article 53 concerning the agreements modifying provisions within the ambit of legislative power, see F.C.P. 1970 I, 2354, R.D.P. 1971, at 1972, R.G.D.I.P. 1971, at 239. Pierre Michel Eisemann & Catherine Kessedjian, National Treaty Law and Practice: France, in NATIONAL TREATY LAW AND PRACTICE: FRANCE, GERMANY, INDIA, SWITZERLAND, THAILAND, UNITED KINGDOM, supra note 12, at 9.

98 1958 CONST. 61 (Fr.) (“In cases described in the two foregoing paragraphs, the constitutional council must hand down a ruling on the law within one month…”).

99 Eisemann & Rivier, National Treaty Law and Practice: France, in NATIONAL TREATY LAW AND PRACTICE, supra note 20, at 262. For treaties requiring legislature approval, see 1958 CONST. 53 (Fr.) (Peace treaties, trade agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory).

100 Thakore, National Treaty Law and Practice: India, in NATIONAL TREATY LAW AND PRACTICE: FRANCE, GERMANY, INDIA, SWITZERLAND, THAILAND, UNITED KINGDOM, supra note 57, at 92.
established this rule.\textsuperscript{101} Thus, after the treaty ratification, the question of the constitutionality of the particular treaty application is rather referred to and decided by the French courts such as the Counceill d’Etat.

Their being restrictive in the judiciary role likely comes from the court’s consideration of the nation’s delicate treaty relations.\textsuperscript{102} It has been said that since “there is no basis in French law for challenging the constitutionality of the agreement after its approval or ratification”, the French courts have hesitated to take an action that could annul the treaty or question the validity of the treaty.\textsuperscript{103} In its view, the subject of international relations is outside the scope of its review. The same is also true for the Indian Courts which often times either deferred its decision to the executive authority or validated the executive acts as within its treaty-making competence under the Constitution.\textsuperscript{104} In Germany and the U.S, where the question of the executive competence in the treaty-making process is allowed to be raised in court, the Courts have maneuvered

\textsuperscript{101} 1958 \textit{CONST.} 61 (Fr.) (“Organic laws, \textit{prior to their promulgation}, and the regulations of the Chambers of Parliament, prior to their application, must be submitted to the Constitutional Council, which decides on the conformity of same with the Constitution.”) (emphasis added).

\textsuperscript{102} In the case concerning the land boundary agreement signed in 1974 between the Governments of India and Bangladesh in which India agreed to lease to the Government of Bangladesh a piece of land in the district of Cooch-Behar in West Bengal, the Indian expressed its concern to the well-being of the country’s international relations by ruling in favor of the government that its act was valid in the absence of a legislation when there is no cession of territory involved. \textit{Union of India and others v. Sukumar Sen Gupta and others}, A.L.R. 1990 S.C., at 1708 (“…without the change in the law or change in the Constitution, the agreement should have been implemented fully and we hope that will be done for the restoration of the friendly relations between India and Bangladesh.”). \textit{In re German-Dutch additional financial agreement}, BVerfGE 16, 220 (226-29) (1963) (rejecting the petition stating that “the seriousness of delaying the comprehensive and delicate treaty settlement and the danger of upsetting the friendly relations with the Netherlands far outweighed the possible disadvantages resulting for petitioners from ratification).


\textsuperscript{104} Thakore, \textit{National Treaty Law and Practice: India, in NATIONAL TREATY LAW AND PRACTICE: FRANCE, GERMANY, INDIA, SWITZERLAND, THAILAND, UNITED KINGDOM, supra} note 57, at 88-90. \textit{Union of India v. Munnall Jain}, A.L.R 1954 Calcutta 615, 616-617 (rejecting the argument on the invalidity of the treaty by which the former French possession of Chandernagore was transferred by France to India in the absence of parliamentary legislation by ruling that the making of treaty is an executive act, and not a legislative act…The makers of the Constitution did not intend that no treaty cannot be entered into without the support of the parliamentary legislation. The President makes a treaty pursuant to his executive power, and no Court of law in India can question its validity.). \textit{Maganbhai Ishwarbhai Patel v. Union of India}, A.L.R. 1969 S.C., at 783 (ruling on the constitutionality of the ceding of territorial areas in Rann of Kutch to Pakistan without the approval of the Parliament stating that such undertaking was within the constitutional competence of the Union Executive).
to interpret the conflict in such a way that it was out of existence for a similar consideration. 105

Clearly challenges can present in both cases either the court attempts to nullify the treaty for its lack of constitutionality or validates it to affirm the executive’s competence. There will always be negative consequences. There are of course several reasons why judicial review on the constitutionality of international agreements should be restrained. For the most part, as previously discussed in Chapter IV (the separation of powers), such a review is a delicate task and may create diplomatic controversies and embarrassment on the international plane. 106 And the courts must take into consideration the repercussion of the strenuous review. 107 But judicial abstention will also mean a potential circumvention of citizens’ participatory right to a treaty-making process (whether directly or through the representative body). The decision will inevitably affect the judicial capacity to enforce constitutional obligations.

The drawback to this approach clearly has something to do with the timeline of the judicial intervention, which can either cause the disruption in the state’s foreign policy upsetting foreign relations and yielding potential liabilities, or result in the disregard of the affected citizens’ participatory rights in the treaty process. The attempt of the court to police the political branch’s constitutional obligation in the treaty realm by invalidating

105 WILDHABER, supra note 14, at 371. See also the Political Question Doctrine, David Gray Adler, Court, Constitution and Foreign Affairs, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY, supra note 17, at 35-38 (During the war period, the political question doctrine has routinely been invoked by the U.S. Courts in response to the challenges to the constitutionality of the war- the Vietnam, Korean, Grenada and Panama wars- which were initiated without congressional authorization).

106 WILDHABER, supra note 14, at 356-357. E.g., Petition for an injunction, In re German-Dutch additional financial agreement, BVerfGE 16, 220 (226-29) (1963) (The 1960 German-Dutch Financial Treaty was alleged a violation of the petitioner’s constitutional right. The Court, however, rejected the petition stating that “the seriousness of delaying the comprehensive and delicate treaty settlement and the danger of upsetting the friendly relations with the Netherlands far outweighed the possible disadvantages resulting for petitioners from ratification”). Cf. Adler, Court, Constitution and Foreign Affairs, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY, supra note 17, at 44 (Effectiveness and efficiency of the administration remained a key role that encouraged the court to view its function as a proponent for governmental policy that has already been established).

their act can be destructive as the fully enforced treaty already involved the consumption of time, resources and energy. The post determination approach is also less effective in the sense that the court’s judgment against the legality of the treaty unfortunately cannot restore the individual rights that had already been overlooked. And surely, there is not much to gain when the issue of political departments’ competence in the treaty-making realm is raised after the facts only to repudiate the treaty since the country cannot escape its obligations.\textsuperscript{108} Thus, these negative consequences may not be easily rectified by judicial redress, but could have been prevented by providing all the branches an opportunity to co-determine this question to ensure that the treaty-making process is properly followed prior to the treaty’s entry into force. Such power is best exercised in the early stage.

The issue of each political branch’s competence (role and authority) in the treaty-making process should, therefore, be prior determined to reduce these internal and external tensions. To what extent the executive treaty-making power is subject to constitutional limitations is a very important question that must be addressed in the early phase. As mentioned, when such a question failed to be responded early in the process, there will certainly be a dilemma attached, either the treaty invalidation ruled by the Court can make the state liable internationally and harm external relations or the treaty validation attempt by the Court (to save the country’s reputation and resources) could mean a loss of the people’s certain important constitutional rights that could have been observed earlier.\textsuperscript{109} Through this conventional approach, the objective of judicial policing power may not be achieved at best as it does not guarantee a constant enforcement of

\textsuperscript{108} The Vienna Convention made clear that a material breach of a treaty includes “a repudiation of a treaty” by the party which does not prevent the other party from seeking a remedy when the treaty has been concluded. See The Vienna Convention on the Law of Treaties, supra note 7, art. 61(3)(a), available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

\textsuperscript{109} In \textit{Ex parte Georger et Telivassigamany}, the French Supreme Administrative Court was asked to void the treaty of territory cessation. The French government was, however, still liable under the obligation as well as lost its reputation and credibility internationally. \textsc{Wildhaber}, supra note 14, at 373.
citizens’ participatory right in the treaty-making process. At the same time, the ability of the executive to partially decide its own competence in the realm of foreign affairs is also crucial to the maintenance of an effective administration. From the evaluation, it may seem that the most effective approach is to establish the procedure that guarantees the constitutional compliance prior to the enforceability of the treaty. The creation of a legal body which should be composed of the executive, legislative and judicial officials to determine the treaty to be subject to the constitutional process prior to the undertaking of any treaty negotiation may be necessary for the maintenance of our democracy and international relations.

ii. Asserting a Preemptive Approach

In response to these challenges, some states have adopted a mechanism to verify the constitutionality of the international agreement in advance either prior to the negotiation or the agreement’s entry into force to avoid future complications such as international liability resulting from a breach of the treaty due to its unconstitutionality. The countries that have established this approach are such as Canada, Germany, the UK, Japan and South Africa\(^ {110} \) ranged from a simple internal consultation to a (less popular) broader one which involves the legislature in the determination of a treaty process. The multi-branch prior-consultation to ensure the executive competence in the treaty-making process is uncommon in most surveyed countries. For Canada, the process takes place through the procurement of legislation. The decision to seek legislative approval on important treaties may be deferred to the legislature in a later process through

\(^{110}\) Although, in the case of Germany, the Constitution does not explicitly state that whether international agreements are subject to judicial review concerning their constitutionality, the German Federal Constitutional Court have ruled on this question. WILDHABER, supra note 14, at 354. However, Germany, at the same time, has provided a necessary mechanism to ensure the constitutionality of the agreement before hand, which I feel will set another excellent example in the formulation of the treaty model.
the coordination among the Standing Committees on their concerned issues.\textsuperscript{111} To avoid future complication concerning its treaty-making authority, the government will ratify a treaty only after any necessary enabling act has been passed.\textsuperscript{112} And this process itself serves as a prior legislative consultation to ascertain the treaty’s constitutionality.

On the other hand, the basic model, which allows the executive body to prior-determine its competence in the treaty realm, is more popular in several states. This approach is reflected in the UK, Japan, South Africa and Germany. Although an approval for certain important treaties must be sought from the legislature, the legislature is not necessarily consulted on the question of the type of treaty that requires its authorization. According to the UK practice, the Legal Advisers to the government acting in cooperation with the Legal Advisors to the Foreign and Commonwealth Office and the Law Offices of the Crown and Parliamentary Counsel make the determination on the question of whether legislation (legislative approval) is required to ensure the validity of a particular treaty.\textsuperscript{113} Similarly, in Japan, the Cabinet Legislation Bureau has a duty to decide before hand whether the international agreement in question falls within the category of executive agreement, and therefore requires no Diet (legislature) approval.\textsuperscript{114} This process is customarily undertaken prior to the signature. The power of treaty interpretation also falls within the executive branch, namely the Treaties Bureau under the Ministry of Foreign

\textsuperscript{112} Copithorne, National Treaty Law and Practice: Canada, in NATIONAL TREATY LAW AND PRACTICE, supra note 9, at 96.
\textsuperscript{113} Sinclair & Dickson, National Treaty Law and Practice: United Kingdom, in NATIONAL TREATY LAW AND PRACTICE: FRANCE, GERMANY, INDIA, SWITZERLAND, THAILAND, UNITED KINGDOM, supra note 31, at 232-233. But cf., A. McNair, supra note 33, at 99 (irrespective of whether formal legislative action is required, it is a common rule that before the executive can express the consent of the U.K. to be bound by a treaty, the executive must provide Parliament an opportunity to consider the desirability of any proposed agreement for a period of twenty-one sitting days before it can ratify the treaty).
\textsuperscript{114} Takao Kawakami, National Treaty Law and Practice: Japan, in NATIONAL TREATY LAW AND PRACTICE 415, 419 (Duncan B. Hollis et al., eds. 2005).
Thus, any dispute or ambiguity concerning the classification of an international agreement, it is the Treaties Bureau of the Ministry of Foreign Affairs, in consultation with the Cabinet Legislation Bureau that has a final word.\(^\text{116}\)

The responsibility to address the ambiguity as to how international agreements should be classified also belongs to the South African executive bureau. Since there is no clear distinction made between the types of agreements that require only the executive and those required both the executive and the Parliament approvals, the Manual on Executive Acts of the President of the Republic of South Africa has played a major role in guiding the distinction allowing the executive to partially determine its own competence, especially when the exception provision (Section 231(3)) has never been defined or determined by the courts.\(^\text{117}\) In addition, the determination of whether a treaty falls under Section 231(3) vests in the minister who is responsible for the particular treaty. Nevertheless, such decision must be taken in conjunction with the law advisors of the Departments of Justice and Foreign Affairs.\(^\text{118}\) This is a required procedure prior to the submission of a treaty to the Cabinet and the Parliament to ensure the constitutional compliance of the treaty.

In Germany, this process is required under §72(4) of the Common Rules of Internal Procedure of the Federal Ministries (Gemeinsame Geschäftsordnung der Bundesministerien - GGO) by demanding that the Federal Ministries of Interior and

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\(^{115}\) According to Article 13 of the Cabinet order for the Organization of the Ministry of Foreign Affairs, the Treaties Bureau shall take charge of (1) matters relating to conclusion of treaties and other international agreements, and (2) matters of international law and legal matters concerning foreign relations. Takao Kawakami, *National Treaty Law and Practice: Japan*, in *National Treaty Law and Practice: Austria, Chile, Colombia, Japan, The Netherlands, United States* 107, 110 (Leigh Monroe et al., eds.1999).

\(^{116}\) *Id.* at 108.

\(^{117}\) Botha, *National Treaty Law and Practice: South Africa*, in *National Treaty Law and Practice*, *supra* note 35, at 587. The exception provision is referred to Section 231(3) which provided exceptions to the approval of the National Assembly given that an international agreement is "of a technical, administrative, or executive in nature, or an agreement [that] does not require either ratification or accession..." S.AFR. CONST. 1996.

Justice be consulted during the preliminary drafting of international agreements to verify the constitutionality of the agreement and its national implementing directive. In addition to the text verification, the competent department together with the Federal Foreign Office, the Federal Ministry of Justice and the Federal Ministry of the interior, collectively decide whether a given treaty should be submitted to Parliament in accordance with the rule of the Constitution (the Basic Law). This method again enables the executive to independently determine its own authority prior to giving the state consent to be bound.

A prior co-determination among the institutional branches in the treaty process is clearly an unusual practice. Among these countries, the judiciary’s role, let alone the legislature’s involvement, in helping ascertain the constitutional process of a treaty in the early stage is absent. Thus, the proposal of a multi-branch treaty determination can be conventional and innovative; conventional in the sense that the executive still takes up its role in determining its treaty power, and innovative in a way that the process will encompass the roles of other departments to establish the executive’s competence.

This multi-branch prior determination approach can take care of two important issues, (i) procedural violation – improper constitutional procedure of a treaty and (ii) substantive violation – infringement of an individual’s constitutional rights, especially participatory right, by ensuring that important treaties follow a proper process, and that treaties that threaten individual fundamental rights are properly heard through a public forum.

These issues of procedural and substantive violations also correlate to the level of court involvement, namely abstaining, deferential and vigorous in the treaty process.

