

**CONSTITUTIONALIZING HUMAN RIGHTS:
A Comparative Studies on
Thailand and Indonesia's Constitutional Reform**

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Abstrak

Perkembangan dan proses reformasi konstitusi di suatu Negara tidak bisa terlepas dari pengaruh konsep-konsep global di antaranya adalah konsep hak asasi manusia. Konsep hak asasi manusia merupakan suatu konsep yang paling penting peranannya dan paling banyak diadopsi di abad ini. Namun demikian dalam proses adopsi ke dalam konstitusi suatu negara, konsep ini mengalami lagi proses 'adaptasi' sejalan dengan situasi politik dan sosial-budaya di Negara penerima. Hal ini diperlihatkan dalam proses reformasi konstitusi yang dilakukan di dua Negara Asia yang berada dalam situasi transisi demokrasi yaitu Thailand dan Indonesia. Dari perbandingan dua negara ini ditunjukkan bahwa tidak akan ada dua Negara yang mengadopsi konsep hak asasi manusia yang serupa secara substansial. Di dalam perjalanannya konsep ini akan mengalami interpretasi, modifikasi -dan bahkan mengalami perubahan- yang pada akhirnya akan menghasilkan sebuah konsep hak asasi manusia yang memiliki karakteristik yang khusus.

A. Introduction

Both Thailand and Indonesia have experienced bewildering years since 1997. The collapse of the economy in both countries among others has led to a radical regime shifting and wide political and constitutional reform. Significant changes have been applied the newly reformed constitutions in both countries. The processes of constitutional reform in each country are different, yet there are some similarities in substance such as in human rights provisions. The process of constitutional reform that Indonesia has made was through amendments on its constitution while Thailand took a different approach and has created a new constitution instead. In their constitutional development,

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both Thailand and Indonesia had earlier experience in changing or amending their constitutions. Indonesia experienced its last change in 1959 under the Old Order regime under former President Soekarno when he ordered to return to the 1945 Constitution of the Republic of Indonesia. Meanwhile, Thailand had experienced a series of constitutional changes through coups from 1932 up until 1991.

The process of constitutional reform in Thailand and Indonesia has been influenced by the socio-political history of their constitutions. This includes the way the leaders and the people of both countries view their constitutions. Differences in viewing the constitution have resulted in different 'treatment' and different processes each country has to follow. This will be discussed in the later section of this article.

B. The process of constitutional reform in Thailand and Indonesia

1. Thailand and its sixteen constitutions:

The beginning of the Thai Constitutional development was marked in 1932 when a group of young reformers initiated to take over of the government from the King (Uwanno and Burns, 1998; Muntarbhorn in Palmier (ed), 1996, 107). They created the first Thai Constitution, forced the King to release his absolute power and changed Thailand (Siam at that time) into a constitutional monarchy. However, instead of becoming a democratic State, after the coup by the military in 1947, Thailand was governed by a group of Thai military and civilian bureaucrats. According to Thaib, "for 39 of the 54 years of Constitutional Monarchy [in Thailand], a military officer had held [the post of Prime Ministers]" (Thaib, 2000, 152).²

In the period between 1932 and 1997, Thailand had sixteen constitutions. The Thai Constitutions were more likely to be an instrument designed by the ruling regime to preserve their power, whether it was a military or civilian regime.³ The first period lasted for 26 years. The second period was the period when "the Sarit and

² According to the 1997 Constitution of the Kingdom of Thailand, the structure of the Thai's government consists of the Cabinets (the Prime Ministers, two Deputy Prime Ministers and the Ministers). They make States' policies together with the Privy Council with advises from the King.

³ McCargo even says that "constitutionalism in Thailand means the use of constitutions as an instrument of day-to-day politics."

Thanom regimes used the interim constitution to suspend parliamentary politics” and this period last for nine years from 1959-1968. Meanwhile, the third period was the period when the Thai military regime began to open its politics that last until 1973.⁴ The last period was the period when the “liberal and progressive” forces began to oppose the conservative regime in 1973 afterwards (McCargo, 2002, 2). After 1973, a political reform was made. The event that marked the beginning of the reformation was the creation of a committee to make a draft on the latest version of a ‘permanent’ Thai constitution (Uwanno and Burns, 1998, 230). However, there were many differences between the people living in the central areas (Bangkok) and those of the outer provinces. One of the reasons was because the Committee consisted of almost 80 percent of Bangkok residents. This led to the demystified reality that the so called “liberal regime” was no more than a group of Bangkok elites who controlled the government (Uwanno and Burns, 1998, 230).

An effort to create a new constitution for Thailand was also undertaken in 1978. In 1993, in respond to the increased public support of the political reformation agenda, the Thai representative body created an ad-hoc committee for a constitutional reform called the Constitutional Reform Committee. This Committee’s main function was to elaborate and design the main issues of reform in many aspects of the life of Thai people and government. This Committee made forty-five proposals for Thailand’s constitutional reform. In 1995, the draft proposed by the Constitutional Reform Committee, was pursued by the Committee for Developing Democracy. The Committee for Developing Democracy undertook a national public hearing to involve Thai people in the constitutional reform processes (Uwanno and Burns, 1998, 233, 239).