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120 Id. at 326.
Under this proposal, while judicial abstention can arguably be of less concern due to the assurance of procedural compliance, the degrees of judicial deference and engagement are still highly relevant when it comes to determining the sufficiency of a public hearing or addressing individual rights infringement in the treaty context (substantive violations). In some countries such as Germany, despite having the procedure of prior determination in place, the issue concerning the constitutionality of the treaty is still allowed to be raised in courts. Nevertheless, the Court has elected to exercise judicial self-restrained (abstention) when it comes to political matters such as the competence of the executive in the making of treaties that had previously been determined. Judicial abstention is thus legitimate here when a proper treaty process has been followed through the assurance of the executive treaty authority. However, it may be misleading to conclude that by establishing this prior-determining mechanism for treaties will automatically foreclose the possibility of a judicial challenge on the constitutionality of the treaty at a substantive level in the aftermath. The substantive constitutionality of the treaty must still constantly and strictly be observed by the judiciary in order to enforce the principle of constitutionalism. This substantive compliance which concerns a guarantee of an individual’s constitutional rights requires us to examine the extent to which the judiciary should defer or engage in rendering its decision. For instance, treaties that violate

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121 In the absence of any explicit requirement of judicial control over international agreements under the German Constitution, treaty application and interpretation nevertheless lie within the jurisdiction of the Federal Constitutional Court (Bundesverfassungsgericht) who decides on the questions of constitutional law and its conformity. WILDHABER, supra note 14, at 366.

122 Id. ("The Federal Constitutional Court has been confronted with claims alleging constitutionality of international agreements, but the courts has until now never upheld any such claim). However, the issue that the Court oftentimes examines is on the constitutionality of a law enacting a treaty rather than the validity of the treaty itself. This approach has allowed the Court to avoid conflicts with the Federal Government and the disruption of the nation’s international relations. Treviranus & Beemelmanns, National Treaty Law and Practice: Federal Republic of Germany, in NATIONAL TREATY LAW AND PRACTICE, supra note 49, at 328 ("...so that its comment on the validity of treaties have not reasonably restricted the Federal Government’s freedom of action in international relations") (emphasis added). See also supra note 102 (Petition for an injunction in re German-Dutch additional financial agreement). K. Loewenstein, The Bonn Constitution and the EDC treaties, 64 YALE L.J. 805 (1955). Cf. Japan v. Shigeru Sakata, 32 ILR 43, 4 JAPANESE ANN. INT’L L. 97, 103 (1960) (upholding the constitutionality of the security treaty as it possessed a highly political character).
fundamental constitutional rights will demand a rigorous participation of the judiciary to ensure that these important rights are closely observed. But the standard of a public hearing, although involving an individual participatory right, should deserve a certain degree of deference. This particular type of deference is to be discussed in the next section.

Despite the possibility of a constitutional challenge on the substantive basis, we cannot deny that what this mechanism helps is enhancing the odds of the treaty survival by securing procedural compliance. This discussed mechanism can at least foreclose the chance of a treaty being overturned by the court on a procedural, if not on a substantive ground.\textsuperscript{123} Thus, for Thailand where a specific procedure is established for important treaties, the creation of an oversight committee who will make prior determination on the application of the constitutional process to a particular treaty is a necessary step to avoid irreversible damages both domestically and internationally. This approach does not only allow the executive to partially determine its competence in the area it originally has a prerogative, but will also enhance the effectiveness of the court’s role in the treaty-making process by reducing the impact of its decision on the country’s international relations (through ensuring procedural compliance), and by guaranteeing that the people’s rights are properly observed and respected early in the process (through ensuring substantive compliance).

\textbf{iii. Assessing the Public Hearing Standard}

Since the incorporation of a public hearing pursuant to Section 190 of the Thai Constitution, the scope of judicial review has undoubtedly been extended in the treaty-making process.\textsuperscript{124} This is another important area of the judicial function that concerns a

\textsuperscript{123} Treviranus & Beemelmans, \textit{National Treaty Law and Practice: Federal Republic of Germany, in NATIONAL TREATY LAW AND PRACTICE, supra note 49, at 327.}

\textsuperscript{124} Saan Pokklong [The Administrative Court], Mar. 30, 2007, Ruling No. 178/2550 (Thail.), \textit{available at} http://www.admincourt.go.th/50/s50-178-o01.pdf (Affirming the decision of the Administrative Court of
The substantive guarantee of the Constitution (upholding an individual’s participatory right). Despite the justifiable role of the courts in addressing this substantive violation, there are times that judicial deference must be applied as a matter of public policy to maintain administration effectiveness. The level of judicial control over a public hearing standard (the substantive requirement of the participatory process) will therefore be addressed in this section.

The Japan-Thailand Economic Partnership Agreement (JTEPA) became the first case since the enforcement of the 2007 Constitution that concerned the unconstitutionality of the treaty on the public hearing basis (inadequacy). Although the case was dismissed by the Supreme Administrative Court for its lack of jurisdiction (on the constitutional issue) which deprives the Court’s ability to determine whether the three day public hearing held by the assigned research center provided people with adequate opportunity to participate, the moral of the story is that a public hearing standard can constitute as an element of the treaty constitutionality, and that the substantive requirement of this public consultation is within the judiciary discretion. Such a power, if exercised without limit, can jeopardize government functions that must try to constantly manage what the judiciary demands.

The limit of judicial review concerning the standard of public participation is especially crucial for Thailand in which the public consultation requirement must take

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First Instance ruling that it had no jurisdiction judging the constitutionality of the treaty pursuant to Article 9 of the Act on Establishment of Administrative Court and Administrative Court Procedure B.E. 2542 (1999). The Administrative Court, therefore, did not get to determine whether the public hearing claimed by the Ministry of Foreign Affairs to be meaningfully held meets the “standard” of public participation. Despite the defendant (Ministry of Foreign Affairs)’s contention that it had assigned the Chulalongkorn University research centre to conduct public hearings 3 days following the cabinet decisions, the plaintiffs claimed that people were not given adequate opportunities to participate because the hearing was not widely announced and took place for a short period of time. Such conduct shows bad motives of the government when it tried to exclude people from meaningful participation and discussions which, in effect, prevent people from effectively checking the government’s exercise of power. Id.
place as early as prior to the entry of a negotiation.\textsuperscript{126} The need for judicial deference in a public hearing standard becomes less relevant in most surveyed countries in which the hearing process is not required. In certain states such as France, the process rather takes place on an optional basis which is substantially within the discretion of the executive.\textsuperscript{127} Thus, under this executive discretionary approach, the judicial review scope or its control over public hearing activities is naturally limited through the decision of the government whether and how to undertake it. This method of limited judicial involvement becomes a necessary tool in many treaty provisions that can carve out the burdens on the executive which paralyze the function of the administration.\textsuperscript{128}

In this section, I will primarily focus on the issue of a public hearing standard which requires a consideration of the judicial deference concept.\textsuperscript{129} Because the requirement of public consultation in a treaty process is an uncommon practice in many surveyed countries, examples given here only demonstrate how the countries approach this requirement, and may not provide us any specific practice. Switzerland turned out to be one of a few countries that have incorporated this tradition into its Federal Constitution in a form of a treaty referendum. The suggested treaty-making model will take into

\textsuperscript{126} CONS\textsuperscript{T}. (2007), Ch. 9 §190 ¶ 3 (Thail.) (“Prior to undertaking a treaty negotiation of any treaty specified under paragraph two; The Council of Ministers shall provide information and cause to be conducted public hearings, and shall give the National Assembly explanations on such treaty.”) (emphasis added).

\textsuperscript{127} See, 1958 CONS\textsuperscript{T}. art. 11, 53 (Fr.) (“Where the referendum is favorable to the adoption of the project, the President of the Republic promulgates [the] same within the time period specified in the previous Article). Article 53 also requires that “no ceding, exchanging or acquiring of territory shall be valid without the consent of the population concerned”. WILDHABER, supra note 14, at 94 (suggesting that the President of France is empowered to hold a referendum on treaties which have repercussion on the functioning of public institutions).

\textsuperscript{128} A major problem that worried the Swiss officials was the fact that “the treaty referendum handicaps Switzerland in its international dealings”. A state, instead of being able to act freely and responsively on the international plane, must be subject to this restriction and must take into consideration wide-range of interests. France, for instance, vigorously protested and refused to enter into an arbitration with Switzerland as a result of the Swiss referendum rejection to the 1923 Convention that abolished Free Zones. WILDHABER, supra note 14, at 102

\textsuperscript{129} Since I justified the need for a public participation in both Chapter III and the Section II, B of Chapter V, its requirement is thus out of the question.
considerations these variations and may also require us to borrow the public consultation standard from a law-making process.

(a) Assessing the Models: Comparative Perspectives

At one end, Germany and India, for instance, provides no room for direct public participation in the treaty-making process. The public is either consulted through representative bodies such as chambers of commerce, trade unions and other organizations that represent public interests or the Parliament which may inquire into the government’s position, intention and over all policy in a form of parliamentary debate.

Along this line, in the absence of statutory or constitutional requirements concerning public consultation in the treaty-making process, many surveyed countries such as the UK, Japan and South Africa have one thing in common; the freedom of the executive to seek the consultation when it feels appropriate. The responsible department may elect to consult with professional or interest groups either before or during the negotiation process. This decisions as to which group should be consulted and how it should be consulted are entirely within the executive’s sole discretion. Since there is no constitutional or statutory requirement for a wide-range public participation, its format is usually on an ad hoc basis, including general participation by way of an invitation to comment on the treaty, rather than pursuant to any compulsory procedure.

130 Treviranus & Beemelmans, National Treaty Law and Practice: Federal Republic of Germany, in National Treaty Law and Practice: France, Germany, India, Switzerland, Thailand, United Kingdom, supra note 22, at 52. Thakore, National Treaty Law and Practice: India, in National Treaty Law and Practice: France, Germany, India, Switzerland, Thailand, United Kingdom, supra note 57, at 98.
132 N. J. Botha, National Treaty Law and Practice: South Africa, in National Treaty Law and Practice: Canada, Egypt, Israel, Mexico, Russia, South Africa 131 (Leigh Monroe et al., eds.2003).
On another end, public participation has been embedded in the constitutional history of very few jurisdictions such as Switzerland. Public consultation mandate dates back to the Federal Constitution of 1921, in which Article 89(4) required treaties concluded for an indefinite period or for a duration more than fifteen years, must be submitted to the people for adoption or rejection if 30,000 active citizens so demanded. The duration of the treaty, thus became the sole criterion for requesting the referendum, whereas the treaty content is irrelevant. And thus, the weakness of this approach is the possible exclusion of important treaties such as those affecting fundamental rights of the citizens when their binding period fails to meet the criterion. The concern led to treaty referendum reforms. The new regime, thus, provided only the mandatory optional referendum when 50,000 citizens or 8 cantons so requests for treaties which contains important provisions establishing rules of law or requiring the enactment of federal statutes for their implementation.

Despite the requirement, public consultation remains significantly a matter of the executive for the fact that the public hearing is regulated by the Federal Council’s Ordinance, also known as “Consultation Procedure” (Vernehmlassungsverfahren) of August 2005 which specifies a hearing format, procedure and scope to be applied to all treaties provided the criteria are met.  

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133 WILDHABER, supra note 14, at 95.
134 Id. at 97.
135 As a result of the restrictive criteria, treaty referendum did not get to play its major role, and only 3.5 percent of the international agreements were subject to the clause between 1952 and 1963. Id. at 99.
136 Swiss had threefold treaty referendum from 1977-2003. These are (1) a mandatory referendum for treaties providing for the adherence to an international organization, (2) a mandatory optional referendum: 50,000 citizens or 8 cantons request it for treaties with indefinite duration, providing for the adherence to an international organization or involving a multilateral unification of law and (3) an “optional referendum”: 50,000 citizens or 8 cantons request it for treaties that legislature decides appropriate, Wildhaber, Scheidegger & Schinzel, National Treaty Law and Practice: Switzerland, in NATIONAL TREATY LAW AND PRACTICE, supra note 10, at 654.
137 Id. at 655. Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution fédérale de la Confédération Suisse [Cst] [Constitution] April 18, 1999, SR 101, RO 101, art. 141 ¶1 (d) (Switz.) (“At the request of 50,000 citizens who are entitled to vote or of eight Cantons, the following are submitted to vote by the People,… International treaties which are of unlimited duration and may not be terminated, the entry into an international organization, [and] involve a multilateral unification of law.”).
consultations held by the Federal Council.\textsuperscript{138} In practice, not only may the Federal Council arrange public consultations \textit{after the signature} (but prior to legislative approval) in a written format, but also through a means of oral communications and conference discussion.\textsuperscript{139} Through the application of the consultation ordinance, the judiciary has almost no role in the decision outcome concerning the adequacy of the public consultation.\textsuperscript{140} Judicial limit in this context thus takes place through the consideration of rules and policy laid down by the executive and legislature without imposing the judiciary’s own standard.

\textbf{(b) Asserting a Public Hearing Standard: Revisiting the Legislative Process}

In the treaty-making context, in the absence of the public consultation requirement in the majority of states, searching for and assessing the public hearing standard can be difficult. Most treaty practices either provide no room for direct public participation or make the process optional. The executive discretionary approach in the consultation process means the branch’s own determination in terms of the manner, the period of the hearing, and the participants. In either case, judicial review in this realm (ability to impose its own hearing standard) is foreclosed.

The executive discretionary approach offers an idea of judicial deference when it comes to determining the substantive requirement of the participation process for Thailand that has adopted a unique method of securing additional legitimacy in the making of important treaties. And due to the distinctive feature (the requirement of prior public consultation for certain treaties), the judicial role in deciding on the


\textsuperscript{139} Wildhaber et al., \textit{National Treaty Law and Practice: Switzerland}, in \textit{NATIONAL TREATY LAW AND PRACTICE: FRANCE, GERMANY, INDIA, SWITZERLAND, THAILAND, UNITED KINGDOM}, supra note 29, at 136.

\textsuperscript{140} The sole judicial check is the possibility of rejecting the application of unpublished agreements. \textit{Cf.}, \textsuperscript{141} \textit{Wildhaber}, supra note 14 at 351. In addition, under the circumstance in which the referendum is held at the discretion of the Federal Council, the citizens’ venue for challenging the constitutionality of the hearing might have been closed since the Federal Tribunal lacks the power of judicial review in such case. \textsuperscript{141} Wildhaber, Scheidegger & Schinzel, \textit{National Treaty Law and Practice: Switzerland}, in \textit{NATIONAL TREATY LAW AND PRACTICE}, supra note 10, at 656-657.
appropriateness of this procedure must be addressed to establish a balanced relationship among the three institutional branches in the treaty context. This following South African approach, although speaking from a law-making perspective, also offers a scope and limit of public participation mechanism through the notion of judicial deterrence on the public hearing standard. Such an approach by allowing a policy decision (the manner of public consultation) to be determined by the executive and the legislature in the form of rules, regulations or laws rather than judicial decisions can facilitate public administration, which is crucial to the assurance of a meaningful public involvement.

Although public consultation is generally required in the domestic legislative process, in particular where fundamental individual rights are involved, there is yet a limit on the exercise of this political right. The decision in *Doctors for Life Int’l v. the Speaker of the Nat’l Assembly & others* (*Doctors for Life*), which affirmed the need for the involvement of citizens in the law-making process, addressed one of the crucial issues concerning the scope of the constitutional obligation of a state's legislative organ to facilitate public participation (substantive matter) and the issue of timing (procedural matter).

The South African Court has played a crucial role in enforcing, expanding and delimiting individuals’ participatory rights in the law-making context. Under the South African Constitution, the scope of the Parliament’s constitutional duties to provide public participation has been set by various sections to support democratic values in the guarantee of individuals’ “social justice and fundamental human rights”. This obligation has been broadened by the application of Section 19 (political rights clause)

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141 Public consultation, although required only in the domestic law-making process, is a growing trend, particularly in the case of human rights treaties or those in which individual rights may be gravely affected. Botha, *National Treaty Law and Practice: South Africa*, in NATIONAL TREATY LAW AND PRACTICE, supra note 35, at 593.


143 The constitutional duty to facilitate public involvement in the legislative and other processes is found in section 59(1)(a) for the National Assembly (NA), section 72(1)(a) for the National Council of Provinces (NCOP), and section 118(1)(a) for provincial legislatures. Id. at 5.
and Section 16 (freedom of expression) of the South African Constitution by the Court.\textsuperscript{144} The Court’s interpretation on a parliamentary obligation in facilitating public involvement in the conduct of public affairs also took into account Articles 19 and 25 of the International Covenant on Civil and Political Rights (ICCPR) concerning the freedom of expression and the political rights of the people.\textsuperscript{145}

Despite the Court’s broad interpretation concerning the Parliament’s constitutional obligation to facilitate public participation, the Court did address the scope of the mandatory public consultation by deferring the manner in which the Parliament may fulfill such an obligation.\textsuperscript{146} The Court by suggesting the possible (not determinative) methods of public involvement that the Parliament may include, decided that the standard of the public hearing arrangement is to be left within the discretion of the Parliament.\textsuperscript{147} The limitation on the Parliament’s obligation to facilitate public participation was driven by public policy concerns (practicality and efficiency of government administration). According to the Court’s ruling, requiring the judiciary to address a specific standard of public involvement may cause “the business of the Parliament” to be “stalled” and the “parliamentary process would be paralyzed if Parliament were to spend its time defending its legislative process in the courts”.\textsuperscript{148} And, therefore, it is not the duty of the judiciary to judge how well the government spends their resources and provides the consultative means. This is a matter of policy rather than a legal question.

\textsuperscript{144} \textit{Id.} at 6.

\textsuperscript{145} \textit{Id.}

\textsuperscript{146} The specific procedure of public participation that was argued by the plaintiff in \textit{Doctors for Life} was “a failure to invite written submissions and conduct public hearings” on the enactment of the health statutes (the Choice on Termination of Pregnancy Amendment Act and the Traditional Health Practitioners Act) as opposed to a mere opportunity provided by the legislature to make either written or oral submissions at some point in the national legislative process. \textit{Id.} at 8.

\textsuperscript{147} “The public may become ‘involved’ in the business of the National Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes. It is plain that by imposing on Parliament the obligation to facilitate public involvement in its processes, the Constitution sets a base standard, but then leaves Parliament significant leeway in fulfilling it”. \textit{Id.} at 13 (citing \textit{King & Others v Attorneys Fidelity Fund Bd. of Control & Another} 2006 (4) BCLR 462 (SCA) at 23-24 (S. Afr.).

\textsuperscript{148} \textit{Id.} at 23-24.
Drawing from this experience, the substantive requirement of public participation should primarily be the discretion of the branch that possesses the capacity and resources to facilitate a public forum. This does not mean that the conduct of a public hearing can be made arbitrarily by the branch. Rules and regulations concerning public consultation must be made to set a legitimate standard, and to allow the concerned branch to manage its own resources, time and energy. The case of *Doctor for Life* represents the middle ground approach by opening up the opportunity for the judicial enforcement of the constitutional rights while allowing the legislature to determine how to address them.\(^{149}\) Such limits provide a practical approach which can help secure proper balance in the enforcement of the participatory right without overstretching to the point that it interferes with the responsiveness of the administration, and becomes an obstacle to the democratic goals.

In conclusion, aside from the need to narrow down the scope of the public consultation in the treaty process for the maintenance of the effective administration, the judiciary may have to play a limited role in deciding on the question of the sufficiency of the consultation by deferring its decision to the political branches. It can be understood how several surveyed countries have come to allow their executive branches to determine the manner of a public hearing or even let the branches undertake the initiative where they sees appropriate to preserve the quality and integrity of the administration. Thus, the primary arguments for the limitation of judicial review in this realm are ones of policy concern; firstly, how the government should manage its resources is not the question for the judiciary,\(^{150}\) and secondly how much information should be discussed is the country’s

\(^{149}\) Czapanskiy & Manjoo, *supra note* 142, at 25.

\(^{150}\) Although freedom of speech (under civil and political rights) is traditionally regarded as a negative right in nature, for these rights to be fully respected, “one must entrench rights to resources that help the exercise of those rights...” Thus, this type of negative rights which arguably does not enjoy unlimited exercises because it could have both budgetary and certain political consequences. CECILE FABRE, *SOCIAL RIGHTS UNDER THE CONSTITUTION* 40, 42 (2000).
privilege that is outside the judiciary’s discretion. The ability of the executive to control the subject of discussion is crucial to the preservation of the country’s position. The length and the contents are a matter of policy decision. And it is not the duty of the Court to create its own rule to define the adequacy of the required public consultation, especially when such a right has budgetary and political implications. On the other hand, this approach does not suggest that the government should be at liberty to hold anything less than a meaningful consultation. My suggestion is only to remind us that the determination of the public hearing standard is the function of the political branches (the executive and legislature) and should come from their coordination in the form of legislation, and certainly not from the judiciary’s words.

III. Breaking the Barriers: Derivation of a Treaty Model

It is undeniable that the increased involvements of the public, legislature and judiciary enhance transparency, openness and accountability in government decision-making which are also the democratic goals that Section 190 intends to promote in the realm of foreign affairs. However, it is clear that securing these objectives without balancing against other democratic values (administration effectiveness and responsiveness) is not sufficient to fulfill the definition of democracy and good governance. The quality of public administration is crucial to the function of democratic mechanisms and the achievement of other political, economic and social goals. The existing mechanism of Section 190 which provides a method of direct public consultation, parliamentary approvals and judiciary intervention in the treaty-making process has put the executive in a straitjacket leaving it with little room to make the decision in terms of the country’s foreign policy. The progressive approach inevitably

\[151\] Debates and discussions oftentimes concern the country’s position, compromises and concessions, and can put the country’s interests at stake. Having all the information fully disclosed in public makes the country bear the risk of the exploitation by its partner. The executive should not be compelled to tender more than “dark hints and appeals to the confidence of the voters”. Wildhaber, supra note 14, at 103-104.
causes damages to domestic and international relations (i.e. the unresponsive public administration, public unrest, and the frustration of foreign nations). Section 190 mechanisms therefore do not only involve the regulation of external, but most importantly internal affairs. What Section 190 may lack is certainly not these ambitious goals, but rather the proper means to fulfill them.

What I am proposing in this section is a reform of the three areas under Section 190, namely (i) the types of treaties to follow this special treaty process, (ii) the procedure of the treaty-making and (iii) the manner of the judicial involvement. These are the three primary areas that have obstructed an effective function of the government, and need to be re-assessed. The existing categories of treaty, especially those concerned with the extensive impacts on national economic or social security or generate material commitments in trade, investment or budgets of the country, are vague and incredibly broad to be subject to public participation, and for the executive to undertake without having a possible backlash. Furthermore, having the Constitutional Court determine on the constitutionality of the treaties (which is likely to be after the treaty has been undertaken) and assert its own public hearing standard would present both major impediments to the treaty-making process and expose the country to international liability. And finally, the treaty-making process itself should not require two stages of legislative checks. The parliamentary approval should only be required before the country is bound by the treaty, which serves as a more effective check on the executive treaty power when detailed substances are available for a review as opposed to a vague framework that might never take shape when tabling it early in the beginning.

152 The U.S. treaty-making process is not as democratic as it might be. But to propose constitutional amendment that requires the roles of both Houses in the making of treaties would certainly make the process more cumbersome. And “[d]o the claims of democracy demand that greater inefficiency?” HENKIN, supra note 15, at 61.
These issues are not addressed solely to impose limits on citizens’ participatory rights in the treaty-making process. They are rather addressed to guarantee the effective implementation of public participation, and to ensure that Section 190 serves the ultimate democratic goals. And how these goals will be best served will be briefly explained through my treaty-making model.

As mentioned, the types of treaties that are subject to Section 190 process is the first area of my concern. Many surveyed countries have included the category of individual rights in their treaty practices. The explicit requirements of the Constitutions such as those of France, India or the UK set good examples of paying close attention to the very fundamental issue that a constitution must primarily guarantee. From the Canadian regulatory model, public participation is operated upon the principle of individual fundamental justice - life, liberty and security interests. This fundamental principle should be incorporated into Section 190 treaties by being an additional category to be specifically subject to public consultation. Thus, in terms of the public participation scope, the primary approach here is to shift the focus from a broad and ambitious language to the very fundamental issue of constitutionalism. This new category will come to replace the vague ones (having extensive impacts on national economic or social security). This new addition will also be the sole category that requires public consultation, while participations for other three classifications are optional, and within the executive’s discretion.

The liberal approach will guide us on the questions of the public participation mechanism as to who should be the primary participants and when they should participate. With this respect, a public participation mechanism must be narrowed down in its scope by primarily focusing on the treaty that may substantially have an adverse

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153 In the U.S. treaty-making context, principle of democracy and constitutionalism suggested a limited role for sole executive agreements, without proper checks, especially when an agreement entails lawmaking and affects individual rights. Id. at 65.
impact upon a person’s life, liberty and security. Those who perceived themselves to be potentially affected may file a request for participation along with their reasons. The extent of the impact on each person is to be considered when judging against others or a government’s own goal in the delivery of the final decisions. Secondly, the institution to guarantee such a forum must be available both at local and national levels. And finally, the means through which participants will address their concerns are public hearings to be subject to appeals within a specific timeframe to allow government to move forward. The appellate process will at least serve as a safeguard for the administration’s responsiveness to individuals’ issues by making the government aware of the people’s opportunity to respond. The incorporation of liberalism in the area of treaty making which calls for individual rights to life, liberty and security as the third category of “important treaties” will create a key element of self-government that is public trust - a believe in change the people could make in the system they can call their own.

The second area is the scope of judiciary function. The judicial role in enforcing this constitutional right can be strengthened and made less intrusive through firstly the creation of a committee that oversees the treaties that should go through Section 190 process prior to being undertaken by the government, secondly the avoidance of imposing its own public hearing standard on the review, and thirdly the jurisdictional grant to the Constitutional Court on the substantive violation of international treaties.

The primary purpose of an oversight committee is to eliminate the uncertainty of the executive’s treaty authority when a fully enforced treaty can later be turned down by the Constitutional Court due to a procedural violation. This method affirms the concept of judicial abstention by discouraging the judiciary to step in once the executive competence has been determined by the committee. This body will be consisted of representatives from the executive, judiciary and legislature whose members possess legal skills and
expertise. The involvement of the legislature in this process is necessary since this is the body of the people that should have a say in determining the matter that may threaten individuals’ fundamental interests. The early determination mechanism will also help ensuring that the basic rights of the people will be properly upheld before they are lost in the treaty process. At the same time, when the frustration of the government from seeking third and fourth opinions is reduced, the government can focus on holding a meaningful public hearing for the treaty that truly needs attention, allowing the participation mechanism to better fulfill its function. Thus, the country’s as well as citizens’ interests can be better served when the process of this particular constitutional requirement is ascertained at the early stage.

This pre-determination method goes along the line with the legislative procedure in which the Constitutional Court must determine the constitutionality of the statute and organic law bills prior to their enactments. In the legislative context, the Court is obliged to rule on the constitutionality of the bill (in consistent with the Constitution) that has already been approved by the National Assembly, but prior to the presentment to the King for his assent. In other words, the bill is assured of its constitutionality before its enactment to bind upon the Thai people. In the same manner, a treaty draft should be prior determined to follow an appropriate constitutional process before it can become a treaty. The making of a treaty may require this similar approach to prevent the infringement of the people’s rights and liberties when once lost in the treaty process can be difficult to redress.

The operation of the committee does not completely wipe out the function of the Constitutional Court. The judicial body still plays an important part in the process of a

treaty determination concerning substantive violations of individual rights. While judicial involvement in this particular area is undeniable, the degree of its participation (deference) can be varied depending on the type of rights being violated, the level of infringement and the kind of important government policy decisions being involved (e.g. national security, allocation of resources). These are the factors that the court must take into consideration when determining the degree of its deference. Thus, for instance, its deferential role will be demanded when the sufficiency of a public hearing is called into question. The limitation of judicial review on the determination on a public hearing standard is through acknowledging the policy decision made between the legislative and executive branches (a rule or regulation). This recommendation, while emphasizing the facilitation of government administration in the treaty process, will ensure a proper and effective judiciary’s role.

The last area of my proposal is re-adjusting the treaty-making process by reducing two-step parliamentary approval to the “prior to be bound” stage. This is the approach that all the surveyed countries have undertaken to ensure that the executive branch has sufficient autonomy and discretion in conducting a negotiation. This approach goes back to the analysis on institutional competence argued in Chapter IV in which the primary authority of the executive in the treaty-making conduct must be preserved in order to secure national interests. Many surveyed countries have shown that legislature’s involvement is either absent or disallowed until the treaty has been concluded to preserve the executive’s function and secrecy of the country’s position. Under limited circumstances such as that of Germany, the legislature is allowed to partake in an ongoing treaty negotiation. Nonetheless, its role is restricted by having no authority to

155 The Constitution establishes an independent judiciary primarily to protect aggrieved individuals harmed by the violations of the law. And the role of the judiciary in policing constitutional boundaries should continue to serve this objective. Charney, Judicial Deference in Foreign Relations, in FOREIGN AFFAIRS AND THE U.S. CONSTITUTION, supra note 16, at 102.
approve or disapprove the content. The New Zealand treaty reform suggested that the parliamentary role in the final stage can induce more effective public participation through the executive’s incentive to gain better support in getting the treaty approved. This method can become crucial when public consultation for the other three categories, as I suggested, are made optional. One could argue that the requirement of the parliamentary approval does not only serve that purpose (encouraging public participation), but also provides additional protective mechanisms against any non-transparent treaty-making conduct. But my question is how well this mechanism will serve such a goal since there are still chances of future textual alterations and the government’s incentives to provide all the wonderful information to get the legislature to endorse the framework. Thus, the crucial stage for a legislative check is rather in the final stage (where government will have a high interest in behaving knowing that the treaty can get turned down if the treaty fails to carry out the people’s interests) before “important treaties” can take effect. The treaties to be subject to final legislative approval will be summarized in Chapter VI.