Following the people’s aspirations, the Thai parliament proposed a draft of Constitution Amendment in 1996. The draft also included the proposal of the formation of Constitutional Drafting Assembly (CDA) consisted of 99 (ninety-nine) members. Seventy-six of the CDA members were chosen from each province in the outer Bangkok, one from each province, while the rest were experts in law, politics or public officials, all were chosen directly by the Thai

⁴ In 1972 the Thanom regime tried to rule an authoritarian regime which resulted in student and people movement in 1973 to protest it.

parliament⁵ (Thaib, 2000, 149). The CDA once again undertook a survey to collect the public opinion. In 27 September 1997, the draft proposed by the CDA won the approval from a joint forum of the House of Representative and the Senate. In 11 October 1997 the King signed the new Thai Constitution of 1997 (Uwanno and Burns, 1998, 243-245). McCargo notes that the Constitution of 1997 known as “people’s constitution” for two reasons, *firstly*, because “[in] the composition of the Constitutional Drafting Assembly, 73 of whose 99 members were provincial representatives...” (McCargo, 2002, 9). *Secondly*, there are several stages where the people of Thailand were asked for their opinion on the draft of the constitution. The people participation on the drafting process became the main characteristic of the 1997 Constitution of the Kingdom of Thailand.

2. Indonesia and the “sacred”1945 Constitution

A long period of colonization in Indonesia had made the founders of the State determined to respect the fundamental rights of all people. The grievances derived from colonization where the fundamental rights of Indonesian people were taken away, made the abolishment of slavery became the very basic aim which was grafted in the first Indonesian constitution in 1945 (Nasution, 2000, 19). The Preamble of the 1945 Indonesian Constitution says that, “[w]hereas freedom is the inalienable right of all nations, colonialism must be abolished in this world as it is not in conformity with humanity and justice...”. The (original) 1945 Constitution⁶ consisted of very brief provisions since it was firstly designed as a transitional constitution.⁷ However, the first body responsible for the investigation of every attempt of the Indonesian independence, *Panitia Persiapan Kemerdekaan Indonesia* or PPKI (The Indonesian Independence

⁵ Thailand applies a bicameral system in its legislative body or the National Assembly (*Rathasutha*). The two bodies which formed the National Assembly are the Senate (*Vithisatha*) and the House of Representatives (*Sapha-phoothan – Rajsadhorn*). In Thaib, above n 68 at 149.

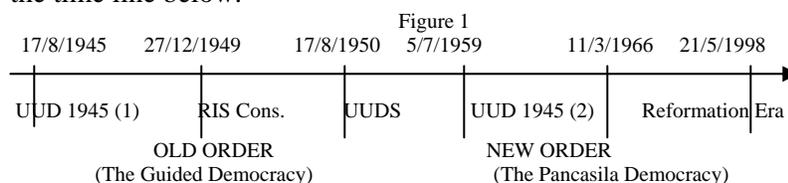
⁶ The 1945 Constitution of the Republic of Indonesia has been amended four times until August 2002.

⁷ This is the original provision from the 1945 Constitution Supplementary Sections point (2) which says: “ Within 6 (six) months after the formation of the Madjelis Permusjawaratan Rakyat (the People’s Consultative Assembly), the *Madjelis* held a meeting to decide the Constitution.” In Nasution, at 484.

Preparation Committee), approved a draft of the 1945 Constitution as a complete constitution (Nasution, 2000, 15).

The characteristics of the 1945 Constitution are: (1) it was general; (2) it contained brief aspects of the State life and how it should work (the State mechanism); (3) it also contained a very limited amounts of fundamental rights and duties of Indonesian people; and most importantly, (4) the 1945 Constitution contained the basic aim of the State of Indonesia which was considered as the realization of the national consensus of all Indonesian people represented by groups of educated elites such as Soekarno, M. Hatta, Supomo, Sjahrir and many others which is known as the founding fathers of the Indonesian State.

After 1945, there are several important periods in the development of Indonesia's constitutional development as describe in the time line below.



The 1949 Constitution was also known as the Constitution of the Federation of the Republic of Indonesia. The 1949 Constitution was created after the agreement between the Indonesian government and the Dutch which wanted to keep its colony. After the war in 1946, the Dutch agreed to hand over the power to the Indonesian people (Nasution, 2000, 27).