This method of final legislative control means the approval of both Houses (National Assembly) through a simple majority vote prior to the treaty’s entry into force (ratification, accession, acceptance or approval). The draft treaty when tabling to the parliament is subject to a time limit (i.e. 15 sitting days) which requires the draft to be returned to the negotiating authority. A legislative approval guideline for the consideration of approval may take the following factors (but not limited to) into account:

- Reasons for Thailand to become a Party
- Advantages or disadvantages of the treaty to be entered by Thailand
- Any out of ordinary obligations that Thailand must undertake
- The costs of compliance and breach
- Economic, social, cultural, environmental impacts
- Or flexibility of the treaty obligations
While the legislative approval guideline will help the executive predict the outcome of this control mechanism process (how a treaty gets approved), the elimination of this additional stage can improve the quality of the administration as well as the legislative function. Thus, the effectual operation of a constitutional method such as Section 190 depends significantly on re-designing its mechanism to secure the political environment that facilitates the process toward fulfilling its fuller objectives.

IV. Conclusion

Giovanni Satori suggested that “once a democratic system has been established…the democratic ideal must be minimized” to ensure the survival of its function. Mechanisms established under Section 190 may be the key elements to improving democratic conditions in a remote area of politics like foreign affairs. But within this process, it is still necessary that the roles of the public, legislature and judiciary in keeping an eye on the executive’s treaty-making conduct are subject to certain limits and properly determined to maintain other democratic goals, namely effective and responsive governmental functions. The treaty practices of my surveyed countries have demonstrated crucial elements that we should take into our consideration in the readjustment of Section 190. These are individual rights concern for direct public consultation, the executive treaty-making autonomy, and the limited legislative control and judicial involvement in the treaty realm. There are good reasons why these conventional practices have widely been adopted and maintained, which are not necessarily in the promotion of the executive monopolization of a treaty power. My proposals of narrowing down the treaty categories to be subject to public participation (the mandatory type and other optional kinds), creating an oversight committee, limiting a

\footnote{The inefficiency of legislature’s review of treaties was reflected in a notorious example when the Genocide Convention was on the U.S. Senate shelf for thirty-seven years before finally ratified forty years after. The U.S. Senate was once described as the “grave-yard of treaties”. HENKIN, supra note 15, at 50-51.\footnotetext{Carole Pateman, Participation and Democratic Theory 10 (1970).}}
judicial review of the public hearing conduct (but enabling its safeguard when the individual interests at stake are high), and eliminating excessive parliamentary roles in the treaty-making process aim at seeking better balance between ensuring the observation of the executive’s constitutional obligations and securing the quality of the public administrations. This is especially the current challenge faced under the implementation of Section 190, which requires extensive accountability of the executive toward the people and legislature, whereas the aggressive role of the judiciary has become a major impediment to the discharge of the government’s duty in international affairs. Lessons learned from other countries’ treaty-making experiences are not the sole justification for proposing the new treaty model. There are cultural and political structural factors discussed in Chapter III and Chapter IV that have come into play in the shaping of the proposed model. Thus, its formulation takes into consideration the analyses on the notion of public participation, the principle of separation of powers and the comparative study of the treaty-making practices which I shall demonstrate how this proposed treaty model can provide an effective response to internal and external challenges (discussed in Chapter I) in the next chapter. There will certainly be counter-arguments to my approach to be addressed in Chapter VI.

158 The case of the Joint Communiqué between Thailand and Cambodia has set a perfect example that has terribly shaken the relations between the two nations after the Thai government was ordered to withdraw its acknowledgement. A New Way to Annoy Neighbor, THE ECONOMIST, Nov. 12, 2009, available at http://www.economist.com/world/asia/displaystory.cfm?story_id=14857229. Judicial review can be intrusive if enforcing people’s participatory rights involves imposing a standard of practice such as public hearings. At the very least, “[c]ourt must be conscious of the vital limits on judicial authority and the Constitution’s design to leave certain matters to other branches of government” Czapanskiy & Manjoo, supra note 142, at 13 n.43 (citing Doctors for Life, 2006 (12) BCLR 1399 (CC) at 59-60 (S. Afr.).
Chapter VI: Toward the Next Chapter

I. Introduction

There is no doubt that political structural change is one of the preconditions for establishing democracy. However, whether this component can solely sustain the principles of democracy and good governance in the long run remains an important question. Political forms such as political parties, electoral process, a constitution, public participation and checks mechanisms are all part of the democratic components. These are structural and legal means of limiting and controlling governmental power to ensure its accountability to the people. From the birth of the People Constitution (Constitution 1997) to the implementation of the 2007 Constitution, Thailand never seemed to fall short of these formal elements. To the Thais, the adoption of a democratic form is relatively an easy task. But what it may lack seems to be the meaning of a democratic nation, the absence of the “demos’ power” and the people’s right mindset (political will). Thailand may fall within the category referred by Giovanni Satori as the “latecomers” that must catch up the trend at an excessively rapid pace. And what these latecomers likely to experience are the sufferings from “overload, [an] unmanageable situation arising from too many simultaneous crises or burdens”. ¹ Amid the political and social chaos, Thailand thus has a major task to tame politics and to foster a real democratic political culture within the people by setting up a political environment that will increase greater trust among the people and toward the institutions through which they exercise their sovereign powers. This is a path toward good governance which can only be realized when both political and social dimensions of democracy are at play.

The treaty provision (Section 190) of the 2007 Constitution is part of the progressive plan. This approach requires an active, impartial, intellectual and selfless mind of citizens, an extensive legislature’s role, and a strong judicial intervention in the treaty-making process. Whatever democratic mechanisms that got incorporated into were expected to be automatically and wisely applied by the people, and to be successfully followed through by the government. Pressured conditions of the government, as a result of this reform, become their responsibility to deal with in order to be accountable to the public. The bottom line of this strategy is that the government’s problem is not really the people’s problem. Unfortunately, the consequences of this idea brought about factors that affected the pace of our democracy. Ineffective administration that led to unresponsive administration, public participation that seemed more problematic and less promising, and inefficient treaty negotiation that resulted in a loss of national interests at the borders’ fronts, altogether, make up the interests of the “demos”. It is thus difficult to see how over-emphasizing transparency and accountability can lead us far, but in fact slows us down from achieving fuller democracy.

As we are moving toward the country’s new political phase, it is quite clear that public affairs are no longer the matters of government and representatives, but also of citizens. These two sectors must work together. Section 190 may reflect the appreciation of the dynamic of public participation and the meaning of limiting government mechanisms, but fails to perceive the significance of a balanced interaction between the limiters and the limited in fulfilling the objectives of democracy. The introduction of liberalism into the participation of a treaty process and the readjustment of each institutional branch’s role in the making of treaties are meant to restore this balance, and to address the political and social dimensions of Thai democracy in the treaty context through recovering currently missing
components, namely effective and responsive administration. The aspect of liberalism, which has also been adopted in the treaty practices of many surveyed countries, to my belief, can enhance the meaning of public participation by creating public trust in their government which is vital to nurturing a positive political culture. At the same time, an understanding of the system of checks and balances which takes into consideration the political branch’s autonomy and independence other than transparency is deemed crucial to the practical function of the executive, which is the source of securing national interests and the public trust. There are thus good reasons why many surveyed countries have maintained the system of the centralized executive foreign policy making (CEFP) without deferring too much power to other bodies. My proposal, however, does not suggest that CEFP must be fully embraced, but rather asks that this method be factored in when seeking accountability, transparency, responsiveness and effectiveness in administrating foreign affairs. The readjustment of each political branch’s treaty-making role to increase the executive competence in the treaty-making process may not be the ultimate answer in the future, but certainly is necessary for now. The current treaty provision (Section 190) is an ambitious project, but not impossible to achieve, given the maturity of certain social and political conditions, which will take some time before it can be fully materialized. This is what I hope that the proposed treaty reform will help prepare for such conditions. Professor David Williams in his book, Designing Federalism in Burma, gave us a lesson that you need the right tool to fix the right problem.² For Thailand, we might only have a good tool that has not yet fitted the problems.

² DAVID C. WILLIAMS, DESIGNING FEDERALISM IN BURMA 130 (David C. Williams & Lian H. Sakhong, eds., 2005) (“the right Constitution can help lead a country away from internal division and toward the rule of law”).
II. Summary of the Problems: The Dilemma of Section 190

As introduced in Chapter I, mechanisms established under Section 190 to secure a more open and accountable administration in the area of foreign affairs have presented both internal and external challenges, which also undermine the principles of good governance and democracy. These mechanisms include the extensive executive’s obligations in the treaty process which involves a public hearing, legislative approvals (prior and after a treaty negotiation) and the policing power of the judiciary after the enforcement of a treaty. Not only does Section 190 expand the list of important treaties whose meanings have not yet been determined, but also requires the executive to provide information and cause to be conducted for public hearings, and to secure the approval of the National Assembly prior to undertaking a treaty negotiation. The second approval prior to the country’s ratification to the treaty is also necessary whereas the power to determine whether the executive is competent to act alone on the treaty in question is solely vested within the Constitutional Court, which can be challenged after the treaty has been in full force.

Although the recent Section 190 amendment aims at solving these problems by trying to create greater certainty in the executive’s treaty-making authority, a legislation to be enacted that lists important treaties within the meaning of Section 190 will only serve as a temporary relief for the types of treaties that are currently foreseeable. And because the list will never be comprehensive, despite the enumerated treaties, they are still subject to the Constitutional Court’s decision whether a treaty in question fits the “important treaty” characteristics. Public participation is still required vastly and mainly on national issues. As long as foreign affairs are not tied to personal interests, the gap between remote politics and individuals will be hard to bridge. Thus, without looking beyond a simple text alteration, and
into a cultural change and balance of institutional arrangements within a treaty framework, these democratic aspects will continue to hamper with the effectiveness of the administration by undercutting meaningful public participation, restraining the executive’s autonomy in foreign affairs, damaging the country’s foreign diplomacy, and subjecting the country to potential international liabilities.

A. Hampering with the Administration’s Effectiveness and Responsiveness

The idea of democracy which is centered on a governing process has much to do with the quality of governance itself by seeking a way in which the demos’ power can be exercised effectively. Thus, democratic mechanisms should not only warrant accountability and transparency, but also the effectiveness and responsiveness of the administration since these are important elements that facilitate the exercise of the people’s sovereign power through the bodies that can accurately represent their interests, and quickly respond to their needs. Unfortunately, these elements have been weakened under the implementation of Section 190.

The vague and broad language of the two additional types of treaties which have recently been added (referring to those having economic and social impacts, or generating material commitments in trade, investment or budget of the country) have presented challenges to the executive.\(^3\) At the same time, the amendment of Section 190 does not guarantee that the branch will not run into the same old problem by having to present all kinds of treaty proposals to the public and parliament before it can proceed to commence a

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negotiation. Accountability and openness of the system may be created, albeit at the expense of government time, resources and efficiency. The check mechanisms introduced under Section 190 which involved the role of the public, legislature and judiciary in the treaty-making process has substantially slowed down the negotiation process. Since the Court’s decision in 2008, the Foreign Ministry and Ministers have refused to sign “mildly-worded agreements” lest it will later be interpreted as a violation of Section 190.4 This outcome is not just a concern of government works with foreign nations, but most importantly a matter of domestic relations – a positive interaction between the people and their government which is founded upon trust and good political attitude. While government responsiveness is essentially lost in the current public participation mechanism within the treaty context, the legislature and judiciary’s powerful roles in determining the survival of a treaty that caused major disruption in foreign affairs administration provided even less guarantee for government responsiveness5 when satisfying these constitutional obligations serve no more than a shield for the executive. The scope of public participation, the level of legislature’s involvement, and the timeline and manner of judicial intervention are all the factors that contribute to the effectiveness of government function upon which responsive administration depends.6

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6 The reduction of the effectiveness of the Thai government administration is posing two phases of challenges; the current situation in which the government’s resources, time and energy have been heavily invested into the constitutional requirements of the treaty-making process in order to avoid any sort of political backlash, and the future challenge in which the government will become further unresponsive by being tempted to fast-forward their obligations only to satisfy the rules while ignoring the true meaning of the procedure. While government resources will be drained down into the demanded treaty process due to the vague terms of the required treaties,
B. Reducing the Executive Autonomy in the Exercise of Foreign Powers

The principle of separation of powers in which government should be composed of independent branches with distinct constituencies is the heart of democracy. As argued in Chapter IV, the core idea of the principle does not only focus on breaking down governmental powers to prevent a tyrannical act of the governing authority, but also concerns the functionality of the institutional branches to ensure the effectiveness of the checks and balances mechanisms. The principle’s underlying purpose is also to assign powers and responsibilities to each political branch in order to prevent interference and to guarantee independence among the legislature, executive and judiciary.

For a long period of time, Thailand had maintained the tradition of “diplomatic kingship” in which the Kings took the leads in the country’s conduct of foreign relations. Even after being under the system of constitutional monarchy, a series of Constitutions, in fact, explicitly vested plenary foreign power in the executive with a few exceptions, and for practical reasons which are functionality and expediency in foreign diplomacy. This public comments and concerns from the hearing which are formed as part of people’s wills and intellects will run the risk of failing to take part in the final decision.

The concept of separation of powers was by many famous political theorists between the seventeenth and eighteenth century. These include Montesquieu, John Locke and William Blackstone. Although uniquely developed by each theorist, the concept “remained a cornerstone in their constitutional thought”. MICHAEL RAMSEY, THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS 59 (2007).

What became the forefront idea of separation of powers was the autonomy of each branch by assigning those particular functions and powers to particular entities. And for effectiveness and transparency, powers should be separated by who exercise them, and the types of activities they involved. Id.

See Chapter IV, Section III, A

Treaties that provides “for changes in the Thai territories or requiring the enactment of an Act for its implementation must be approved by the National Assembly”. For numerous examples, see Chapter II, Section III, B (ii). Kanitta Topothai, The Jurisdiction of the Constitutional Court on the Matter of Being the International Agreement under the Constitution of the Kingdom of Thailand, B.E. 2550 Section 190 with Regard to the Free Trade Agreement (FTA) 26 (Dec. 12, 2008) (an academic document submitted in partial fulfillment of the requirements for the program of senior executives on criminal justice administration, National Academy of Criminal Justice)(on file with the Library of Courts of Justice), http://elib.coj.go.th/managecourt/data/c12_4.pdf (“Because the King as the head of state who exercises his executive power through the Council of Ministers has the prerogative to conclude a peace treaty, armistice or
constitutional framework technically limited the scope of the parliament authority in the treaty-making process, whereas the public role was never required. This practice, however, has been reversed as the exceptions got expanded under the implementation of the 2007 Constitution.\(^\text{11}\)

Despite the presumption of the executive’s inherent foreign affair power under this new Constitution,\(^\text{12}\) its new treaty provision has effectively stripped away the executive’s treaty-making power by re-distributing it to the public and other political organs. The executive’s treaty authority has been counter-balanced through three channels, namely the public, legislature, and judiciary. These first two channels basically require that the undertaking of important treaties be disclosed and discussed directly with the public and legislature. This process, including a formal approval of the legislature on the treaty framework, is acting as an authorization before the executive can proceed to a treaty negotiation. In the absence of these steps, the executive is deemed powerless to conclude an important treaty, and the treaty itself is considered unconstitutional.

In the judiciary channel, the executive treaty power can be closely observed. The broadness and vagueness of the exceptions (in the form of treaty categories) render the executive’s treaty-making authority inflexible and uncertain.\(^\text{13}\) Because the treaty categories

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\(^{11}\) The expanding exceptions refer to (i) the textual adjustment of the first treaty category to include those affecting “extraterritorial areas over which Thailand has sovereign rights or jurisdiction in accordance therewith or in accordance with international law”; and (ii) the addition of two treaty categories that have extensive impacts on national economic or social security, or generates material commitments in trade, investment or budget of the country. See Chapter I, Section III, B (iii).


\(^{13}\) A change that has been made to the first treaty category by replacing a treaty which provides for a change “in jurisdiction” with “extraterritorial areas over which Thailand has sovereign rights or has jurisdiction in
(especially those with “extensive impacts on national economic or social security or generates material commitments in trade, investment or budgets of the country”) fail to provide a clear meaning, the interpretative power then belongs to the Constitutional Court who can solely make a final decision concerning the executive’s authority.\textsuperscript{14} It has been widely acknowledged that the source of the problem is the court decision in 2008 concerning Thai-Cambodia Joint Communiqué which applied such a broad interpretation of Section 190. Whether the branch is capable of acting alone in negotiating and concluding a particular treaty can be subject to a challenge in court later. This constitutional obligation makes it harder for the executive to predict and comprehend its competence in the making of treaties since the power to interpret what these important treaties are is rested within the Constitutional Court, which also means the power of this judiciary body to determine the territory of the executive authority in foreign affairs.

Since the implementation of Section 190, the treaty-making power of the executive has thus been affected and curtailed in several ways primarily to secure openness and accountability in the area where the public had traditionally been excluded. The question that we may have is why should we care or so what if the executive must take substantial efforts to complete the task. This perception obviously does not take the relationship between government practical function and a successful operation of democracy into account. The ability of the executive to retain sufficient autonomy in this particular area is crucial to the

\textsuperscript{14} Id.

\footnote{accordance therewith or in accordance with international law”, although meant to clarify the old definition, has still been a subject of dispute since such terms provide broad definitions concerning the extent to which the country can actually exercise its sovereign rights which can go beyond territorial seas such as exclusive economic zone or continental shelf. These broad terms has made the executive branch feel uneasy to rely on its own authority in negotiating a wide variety of treaties. While the executive prefers a narrow interpretation to limit to “territorial jurisdiction”, the judiciary is more willing to apply a broad interpretation to cover possible sovereign rights. Topothai, \textit{supra} note 10, at 28.}
effectiveness in its administration in order to guarantee healthy domestic relations for one reason, and a good foreign diplomacy for another.

C. Damaging Foreign Relations and Hampering Economic Gains

The issue of administration effectiveness is not only a domestic concern, but also a matter of external relations. It can impact, establish and destabilize the country’s credibility and international relations. This matter of securing an effective government requires the executive branch to at least maintain sufficient discretionary power and to have certain flexibility in the implementation of foreign policy.

In the case of Thailand, the independence of the executive branch which has been undercut by the application of Section 190 has substantially affected the negotiation process of several routine beneficial international agreements, which could have fallen within the category of “important treaties”, and for the worst part, its treaty partners that may eventually lose its faith in the country’s commitment under a weak leadership of the Thai executive who seems to have less authority than the parliament and the court in the making of a treaty. Hesitant gesture of the Foreign Ministry in pursuing international negotiation also sends out a negative sign of Thailand’s foreign policy (e.g. its willingness to establish international diplomacy). The maintenance of the country’s foreign relations oftentimes relies on the conclusion of a friendly or cooperative treaty, which unfortunately is without exception. Its process has also been disrupted and delayed under the implementation of Section 190. The country thus faces a big time of losing its economic and political opportunities that are contingent upon the enforceability of those treaties.

There is no question that there is still the need to protect real important treaties originally intended to secure by Section 190. However, the safeguard must not be at the expense of other minor treaties which are tantamount to the people’s interests and the country’s economic and political gains. The reaction of the Constitutional Court which resulted in the withdrawal of Thailand-Cambodia Joint Communiqué has rolled the foreign relations between Thailand and Cambodia downhill, despite the fact that it served no more than a friendly diplomatic gesture according to the former Foreign Minister Pattama’s view.16 Since the decision in 2008, the government hardly desired to push forward the three memorandums of understanding on border demarcation between Thailand and Cambodia signed by their Joint Boundary Commission, which “are still awaiting parliamentary approval despite being forwarded to the lawmakers three times since November 2008”.17 Although these memorandums can help patch up the tie, and improve border trade relations between the two countries, the action to undertake it is still up in the air. The disruption of the cross-border trade and tourism definitely harmed both countries' revenues which generate billions of baht.18 The border trade was even known to benefit Thailand more than Cambodia.19 Thailand-Cambodia Joint Communiqué is not the only case that has a negative implication on Thailand’s foreign relations. Its precedence has discouraged the executive from relying on its own power to conduct the negotiations of other international treaties. The hesitation of the

17 Supra note 15.
19 Id.
Thai government in pursuing even a mild commitment cast doubt in the mind of its partners who essentially questioned about Thailand’s hospitality and sincerity.

Sure enough, Section 190 amendment has been speculated to help ascertain the boundary of the executive’s treaty-making authority by saving time on the making of routine and technical agreements, which have been known to benefit the country’s economy and foreign relations. However, it is unclear if other cooperative agreements, which may not have been listed in the legislation, but share certain characteristics with those important treaties will not be the subject of a challenge. The risk that the executive will run into in determining its own competence in the treaty process may be reduced, but will not entirely be eradicated.

We cannot deny that creating a transparent treaty-making process may be necessary, but it is not the sole democratic element that should drive the machinery of our public administration. The fact that the country’s economic well-being still highly depends upon external relations reminds us that we may not afford to have a claim of transparency take over the country’s interest in the pursuit of foreign diplomacy. There are political and economic interests to gain from the effective conduct of foreign relations that we must take into account. Maintaining good foreign relations does not simply concern “theirs”, but the economic and social well-beings of “ours” through exchange of trade, resources and information. As a treaty process, Section 190 should not weaken its primary function which provides the means to secure these particular interests. However, I did not suggest that the transparency mechanism should be undercut. Far from this perception, the mechanism should rather be operated in a fashion that minimizes its impact on other important components. These economic and political interests to be borne out of having effective administration in
the conduct of foreign relations must therefore be balanced against the transparency and openness of the system since they also constitute as one of the democratic goals.

D. Bearing International Liability:

In the modern time, a country can no longer stand in isolation, especially when it has continued to benefit economically and politically from the power of globalization. Thailand has been part of the global force since it first made contact to the outside world in the thirteenth hundred.\(^{20}\) As the world gets smaller, the interconnection among nation states may make our self-governance “less than a self” in the sense that the country can no longer be solely accountable to its citizens, but also to the outsiders under the role of international rules and obligations. The country’s commitments that once made with other nations cannot simply be repudiated without legal consequences regardless of how serious or legitimate reasons are being made.

This understanding raises another important issue within the implementation of Section 190 which allows the Constitutional Court to nullify a treaty that may have already been in force. And what is left with the country are international breach, possible liability, reparation, and a violation of citizens’ participatory rights that cannot be refurnished once treaty compliance is sought by the other party.\(^{21}\) Serving as customary international law, the Vienna Convention on the Law of Treaties (the Vienna Convention) made clear that a

\(^{20}\) See Chapter I, Section III, B (i)

\(^{21}\) In addition, although the 2007 Constitution provides an escape clause for treaties which have been complete prior to the date of its promulgation, this does not mean that there will not be further complication concerning the future treaties or existing treaties whose terms are subject to automatic renewal at the end of their periods. These treaties whose terms enable automatic renewal may encounter the conditions required by Section 190 which could result in the modification of the treaty instead of a continuation of the existing terms. This is another potential breach that Thailand must face. CONST. (2007), Ch. 15 §305(5), (Thail.) (“any act, in connection with the conclusion or the implementation of a treaty, which has been done prior to the date of the promulgation of this Constitution shall be valid and the provisions of section 190 paragraph three shall not apply but the provisions of section 190 paragraph three shall apply to acts which remain incomplete and require further action”).
material breach of a treaty includes “a repudiation of a treaty” by the party which does not prevent the other party from seeking a remedy when the treaty has been concluded.\textsuperscript{22} An act of refusal to honor the treaty that has been made therefore does not release the country’s international obligations. The country still either has to comply with those commitments or pay the price for breaching them. Article 61 and 62 of the Convention also refer to situations of “impossibility of performance” and “fundamental change of circumstances” which cannot provide grounds for treaty termination, except under limited circumstances.\textsuperscript{23} Both Articles, however, explicitly disallow a breach of treaty as a ground for termination, which prevent a party from making repudiation of a treaty as an excuse to escape its obligation without legal consequences.

Thus, Section 190 may be able to give the court all the power to nullify an international treaty. The country is nonetheless responsible for its compliance or otherwise for its breach which can incur costs in the form of financial obligation or diplomatic relations. The decision of Cambodia-Thailand Joint Communiqué is a clear example of the weakness of section 190. The withdrawal of the pact ordered by the court did not affect anything, but the diplomatic relations between the two countries. The strong application of a “check system” in which the judiciary is prescribed with the power to invalidate the executive treaty authority became sharp teeth that rather damage than protect its own skin. Judiciary


\textsuperscript{23} For instance, Article 61(1) provides that “[a] party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty.” Article 62(1)(a), (b) states that “[a] fundamental change of circumstances which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless [they] constituted an essential basis of the consent of the parties to be bound by the treaty and the effect of the change is...still to be performed under the treaty”. The Vienna Convention on the Law of Treaties, \textit{Id.} art. 61(1), 62(1)(a), 62(1)(b).
intervention may be the right approach to balance out the executive power, but the timeline is clearly wrong to achieve the intended outcome.

E. Weakening the Principles of Democracy and Good Governance

The dilemma of Section 190 does not only pose numerous problems in practice, but also in principle. These issues may be found to work against the principle of democracy and good governance which share a common ground in terms of the quality of a governing process. Although transparency and accountability are well-known elements of democracy and good governance, these characteristics cannot be solely sustained, and must be accompanied by other governing qualities. Thus, the improvement of any democratic elements must seek balance to avoid jeopardizing other important components.

The issues of the government’s ineffective response to the political participation and social needs of the public, and the delayed administration in international affairs as a result of the Section 190 implementation are all relevant to the quality of our governing system in which I believe are not part of the democratic goals. First of all, the public participation mechanism and legislative prior approval process, which are intended to induce both transparency and responsiveness of the public administration in the area of foreign affairs, provide no guarantee that the decision outcome will well reflect public opinions when it is doubtful whether a busy and ineffective government will carefully listen to the people and keep up with its promises. Secondly, the fact that the direction of the country’s foreign diplomacy (the decision to undertake a negotiation and conclude a treaty) can be thwarted by the judiciary body can put the country’s economic and political gains on hold. These gains are also deemed the interest of the people. Thus, both internal (toward the people) and international (toward international community) accountability are equally important as they
seek social, economic and political dependence upon each other. And to hamper this process, Section 190 which conveys a means of treaty negotiation, is to undercut its own objective. In addition, the issue of international liability due to this external accountability, which is sometimes inescapable without legal consequences, also has negative impacts on internal affairs both in terms of benefit and the public participatory rights losses. While the country will be sought either for compliance or compensation, the decision of the court to invalidate a treaty will not restore the people’s participatory rights that had already been disregarded in the treaty process. And it seems that judicial intervention at this stage does not serve much purpose, but only causes internal and external damages.

It is true that democracy is an “exercise of power” that belongs to the people, and not to a particular branch. The power therefore may either be directly exercised by the people or through their representatives that must be held accountable to the people, the original owners. But in the assurance of this process, is it necessary to substantially intervene with the authority of the executive in such a way that might eventually undermine effective democracy, the system in which the people’s wishes and interests being effectively represented and accorded a guarantee of popular control over final policy decision. This would be a democratic irony. Seeking to secure the accountability and openness of the system should not weaken the effectiveness and responsiveness of the public administration.

Thus, the primary objective of the proposal to a treaty process reform is to address this

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24 Giovanni Sartori, Democratic Theory 3 (1962). Democracy is generally understood as “a political system in which the citizens themselves have an equal effective input into the making of binding collective decisions. Whereas a non-democratic system gives power to the hands of certain individuals to make binding decisions without any accountability to citizens.” Michael Saward, The Terms of Democracy 15 (1998).

25 Ross Harrison, Democracy 8 (1995) (defining effective democracy as the process in which people’s wishes are being effectively represented by way of getting what they want or responsive administration regardless of whether it is direct or indirect participation).
dilemma by showing the possible co-existence of these important democratic elements through cultural and structural changes to be concluded in the following section.


A. A Model Summary: Areas of Reforms

In Chapter V, I have developed the derivation of a treaty-making model through the comparative analysis of the treaty practices in various countries by factoring in the liberal and structural approaches addressed in Chapter III and IV respectively in response to the three primary areas of concerns under the current treaty-making provision (Section 190) which are the re-adjustment of (i) the treaty categories for public participation and legislative approval, (ii) the level of the public and legislative involvements, and (iii) the manner and scope of the judiciary intervention in the treaty process.

While narrowing down the treaty category to be subject to a mechanism of public participation is a means to attain cultural change through the use of better public involvement in order to foster the people’s positive attitude in politics, adjusting the categories of important treaties required for final legislature’s approval is to ensure transparency and accountability of the treaties that may not receive public hearings, through indirect public involvement. The single participatory approach (the requirement for the sole category) is meant to induce more active political participation of the people while increasing effective government function by narrowing down its obligations to focus on truly fundamental issues. The re-adjustment of the treaty categories for a final legislative approval process is crucial to the effectiveness and transparency of the public administration. Although demanding broader categories to include the traditional kinds (affecting territory and sovereign rights, and domestic laws of the country) and the special kinds (affecting individual rights, and
generating material commitments in trade, investment or budgets of the country), this adaptation has eliminated the most vague category, and replaced it with a more definitive one. The proposal of treaty category adjustment still maintains the traditional negative list approach in which the plenary treaty power is vested within the executive, except those listed under Section 190 of the Constitution. And those are important treaties that must receive proper authorization from the body that represents the interests of the people.

The structural changes by re-specifying the timelines and scopes of the legislative and judicial involvements in the treaty process are required to improve administration efficiency without giving up transparency and accountability as governing qualities in the treaty negotiation process. While legislative function can best safeguard the people’s interest in the final stage of the treaty process, moving up the judiciary body to determine the executive competence in the making of a treaty at an early stage can help timely secure the people’s participatory rights and preserve the country’s stakes (potential international liability and embarrassment). An appropriate role of judicial intervention is suggested through empowering the Constitutional Court (jurisdiction grant) to address questions concerning the individual’s rights violation of a treaty, and the determination of its deferential power. These are the underlying arguments which led to the reformulation of a treaty process.

1. **Readjusting Treaty Classifications**

The liberal approach and the treaty practices of my surveyed countries had shown the significance of incorporating individual’s fundamental interests into the treaty process by adopting it as one of the treaty categories. Thus, pursuant to this understanding, Section 190 should appear as follows;
A treaty which:

(1) Provides for change in the Thai territories or extraterritorial areas over which Thailand has sovereign rights or jurisdiction in accordance therewith or in accordance with international law
(2) Requires the enactment of an Act for the implementation thereof, or
(3) Has substantial adverse impacts upon individuals’ life, liberty and security interests or the livelihoods of local communities
(4) Generates substantial commitments in trade, investment or budgets of the country

The proposed new category which focuses on the people’s fundamental interests also narrows down legal interpretation by replacing the vague category of having extensive impacts on national economic or social security, and by ensuring that only treaties that actually have adverse impacts upon individuals (in the exclusion of potentiality) will receive a proper hearing in accordance with the constitutional requirements. Treaties that concern individuals’ fundamental rights will be the sole category which demands a public hearing process, primarily due to the cultural argument I made in Chapter III. This proposal of course does not bar other important treaties which may also carry individuals’ fundamental rights implication from guaranteeing a public forum (e.g. treaties affecting the country’s territories oftentimes bring along the issue of personal livelihood). In any case, all four classifications are considered “important treaties” that require approval from both Houses prior to their entries into forces.

ii. Adapting Treaty Process (Legislature and Public Involvements)

The second area of reform is to re-affirm the principle of separation of powers which aims at preserving both checks and independence of each institutional branch. The elimination of the legislative approval in the early stage may also mean increasing the role of
the public (which are optional for the three treaty categories) whose views and concerns will hold the executive most accountable at the final legislative approval upon the conclusion of a treaty. The treaty content that does not reflect people’s interests and concerns will run the risk of falling through at this last screening stage, which is more critical than an early approval of a treaty framework which is still subject to changes, and renders the executive’s position inflexible. The language should appear as follows;

Prior to taking steps to concluding any treaty specified under paragraph two,

(1) The Council of Ministers shall provide information and cause to be conducted public hearings for the treaty that bears the characteristic of the third category

(2) A public consultation may be conducted in the case where the Council of Ministers is of the opinion that a treaty may affect national or public interests specified in the first, second and forth categories

(3) Prior to expressing its consent to be bound, the Council of Minister shall, thereby, submit to the National Assembly a final treaty text for approval, and make its details publicly accessible…

Under this proposal, public consultation is divided into two levels, namely (i) mandatory for treaties affecting fundamental individual rights, and (ii) optional for the rest of important treaties (the first, second and forth categories). Because the mandatory public consultation has been cut down to one important category, the government will be expected to address the issue promptly and effectively. At the same time, the optional approach (as opposed to complete absence) can provide additional incentive for the government to seek public consultation for other important treaties in order to secure their final legislative approvals without being interfered by the substantial demands of the constitutional process.

The re-wording of the treaty process is also in accordance with the Vienna Convention on the Law of Treaties (1969) which allows different means for a country to be
bound, and not necessarily limited to consent expressed by ratification, acceptance or approval.\textsuperscript{26} This is also the problem of the Section 190’s current text which only takes into account the consent to be bound by a treaty by ratification. Its failure to include other means of consent makes the requirement of parliamentary approval and public accessibility “after the treaty has been signed” meaningless, and yield potential liability had the parliament disapproved it. Because many international treaties take effects upon signing, the disapproval of the legislature afterward will not excuse the country from compliance. And at worst, this final screening process will not serve as any safety valve for the people’s interest. Thus, the suggested wording by not specifying a particular means to declare an intention to be bound will also force the executive branch to secure legislative approval prior to its undertaking any legal action whether signing or ratifying a treaty.

\textbf{iii. Creating an Oversight Committee}

In considering the doctrine of separation of powers to ensure that the interaction among the institutional branches works toward the effectiveness of the checks system,\textsuperscript{27} the creation of an oversight committee is to replace an ineffectual function of the judicial body whose intervention, after the treaty takes effects, does not serve as effective check upon the executive, and only incurs legal burdens to the country. Although the judicial role in the treaty-making process is limited in many surveyed countries, its role and opinion are still necessary to form a final decision in regarding to the types of “important treaties”. However, this decision must take place at an early stage. With this respect, the following clause

\textsuperscript{26} Means of expressing consent include consent to be bound by signature, by an exchange of instruments constituting a treaty, by ratification, and by accession. See The Vienna Convention on the Law of Treaties, art. 11, 12, 13, 14, 15, supra note 21.

\textsuperscript{27} See Chapter IV, Section II.
requiring the executive, the legislature and the Constitutional Court to co-determine the
nature of the treaty in question prior to an undertaking of a treaty negotiation must be added.

A treaty proposal shall be submitted to an oversight committee to prior determine the nature thereof that
may fall within the parameter of any treaty specified under paragraph two. In the case of dispute concerning
legal interpretation, the power to make the final determination thereon shall be vested in the
Constitutional Court.

This clause, although giving the power to the oversight committee to decide on the question of “important treaties”, also addresses a potential conflict among the branches concerning the legal meaning of the treaty proposal (in which an executive may have a high interest in asserting its own interpretation) by giving the constitutional court the power of final determination.

iv. Empowering the Constitutional Court in the Treaty Context

As argued in Chapter V, Section II. D (ii), the operation of the oversight committee which helps addressing the issue of procedural violation in the treaty-making process does not necessarily eliminate the role of the constitutional court or render a constitutional challenge on a substantive ground impossible. The court must still adjudicate on a claim where individual rights guaranteed under the Constitution are involved, regardless of the context in which such a violation took place. Thus, even in the area of foreign affairs where limited judicial involvement is suggested, the court should address the question whether a treaty infringes upon an individual’s constitutional rights. Nevertheless, the degree of involvement (standard of review) will be varied depending on the type of right being violated (negative vs. positive rights), the degree of infringement, the level of public impact and the kind of government policy decision being involved. This determination will be made through
the court’s own analysis. Another paragraph concerning the Constitutional Court’s role and limit should be added as follows;

The Constitutional Court shall decide on an issue where the implementation of such a treaty has violated the rights and liberties of an individual guaranteed under this Constitution. In the case where the violation occurred in relation to national security interest or other important government policy decisions, the court may defer its decision to the concerned authorities where these national interests have been determined to substantially exceed a private right.

This clause, while mandating the constitutional court to address the question that concerns its primary function (adjudication on the merit of an individual’s constitutional rights infringement case) in the treaty context, will allow the court to employ its judgment in deferring important issues to other competent authorities by balancing these interests against the individual right at stake. The flexibility accorded by this clause is crucial to an effective function of government, and most importantly the procurement of important national interests. Because the clause does not require the court to make a deferral, but only to use its best judgment in addressing an individual’s rights violation while taking into consideration other public interests, the protection of individual rights is not being compromised. Thus, even after the treaty has been fully in force, an individual can still challenge in court through this clause, for instance, if he felt that his participatory right (which is within the constitutional guarantee) has been violated. But it is up to the court to decide how much right a person can be accorded pursuant to the balancing test suggested in the clause.
This is an important power that is currently missing from the Constitutional Court’s jurisdiction.\textsuperscript{28} Thus, in connection with Section 190, Section 212 (Chapter 10) must also be adjusted to grant the court additional power as follows;

A person whose rights or liberties recognized by this Constitution are violated has the right to file a motion to the Court for a decision that a provision of law or \textit{a treaty} is contrary to or inconsistent with the Constitution.

The proposal purports to improve competency of the institutional branches by allowing each branch to perform its primary function effectively. While the court would still play an important role in adjudicating on the matter that touches upon foreign policy (individuals’ rights violation by a treaty), its scope of interference would still be limited through balancing the national security interest or other important government policy against the individual rights at stake in addressing the substantive violation. Thus, the level of deference would directly depend upon the kind of individual rights being implicated. Through this application, the courts could then accommodate the political branches' institutional competence over foreign affairs issues by according the political branches with the appropriate amount of deference.

\textbf{B. Counter-Arguments}

The proposed treaty model can be subject to criticism primarily in terms of a good governing and democratic principles that the approach may undercut several democratic mechanisms currently guaranteed under Section 190. Because this version of a treaty provision is regarded as highly protective against corruptive practices, any readjustment or modification can be perceived as weakening democratic values like transparency and

\textsuperscript{28} \textit{CONST.} (2007), Ch. 10 §212-215 (Thail.). \textit{See} Chapter II, Section III, D (ii).
accountability. The proposed areas to reform will inevitably encounter such a claim that they are a limitation of the people’s participatory rights in the treaty process, a reduction of accountability and openness of the system, and an empowerment of the executive branch, which is not a representative body that is directly accountable to the people. To summarize these potential arguments, first of all, the reduction of treaty categories to one mandatory and three optional cases, while lessening the safety valve of the people in scrutinizing government external activity, will deny public involvement in a broader treaty context. People’s opportunities to hear and voice their opinions in the making of important treaties will be limited to certain circumstances. Secondly, the elimination of legislative approval at the early stage is the removal of a mechanism that ensures transparency and accountability of the executive act. Treaty framework approval is an important step to lock the executive’s negotiation position in order to prevent self-seeking individuals from pursuing their personal agenda. And thirdly, narrowing down the scope of important treaties, reducing legislature’s involvement and allowing the executive to decide on its competence in the making of particular treaties will enable the executive to freely exercise, and potentially abuse its foreign affairs power.

The concern of limited public participation is a valid claim that people should not be deprived of their rights to take part in government policy decisions. Instead of weakening the participation mechanism, the readjustment of the treaty categories to primarily focus on individual fundamental interests, in fact, increases the safety valve by closely guarding the

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29 See Chapter I, Section III, A (i), (ii) and (iii) (defining democracy, good governance and their relationship).
30 See Chapter II, Section III, C (Pursuant to Chapter 9 of the 2007 Constitution, the prime minister is elected from among the members of the House of Representatives following national elections for House of Representatives. The leader of the party positioned to organize a majority coalition generally becomes the prime minister by appointment by the King, who also appoints no more than thirty-five other ministers to constitute the Council of Ministers.).
interests that personally and directly concern the people and local communities. The modification does not decrease the people’s rights to participation, but only shifts the attention to the very fundamental issues to help improve the effectiveness and accountability in the treaty participation process. This proposed category also goes along the line with the existing conventional ones which arguably address certain fundamental concerns of the people by having direct impact upon their lives.\textsuperscript{31} Broad public participation issues such as those relating to national interests may increase people’s opportunities to partake, but neither necessarily invites public involvement nor induces an active government response to the addressed concerns. Nevertheless, the fact that the government may also seek public consultation on other important treaties could provide a broader ground for public involvement, which could slowly mature into a routine practice for the government to secure public approval. Thus, under the new proposal, people’s participatory rights will rather be strengthened, and better guarded.

The second area of criticism concerning the elimination of legislative approval which is amount to abandoning an additional screening process may be a removal of a \textit{mechanism} that helps secure the openness and accountability of the system, but not necessarily the \textit{openness} and \textit{accountability} themselves. These democratic elements, as argued in the previous section, are best protected at the final stage of a treaty-making process. The weakness of the current language that allows the executive to bind the country to

\textsuperscript{31} The conventional categories which are those that provide for change in the Thai territories or require the enactment of an Act for the implementation also concern people personally. While the Constitutional Court has interpreted that treaties affecting territories of the country could create social impacts by affecting social and economic rights of citizens living in the disputed area in Thailand-Cambodia Joint Communiqué case, the treaty which requires an enactment of an Act, in the same manner, have strong implication upon people’s lives by committing the people to a new law. \textit{See} Saan Rattatummoon [The Constitutional Court], Jul. 8, 2008, Ruling No. 6-7/2551 (Thail), \textit{available at} \url{http://61.19.241.65/DATA/PDF/2551/A/108/1.PDF}. 

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international obligations through signature prior to securing a formal authorization from the legislature, although requiring a two-step legislative approval, does not truly protect against unwanted or bad commitments. At the same time, a treaty framework is a broad document of which contents are still subject to future alterations. This aspect does not necessarily provide an effective measure to prevent the self-dealing claim. The elimination of the early stage legislative approval may, in fact, strengthen the role of the public by lessening the amount of time that government has to spend with the parliament and inducing the government to pay better attention to the public views and concerns in order to secure legislative approval in the final stage. It is then not necessary that the extensive involvement of the legislature will serve our best interest, but rather be an impediment to a smooth operation of the executive in the pursuit of national interest through our foreign diplomacy.

The proposed model may still open up another area of criticism that it would give too much power to the executive by cutting down the screening process (legislative approval) and endowing the branch the power to take part in the determination of the special treaties. The approach will allow the executive to interpret the meaning of these treaties narrowly to circumvent Section 190 treaty procedure. While this concern is true that the executive has a high incentive to avoid the extra burden, the approach, however, does not make the branch the sole decision-maker on the question of the treaties’ definitions which are to be co-determined with the legislature and the Constitutional Court. The executive’s legal opinion is still subject to the Constitutional Court’s final decision in the case of conflict in terms of legal interpretation. The legislature, which is the representative body of the people, will have a strong interest in ensuring that treaty frameworks affecting individual rights or fundamental interests must be made in accordance with Section 190. Thus, the participation of the
legislature and judiciary is still acting as a balancing tool against any possible abuse of the executive’s discretionary power. The approach that enables the executive to partially determine its competence in the making of treaties is to facilitate routine, technical administrative or cooperative agreements if the branch could demonstrate their characters that are outside of Section 190 concerns, and establish a pattern of these agreements in order to expedite the treaty negotiation process.

In addition, the risk of the abuse of power will be minimized by a scrutinizing mechanism at the conclusion of a treaty rendering the treaty to have no legal effects unless formally approved by the legislature, and made available to the public. The Constitutional Court will also serve as an enforcement body that addresses individuals’ rights violation by a treaty made under the capacity of the executive. This additional jurisdictional grant to the Constitutional Court can provide another effective means that undercuts the executive treaty authority in a way that supports the institutional competency of each branch. Although arguably the court’s involvement in the treaty context can be limited, the restrictions either in determining the executive’s treaty power or in addressing an individual rights’ violation are to increase the executive’s competence in the area which highly demands expertise and expediency, and involves important government policy decisions. In fact, this type of empowerment is not necessarily a bad thing if it means flexibility in guiding the direction of our national foreign policy. This is empowerment in the sense that scrutiny still applies, but does not interfere with the discretionary power so seriously that it impairs the primary function of the executive in the realm of foreign affairs.
C. Toward Embracing the Model in Comparison to Section 190 Amendment

The potential criticisms of the proposed modal previously addressed have much to do with the concerns of the principles of democracy and good governance which have been weakened throughout Thailand’s political history. This is what Chapter II sought to explain to us to realize and understand the dynamic of political struggles among various factions and the intensity of political exploitation of which the concern makes it harder for the 2007 Constitution to compromise. These concerns became the forefront of limited amendment made to Section 190, which only sought to resolve the problem by spelling out significant treaties without attending to the issues of public mindset and institutional competence in the political process.

Unlike the simple solution in the amendment, the study of the past democratic failures requires this proposed model to maintain accountability and transparency as top priority in the readjustment of Section 190 while strengthening other democratic elements. This model must at least be taken into consideration for its several positive aspects that aim at correcting the weaknesses of Section 190. These are (i) enhancing the principles of democracy and good governance, (ii) preserving the executive foreign affairs power, and (iii) maintaining the country’s international relations. The model can serve as an improved version of Section 190. By focusing on the people’s fundamental rights, securing administration responsiveness and efficiency, and preserving the country’s international relations.

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32 Supra note 4 (“the PAD gathered in front of parliament to protest against the government-supported plans to amend two parts of the constitution”).
33 “There shall be the law on the determination of the treaty types, negotiation framework, procedures and methods for the conclusion of treaties having extensive impacts on national economic or social security or generating material commitments in trade or investment…” CONST. (2007), Ch. 9 §190, ¶ 5 (Thail.) (amended 2011) (emphasis added).
credibility and reputation, the proposed changes are ways of cultivating trusts in both domestic and international relations.

i. Enhancing Democracy and Good Governance

The proposed model, which has been formulated from the analyses of Chapter III to V, can directly address weak elements of democracy and the principle of good governance through improving the effectiveness and responsiveness of the public administration, while maintaining transparency and accountability as priority components. In comparison to the amendment which only requires a treaty legislation, the model, although seeking to delineate the scope of public participation, eliminate legislative involvement and increase the executive competence in the treaty process, neither undermines the safety valve of the people nor renders the executive the monopolist of foreign affairs power. The suggested changes rather aim at protecting important functions and fostering the characters that each body should have - which are active and discerning citizens, a responsive executive, an attentive legislature, and an effectively-policing judiciary – desirable levels of which may not be achievable under the amendment. These are the primary outcomes that the model is expected to generate in the improvement of our democracy.

The three areas of reforms, which are the scope of public consultation, the level of legislature involvement, and the manner of the judiciary intervention, are all relevant to the satisfaction of the four prime democratic and good-governing characters. As argued in the previous section, openness and accountability in the treaty-making process will remain secured in these readjustments through the increasing consultation of the public in a personally affected area, a legislative authorization of only treaties that truly reflect people’s interest, and effective judiciary intervention that can timely protect people’s constitutional
rights. The manners in which the legislature and judiciary are involved pursuant to this model will not leave the exercise of the executive foreign power go unchecked, and becomes the subject of public criticism as the treaty provision of the 1997 Constitution faced.\textsuperscript{34}

By contrast, the Section 190 amendment which may preserve all the original democratic mechanisms, such as a wide range of public consultation, two-step legislative controls and the strict observation of the Constitutional Court in policing the constitutional boundary among the branches, is expected that a minor change made to require a treaty legislation will restore the executive and legislature’s effective functions. These mechanisms without careful adjustments will continue to pose the problems I presented in Chapter I. Creating the law to specify important treaties may not be sufficient to induce public participation, to improve the quality of the administration, and to strengthen the power of the Constitutional Court as the primary guardian of the individuals’ rights for the facts that the amendment did not take cultural and political (institutional arrangements) factors into consideration. The legislation will undoubtedly provide a short-term solution as a temporary guidance for the executive’s treaty authority, but may never address the long-term issues such as the public mindset, social reconciliation, balances among the institutional branches, and propriety of the judicial intervention.

Thus, the proposed model will involve substantial changes in order to undertake a more comprehensive approach to achieve these results. Whereas accountability and transparency of the system would not be compromised, the model can quickly restore the effectiveness and responsiveness of the public administration. By boiling down the issues for public consultation to those concerning individuals’ fundamental rights, the proposed clause

\textsuperscript{34} Martinez Kuhonta, \textit{The Paradox of Thailand’s 1997 People’s Constitution}, XLVIII ASIAN SURVEY 373, 374-375 (2008).
will help excluding a number of routine or cooperative agreements which can make the arrangement of a public hearing unnecessary and cumbersome, and possibly causing many treaties to go unattended. 35 In addition, this readjustment of treaty categories, while requiring the government to pay close attention on and distribute resources to those important issues, will allow the government to exercise its discretion in seeking public consultation on other subjects of national concern when time and budget permit. The process will eventually warrant a better response of the government toward the people’s concerns by making the people’s interest the center of the public discourse, while giving the government enough resources to incorporate public comments in other areas of national interests.

The second adjustment which only requires final legislative approval (for all four important treaty categories) also serves similar purposes, administrative efficiency 36 while acting as a safety net to ensure that the concluding treaty will truly reflects people’s interest before giving its permission for the country to be bound. The elimination of the legislature involvement prior to a treaty negotiation is to increase the autonomy and flexibility of the executive in taking the lead in the shaping of the country’s foreign policy, and to reduce the workloads of the legislature that would have resulted in its frivolous supervision when it

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35 Cf. John C. Stennis & J. William Fulbright, Senators, Lecture at American Enterprise Institute for Public Policy Research: *The Role of Congress in Foreign Policy* (July, 1971), in *THE ROLE OF CONGRESS IN FOREIGN POLICY*, 1971, at 5 (suggesting the negative outcome of having every international agreements to go through the Senate that it would be literally impossible for them to pay close attention, and give thoughtful consideration). *LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS* 50-51 (1990). At the same time, Tocqueville advanced why high-profile or broad issues will not produce effective public participation since it has a tendency to intensify social conflicts driven by participants’ biases, political alliance and emotion which tend to make individuals lose touch with reality. Stephan Holmes, *Tocqueville and Democracy*, in *THE IDEA OF DEMOCRACY* 28 (David Copp, John Hampton & John E. Roemer eds., 1993) (“In the heat of the struggle each partisan is driven beyond the natural limits of his own views by the views and excesses of his adversaries, loses sight of the very aim he was pursuing …”)

comes to scrutinizing important treaties. The efficiency argument is thus also connected with a guarantee of administration responsiveness by allowing these two political branches to channel their energies into important matters. It is then more important to ensure that the legislature serves a serious function at the critical stage than playing several light roles when committing the country to significant treaty obligations. The procurement of legislative approval will work as a formal guarantee for an effective response of the public institutions.

Similarly, the timeline and scope of the judicial interventions will serve as a safeguard for the people’s constitutional rights, in the making of Section 190 treaties. While the judicial involvement in the treaty determination which has been moved up to the stage prior to a negotiation will provide a certainty in the government’s public hearing obligation, the Constitutional Court’s additional jurisdiction in hearing a case concerning individuals rights’ violations by a treaty will be another important safety net that protects the people against the government’s potential abuse of treaty power. In terms of administrative effectiveness, this “pre-determination” approach will enable the executive to decide on its competence, especially in the making of routine, technical, or cooperative treaties to advance diplomatic relations with other nations. At the same time, the concept of judicial deference that has been applied to the Constitutional Court’s standard of review concerning the infringement of individuals’ rights either by the making of a treaty or by the treaty itself will better accommodate the government with policy space, the area which falls outside the judicial primary function. The proposed method of the judicial interventions, by making the executive’s treaty activity less disruptive, may be understood as a readjustment of judiciary-executive relations through transforming from adversary to a more cooperative one.

37 HENKIN, supra note 35.
Nevertheless, the policing power of the judiciary remains unaltered, and will still serve as a check mechanism on the executive’s exercise of power in the realm of foreign affairs.

ii. Preserving Executive Competence in the Realm of Foreign Affairs

From the analysis of Chapter V, it is quite clear that the interest in preserving the executive autonomy in the exercise of its foreign affairs power should not be compromised. While the democratic values can be strengthened as previously argued, national interests such as economic and political benefits or diplomatic relations will be best served when the executive, legislative and judiciary operate as “partners” (respect each other’s authority and responsibility) within the framework of the constitution. The proposed model therefore addresses this institutional interaction which aims at creating legislature consultation and judicial review (the ability of the Constitutional Court to review the government’s treaty conduct) in a proper balance, and maintaining mutual respects among the branches in the area that demands expertise, speed, and effective communication for national interest to be well secured. Thus, the proposed model goes beyond a simple claim about conserving a conventional treaty-making practice by raising economic, social and political justifications to prove why the tradition of ensuring the executive’s sufficient autonomy in foreign affairs is crucial in our time.

Although the Section 190 amendment can arguably help preserve the executive’s treaty authority by providing a legislation to determine important treaties, the solution may still invite controversies on the treaties that might not have been contemplated on at the time of the enactment, but share the important aspects with those special treaties, which in effect will still create an uncertainty in the boundary of the executive’s treaty power. And if the treaty’s nature has not been ascertained, this can again raise the issue of an improper process,
which will affect its constitutionality. The amendment will thus only serve as a temporary relief to facilitate the executive’s foreign affairs administration on the foreseeable or common types such as routine, technical agreements, which provides no guarantee that other cooperative ones such as the joint communiqué (understood by the executive at the time that it carried no legal obligations) will be safely executed without political backlash. Above all, the amendment only addresses one angle of the problem.

On the contrary, the important changes proposed by this model which especially concerns the reduction of the legislative approval, the creation of an oversight committee to (prior) ensure the constitutionality of important treaties (as a guarantee of the executive competence), and the application of judicial deference concept in the Constitutional Court’s review of the individuals’ rights infringement can tremendously help restore the executive branch’s autonomy, and facilitate an efficient exercise of its treaty negotiation authority in the long run. First of all, the absence of the legislative approval requirement on a treaty framework prior to a negotiation will enable the executive to act on its own discretion based on the information, experience and time it has while maintaining a certain level of secrecy concerning the country’s position in the negotiation process. This again by no means suggests that its broad discretion will not be counter-balanced, given the mandatory public participation on the fundamental issue, and the final legislative approval for all important treaties. An early authorization, if resulted in a deadlock of a negotiating position, will create further complication as whenever the country’s position has been counteracted, the executive will be subject to a series of legislative approvals for each adjustment. On the other hand, if the early authorization serves merely as a broad permission for the treaty framework, it would not serve any democratic purpose since the legislature would not have foreseen future
changes in the treaty content in order to act as a real screening agency. Secondly, the establishment of an oversight committee to pre-determine the nature of a treaty proposal to ensure each treaty’s compliance with Section 190 requirements will allow the executive to fully exercise its negotiation authority without disruption later on (at least on a procedural level). This method will reduce a number of “bad treaties” that render the executive less competent and less credible in the making of treaties. The issues of competency and credibility can also affect the flexibility and autonomy of the branch directly by weakening its capacity to negotiate, and indirectly by raising doubts in the mind of its treaty partners whether to make any concession to the agency of the country whose negotiating power is unsettled. As a result, it would not give the executive much room to bargain. In addition, enabling the executive to decide on the nature of a treaty proposal with other branches is a restoration of its competence, especially in the making of routine, administrative or technical agreements by giving the branch an opportunity to assert its position that it believes within its treaty authority, and by taking into account an opinion of the branch that is primarily in charge of a treaty process. And finally, limiting the power of the Constitutional Court’s review on the issues affecting important national policy in the treaty context by asking the court to simply apply a balancing test where a strong legitimate national interest is present is to provide the executive flexibility in redressing individuals whose constitutional rights may have been infringed as a result of the treaty implementation without completely withholding the Court’s ability to render a judgment.

Therefore, the elimination of an early legislative approval, the creation of an oversight committee and the application of judicial deference in the treaty context, while coinciding with the conventional treaty practice by preserving a certain degree of the
executive foreign affairs power, are deemed crucial to the assurance of an effective and competent exercise of the executive’s treaty authority that the amendment may fall short. After all, this is the area where the branch is warranted within the framework of the Thai Constitution. The adjustments are arguably compatible with the constitutional structure in which the plenary foreign affairs power (while subject to certain limits) is vested in the executive body. And this is so due to the fact that the undermining of this executive’s character is bound to create complication in the matter of the country’s international relations.

iii. Maintaining Foreign Relations and Avoiding of International Breach

The analysis of Chapter IV on the preservation of the executive’s autonomy in the realm of foreign affairs in relations to the principle of separation of powers suggested the significance of this political characteristic to the maintenance of the country’s image, reputation, credibility and good foreign diplomacy in the world stage. Thus, another goal of the proposed model is to improve the means to secure this outcome, which in a way, is for the people to fully exploit the benefits of the global networks. Although there are both gives and takes in the process of making international commitments, and it is important that the process should not allow the preservation of good foreign relations to take priority over the people’s interest, these two interests should still be equally weighed for the fact that the state of domestic well-being is also contingent upon the condition of external relations.38 Not only

38 See ROBERT GILPIN, THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS (1987) (focusing on the interplay of international market forces and the increasing economic interdependence among national governments while recognizing that poor countries will suffer as opportunities shrink). In the case of Thailand, unstable diplomatic relations between Thailand and Cambodia have undermined both countries’ economies. Closure of their border crossings due to the political tension had been reportedly affected the trade volume and local lives of the two countries. See http://news.xinhuanet.com/english/2008-10/26/content_10255381.htm. See also http://www.tannetwork.tv/tan/ViewData.aspx?DataID=1039922. In an extreme case, economic sanction which is a severe form of a diplomatic protest involves the systematic deprivation of a nation of economic resources through the prevention of sales or purchase of goods as well as the denial of investment, foreign exchange or credit to the target country. In an increasingly integrated global economy, the impacts of economic
does an inadvertent termination of a treaty could create “bad relations” between the countries, it may also incur the country in breach liability (possibly in a form of financial obligation) when the demanded compliance could not be made. Thus, it cannot be simply said that maintaining good foreign relations is less relevant to the people’s interest. By understanding the difference that an efficient, yet accountable treaty-making process could make, the model has therefore been formulated in the realization of these interests.

While the amendment is still lacking a mechanism to ensure that a treaty has received a proper process, and will not be subject to later challenge for a procedural violation, the proposals of the treaty category adjustment and the creation of an oversight committee are the guarantee for the maintenance of the country’s foreign relations. Both methods are ways of assuring the country’s treaty partners the success of the treaty conclusion that it will less likely be subject to a constitutional challenge for circumventing an important process. While the contraction of important treaties to only require that those affecting fundamental interests of the people be subject to public participation can help guarantee a survival of “less significant treaties”, the operation of the oversight committee will ensure that each treaty will receive a proper process in accordance with the constitutional requirement to prevent the country’s future repudiation to its international obligations, which will inevitably affect its credibility and create embarrassment. The fact that setting up this determination body to ensure the constitutionality of a treaty can save time, energy and resources on both sides is a contributing factor to fostering a positive and friendly environment in the treaty process. The 

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model can thus help promoting greater certainty in the treaty procedure which can, in turn, preserve the country’s international relations.39

In terms of international breach avoidance, while the creation of this committee is especially important to reduce the possibility of a later judicial challenge on the procedural ground,40 the re-wording of the final legislative process is also required to prevent the executive from binding the country through signature prior to obtaining formal legislative approval. The current constitutional text which only provides a final legislative approval after the treaty had been signed can open up a huge liability as there is a possibility of the legislature’s disapproval which could have resulted in the country’s repudiation of the binding treaty. With regard to the issue that results from a judicial challenge, the termination of a fully enforced treaty on the basis of a procedural violation does not simply release the country’s obligations. Even in the case of a cooperative treaty such as the Joint Communiqué between Thailand-Cambodia that simply contains a statement acknowledging Cambodia’s Pra Vihear World Heritage enlistment of which withdrawal does not create any financial liability for Thailand, it nevertheless costs the country in terms of diplomatic relations. A worse scenario certainly is when the country is involved with concessions and trade commitments that could have resulted in enormous political and financial consequences.

39 Securing certainty in the treaty process is directly relevant to a country’s credibility and stability of its foreign relations. In the case of the U.S., a sharp bifurcation of the treaty process between the presidential stage and the Senate stage has been criticized by foreign governments as making it impossible to do diplomatic business, and that it gave no chance of any predictability on the treaty approval. As a result, such a reaction caused annoyance to foreign governments and troubled United States foreign relations. HENKIN, supra note 35, at 50. See also, Harold Hongju Koh, Congressional Controls on Presidential Trade Policymaking after I.N.S v. Chadha, 18 N.Y.U. J. Int’l L. & Pol. 1191, 1217 (1986).

40 The operation of an oversight committee does not entirely foreclose a judicial challenge on the basis of the treaty’s unconstitutionality since the Constitutional Court can still decides on the questions of the individuals’ rights infringement by a treaty or the sufficiency of a public hearing held by the government. Judicial review must nonetheless be limited in addressing the infringed rights based on the balancing test, and in deciding on a public hearing standard made in accordance with legislation. See Chapter IV, Section V, C and Chapter V, Section II, D (ii)-(iii).
Thus, to ensure that the role of the Constitutional Court is involved early through the creation of this special committee to establish a proper process for important international agreements, and the participation of the legislature is effectively executed through requiring it before being bound by any legal instrument are to relieve the burden not of the executive, but most importantly, of the country. Thus, in comparison to the Section 190 amendment which still opens the door for the treaty’s procedural challenge due to the lack of an adequate determining process, the proposed model seeks to undertake a preventive approach by creating a mechanism that can reduce the possibility of inadvertent treaty termination in the realization that, when it comes to matters of international relations, the cost of providing a remedy can far exceed that of prevention.

The three areas of reforms proposed under this treaty model, which involve readjusting the scope of public participation and the roles of the executive, legislature and judiciary as equal partners can have positive effects upon the implementation of democracy and the principle of separation of powers within the treaty context. While empowering the function of public participation, and guaranteeing administrative accountability, transparency, effectiveness and responsiveness are ways of strengthening the country’s democratic characters, preserving each branch’s autonomy and its primary function is an effective implementation of the system of checks and balances. Despite the suggested elimination of Section 190’s certain mechanisms, this model still serves as an active constitutional safeguard for the people’s fundamental and political rights in the treaty process. The eradication of broad treaty categories and excessive legislative involvement are to enhance the realization of these important constitutional rights. Shifting the scope of public participation to center on individuals’ fundamental interests, inducing effective and
responsive characters of the public administration upon which the protection of the people’s rights depend, securing the people’s participatory rights in a timely fashion, and empowering the Constitutional Court to address individual rights’ violations in the treaty context are the primary methods of constitutional guarantee under this model. These are not just good principles that the model can induce. In terms of practicality, the proposed reform introduces a more realistic approach for applying the mechanism of public participation, by creating efficient roles for the public institutions, and by limiting damages to the country’s international relations. Through this vision, the proposed model makes the principles and practice complementary. While the existing treaty provision may build upon a strong principle, its impracticality, unfortunately, turns into a major impediment to furthering its primary objectives.

**IV. Unresolved Questions**

The research conduct of this dissertation primarily deals with a broad framework of a treaty process which has been taken out of and adjusted in accordance with the current Constitution. The proposed treaty model therefore provides only a general treaty-making procedure, which does not go into details concerning specific mechanisms such as a public hearing process or the determination process of the proposed oversight committee. These are the questions that will require further research, and must be answered had this model been accepted.

Legislation enactment may be necessary in order to establish the committee and to determine its member composition and the manner of conduct that has been proven to be most efficient. The participation of the legal offices of the executive and legislature in this committee is also a possibility, given the office of the Juridical Council already acted as the
executive’s primary legal counsel. The manner of the conduct will determine whether legal opinions from different branches should be deliberated at the same venue within the same time frame or in circulation by having the executive be the first to take up on the issue, and forward its opinions to the other two branches. The composition and determination process of the oversight committee must be dealt separately outside the constitutional context which should only provide a broad framework of a treaty process.

Similarly, legislation enactments concerning a hearing standard and a specific procedure are required to establish a public hearing process. In the absence of the law, Section 190 will open up an opportunity for the Constitutional Court to assert its own hearing standard causing greater chance for the country to face international breach. Nevertheless, the legislation enactment may not entirely foreclose the issue of international liability. The ability of the Constitutional Court to determine on the question of the individuals’ rights violation by a treaty and the public hearing sufficiency in accordance with the legislation means that the government is technically still subject to the judicial challenge even after the treaty has been in force. However, in terms of the public hearing issue, the law will reduce the arbitrariness of judgment, and instead help ascertain a public hearing standard by giving guidance to the executive on what it should expect and respect. Thus, what this model may fail to solve are the possibility that the judiciary body will still be able to turn down the treaty that either infringes upon an individual’s rights or does not meet the required hearing standard provided in the legislation, and the kind of remedy to be furnished to the people whose constitutional rights were violated as a result of the treaty implementation or the inadequacy (in the case of participatory rights in the treaty process). These questions present
a difficult challenge to perfect a treaty model, and are outside the research parameter of this dissertation.

V. Conclusion

The current democratic dilemma under the implementation of Section 190 Treaty provision involves the improvement of administrative transparency and accountability that led to the undermining of other important democratic characters. The irony of the approach reveals that the principles of good governance and democracy have inadvertently been weakened as a result of the efforts to upholding them. While facing internal challenges such as lagging democratic culture, people’s weak faith in the effectiveness and responsiveness of government administration, the country also encounters external barriers in terms of foreign relations stability and international responsibility as a result of Section 190 innovation whose amendment has not provided a better response (Chapter I). A strong motivation of this reform should then be understood through the political character of Thailand and its evolution that revealed the struggles in its democratic path. And the reason why the 2007 Constitution is playing hardball with the executive should explain the entire history. As part of the democratic reform effort, under the new understanding, the recent constitutional structure has set the new roles and boundaries among the public, legislature, executive and judiciary in the realm of foreign affairs. The increased participation of the public and legislature, and the ability of the judiciary to intervene in the treaty-making process were the new powers prescribed in the Constitution (Chapter II). But because of the issues of internal and external accountabilities brought by Section 190, each of its mechanism, namely the requirements of public consultation, multiple legislative approvals and judicial intervention was required to be examined and reconsidered.
Pursuant to the new constitutional framework, the role of the public in the treaty process was translated into a mechanism of public participation to which important treaties must be subject. In the advancement of the functionality of this mechanism, the theories and weaknesses of political participation were elaborated and addressed in order to entail public participation which is one of the Section 190’s latest innovations to foster the right political culture and enhance the democratic characters of the public administration. The study then suggested that an incorporation of the liberal approach which places an emphasis on individuals’ fundamental rights is recommended to advance the objectives and improve the effectiveness of the mechanism (Chapter III). In terms of the role of the State, Section 190 mechanisms have readjusted the relationship among the public institutions by increasing legislative and judicial abilities to check upon the executive’s treaty activity. This readjustment, however, has a strong implication on the operation of the principle of separation of powers which comes into play in preserving not only the accountability of the government, but also each branch’s autonomy. Thus, to secure the practicality and efficiency of these checks mechanisms provided under Section 190, the examination on the principle of separations of powers provided an answer to a very important question concerning the extent of the executive’s central authority and judicial deference in the realm of foreign affairs. An aspect of the separation of powers principle which underlines the independence of each political branch thus unfolded the significance of the centralized executive foreign policy making (CEFP) concept. This is the notion that the proposed reforms of Section 190 take into consideration in order to relieve both internal and external pressures in the execution of our foreign policy (Chapter IV).
The analysis of each component of Section 190 mechanisms is a necessary step to reformulating a treaty model that has been coupled with the examination of the treaty practices in various jurisdictions. From the treaty experiences of the surveyed countries, the study on the roles of the public, executive, legislature and judiciary in their treaty processes showed that these countries reflected the CEFP tradition while a public participation is commonly absent, except in Switzerland which limits the function of public participation to a form of a treaty referendum to facilitate efficient execution of its foreign policy. The derivation of the proposed treaty-making process therefore factors in these variations in terms of the level of legislature’s involvement, and the degree and manner of judicial intervention in pursuant to the analysis of the separation of powers doctrine while recognizing liberalism as a practical approach for public participation. In sum, the proposed treaty model consisting of the three areas of reforms is fundamentally based on the analyzed components of Chapter III (the scope of public participation) and IV (the manner of the legislature and judiciary participation) to secure the rights mechanisms in the treaty process that can further our democracy (Chapter V).

In the conclusion of this dissertation, the proposed model of a treaty-making process provides ample justifications for its adoption ranged from the enhancement of the democratic principle to the practical aspect such as the maintenance of good foreign diplomacy. The proposal tries to fix the flaws of Section 190 which resulted from the inadequacy in its response to the internal and external challenges, while still preserving constitutional safeguards within the treaty-making process. The proposal provides a way of securing transparency and responsiveness in the internal process, and ensuring efficiency and accountability in the external course where individual rights and public interests lie. The
model does not only serve as a minor structural reform that primarily focuses on rearranging the roles of the public institutions, but also the cultivation of a new political cultural discipline which can only build upon strong positive relations between the people and the public institutions. These are the major arguments that, I believe, justify the adoption of this model. Although Section 190 is considered a revolutionary treaty-making process which places an emphasis on improving transparency and accountability through heavily restraining the executive’s treaty power, and increasing public and other institutions’ controls over such an exercise of power, the costs it brings can undermine the function of democracy and jeopardize public interest in the long run. The provision accompanies many problems that may have been overlooked by the writers whose determinations were to protect the generation against Thailand’s past democratic failure. But these attempts may not lead us far enough down the road if they constantly present impediments in the executive’s function without proper balance. Thus, to me, it is very clear why this proposed model should at least be considered. And why this model should be fully embraced is a question for the Thai people who are the original owner of the Constitution.
### Appendix

<table>
<thead>
<tr>
<th>Country</th>
<th>Prior to Treaty Negotiation</th>
<th>During Negotiation</th>
<th>Prior to entry into Force</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>France</strong></td>
<td>LR: No official role</td>
<td>LR: No official role</td>
<td>EC: President/MFA conclude and ratifies treaties (art.52)</td>
</tr>
<tr>
<td></td>
<td>EC: Central power of Ministry of Foreign Affairs (MFA)</td>
<td>EC: President has power to negotiate and ratify treaties</td>
<td>LR: Treaties to be approved by Parliament prior to taking effects - Peace Treaties, Trade agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory (art.53)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>JC: The Conseil Constitutionnel has the power to ensure the conformity of the statute authorizing the ratification or approval of an international agreement to the Constitution (art. 61)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>PP: President or members of Parliament may submit a bill relating to the economic, social or environmental policy of the Nation for a referendum (art. 11)</td>
<td></td>
</tr>
<tr>
<td><strong>Germany</strong></td>
<td>LR: No official role</td>
<td>LR: Observation of Parliament members at the invitation of EC</td>
<td>EC: Treaties are concluded by the President and the Federal government</td>
</tr>
<tr>
<td></td>
<td>EC: controls initiation, conclusion and termination of treaty negotiation</td>
<td>EC: President is vested with full power to negotiate</td>
<td>LR: Treaties to be required for legislature’s participation at their conclusions - Treaties affecting the existing legislations or requiring a new law, affecting the existence of the state and its territorial integrity, independence, status and sovereignty (art. 59(2))</td>
</tr>
<tr>
<td></td>
<td></td>
<td>PP: Consulted through representative bodies such as chambers of commerce, trade unions and other organizations</td>
<td></td>
</tr>
</tbody>
</table>
| **India**  
(common law) | LR: No official role  
EC: In the absence of any legislation, a power to enter into a treaty negotiation is exercised by the Cabinet (art. 52) | LR: No official role  
EC: Sole power to conduct a treaty negotiation  
PP: No statutory or constitutional requirements for direct public consultation. | EC: The cabinet exercises a power to sign or ratify a treaty  
LR: Treaties to be required for legislation implementation - treaties relating to cession of Indian territory, affecting the existing laws or restricting or infringing upon individual rights (art. 253) |
| **Japan**  
(civil law) | LR: No official role  
EC: The cabinet has the power to initiate and undertake treaty negotiation (art. 73(2)) | LR: No official role. The government either chooses to report on the negotiation to the parliament or can be questioned by the parliament  
EC: Maintain the primary responsibility to negotiate a treaty (art. 73(2))  
PP: No statutory or constitutional requirements. EC may choose to consult with public | EC: Concludes and effects only executive agreements (routine, technical, administrative agreements)  
LR: Treaties to be subject to formal approval of the Legislature - Agreements relating to the Parliament’s legislative power (new leg., modified law), involving expenditure unless previously authorized by the Parliament, and those that are politically important in nature (art. 73(3)) |
| **New Zealand**  
(common law) | LR: No official role  
EC: The executive is vested with full power to initiate a treaty negotiation, and to approve its negotiating position without having the official involvement of the legislature. | LR: No official role. But may only partake at the invitation of the EC  
EC: Primary body that undertakes a treaty negotiation. EC generally secures the passage of the necessary legislation | EC: May only effect technical or routine agreements or treaties that only aim at creating rights and obligations between states, and do not affect individual rights and the existing laws. In case of technical agreements, parliament delegates authority to |
<table>
<thead>
<tr>
<th>Country</th>
<th>LR: No official role</th>
<th>EC: The President and cabinet maintain the primary function in treaty negotiation (Section 231(1))</th>
<th>LR: No official role</th>
<th>EC: Sole negotiator. parliamentary committees are not authorized to negotiate or renegotiate the terms of treaties, except inserting a reservation</th>
<th>PP: No statutory or constitutional requirements.</th>
<th>LR: Once ratified by EC, a treaty is generally required to be implemented by Parliament through incorporating it into its domestic law</th>
</tr>
</thead>
<tbody>
<tr>
<td>South Africa (common law)</td>
<td>LR: No official role</td>
<td>EC: The President and cabinet maintain the primary function in treaty negotiation (Section 231(1))</td>
<td>LR: No official role</td>
<td>EC: Sole negotiator. parliamentary committees are not authorized to negotiate or renegotiate the terms of treaties, except inserting a reservation</td>
<td>PP: No statutory or constitutional requirements.</td>
<td>LR: Once ratified by EC, a treaty is generally required to be implemented by Parliament through incorporating it into its domestic law</td>
</tr>
<tr>
<td>Switzerland (civil law)</td>
<td>LR: Share the treaty-making power through shaping external relations and influencing foreign policy (art. 54)</td>
<td>EC: Share the treaty-making power through initiating a treaty negotiation</td>
<td>LR: The Committees on Foreign Policy of both chambers are allowed to send their own observers to attend international negotiations. Federal Council must inform the committees through the process</td>
<td>EC: Federal Council negotiates treaties</td>
<td>PP: Mandatory optional referendum when 50,000 citizens or 8 cantons so requests for treaties containing important</td>
<td>EC: The Federal Council may conclude the following treaties alone – (i) agreements the Federal Assembly had authorized in advance whether explicitly or implicitly, (ii) purely administrative or routine agreements of minor importance (i.e. no individual rights affected), and (iii) urgent agreements that must require a provisional entry into force</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>LR: The Federal Assembly must approve all other treaties that EC</td>
</tr>
</tbody>
</table>

prior to ratifying the treaty

PP: No statutory requirement for public consultation. But public (generally NGOs) may attend important treaty negotiation as observers.
| United Kingdom (common law) | LR: No official role | EC: The exercise of treaty-making power is the responsibility of the Secretary of State for Foreign and Commonwealth Affairs, which operates as a central coordination with other governmental departments that has primary responsibility to initiate a treaty negotiation. | EC: The Royal prerogative issue Full Powers for the executive to conclude and sign treaties. L
R: No treaty can give effects without receiving the cooperation of Parliament (in the form of legislation enactment) Treaties requiring legislative action are those; (i) Modifying/adding to the existing law or statute (ii) Endowing additional power to the Crown, not previously existed (iii) Affecting private rights (iv) Creating a direct or contingent financial obligation upon UK (v) Providing for an increase in the powers of the European Parliament |

LR – Legislature
EC – Executive
JC – Judiciary
PP - Public
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