The 1949 Constitution was formally made under the international community acknowledgement of Indonesian independence, since the Round Table Conference in 1949 involved Australia and Belgium as mediators. However, the substance of the 1949 Constitution was mainly 'forced' by the Dutch as a requisition of the 'transfer' of power from the Dutch to its former 'colony'. In the beginning of 1950, the efforts to change the constitution, which still 'reflected' the influence of colonization of the Dutch, began to emerge. The efforts emerged from the joint committee formed by the Federation of the Republic of Indonesia and some federal States such as Yogyakarta. Their aim was to return to the form of a State as it was proclaimed in the first days of Indonesian independence that is the Unitary State of Republic of Indonesia. The new constitution, which created the new Indonesian Unitary State, was approved in 17 August 1950 (Nasution, 2000, 28; Feith, 1962, 99). The period was then known as the Liberal Democracy period.

Although many writers such as Feith (1962), Lev (1966), or Nasution (2000); believe that the 1950 Constitution was the most democratic and complete constitution for Indonesia, certain circumstances such as frequent changes of the cabinets, the pressures from the military to re-apply the 1945 Constitutions and many local political movement which threatened the unity of the State, had resulted in the instability of the State. This instability apparently had many disadvantages to social and economics development of the country and it forced the government under former President Soekarno to accept the idea to return to the 1945 Constitution in 1959 (Thaib, 2000, 15; Nasution, 2000, 256-315). One of the reasons for the return of the 1945 Constitution was that the 1945 Constitution was made under a very special moment for all Indonesian people it had a 'sacred' meaning and aim which may unite all the Indonesian people because of the strong feelings that bound with the 1945 Constitution (Nasution, 2000, 321-323).

However, the general provisions of the 1945 Constitution and its transitional characteristic gave many important aspects of the constitutional provisions to the delegated laws. This made the 1945 Constitution used by the Old Order under the former President Soekarno and in the New Order under former President Suharto to preserved their power and interests. The argument that the 1945 Constitution was not to be amendable, since it contained 'sacred' aims of the State and the national consensus of all Indonesian people when the Indonesian people declared their independence, was strongly held all the way of the Indonesian constitutional development.

The experience of the Indonesian constitutional development had proved that the 1945 Constitution was succeeded in preserving the oppressive regimes. Hassal notes that, '[I]n Indonesia, political culture rather than the law itself has rendered the Constitution "untouchable"' (Hassal in Taylor (ed), 2000, 115). This has unquestionably proved by the reality that for more than thirty-three years, the New Order regime had used the 1945 Constitution as a shield and also as a weapon to oppress any groups or individuals who are not in line with their 'policies' (ELSAM, 1998). Students' oppositions, religious opposition or other movement trying to reform the regime were answered by military oppressions. Until the time when the crisis hit Indonesia and the government became weaker, the student and other civilian movements such as the labor unions gained their strength and toppled the ruling New Order regime (Feulner, 2001, 13-19). The former President Suharto resigned and replaced by his vice president B.J. Habibie. The government under B.J. Habibie was a transitional government to prepare a massive political and social reform which most importantly by amending the 1945 Constitution (KOMPAS Online, 23 May 1998). The process began with the 1999 general election, to choose the representatives for the House of Representative and the Peoples' Assembly (Budiarjo, 2003). The role of the military group in politics was substantially reduced. The transitional government also introduced many new laws related

to human rights and ratified many international conventions under the United Nations or its special agencies such as the International Labour Organization (the ILO) (Feulner, 2001).

C. Adopted concepts in Thailand and Indonesia's constitutional development

From the beginning of the discussion of the Constitutions in both Thailand and Indonesia the comparative factors became very significant. The experiences from other countries have been the most valuable sources in framing the new constitutions in order to achieve better mechanism for the State. For example, in the discussion of the Constitutional reforms of Indonesia, in 1945 and in 1950s, when the conceptors of the Indonesian constitution tried to formulate the State's ideology they made comparisons to other countries such as the United States concept of liberal-capitalism, the Soviet Union concept of socialism, the German concept of national-socialism ideology, or the Japanese concept of eternal-unity (Nasution, 2000, 58). The 'war' on ideology especially between the United States and the Soviet Union also has certain importance to the discussion. In the end of the discussion, the framers of the Constitution of Indonesia decided⁸ to follow the idea of Soekarno about the five principles, which has been said in the very first discussion of State in the *Panitia Persiapan Kemerdekaan Indonesian* or the Indonesian Independence Preparation Committee (PPKI) in 1945. Taken from the 'characteristics' of Indonesian people, the five principles are: (1) Indonesian nationalism; (2) Internationalism or Humanity; (3) Consensus or democracy; (4) Social justice; and (5) The beliefs in God. These five principles was later became the *Pancasila* principles.

In Thailand, influences from 'foreign laws' to the Thai' legal system have been quite strong even before Thailand had its first written constitution in 1932. For example, the Indian concept of the "divine rights" of the King influenced the absolute monarch in Thailand (called Siam at that time). The first Thailand legal code, "Laws of the Three Seals", which was made in the period of King Rama I, was the reflection of the pressure from neighbouring colonialism. The Thai King believed that reforms especially in economic laws were needed to protect the Thai from colonialism and to keep good economic relation with colonial rulers such as the British and the France (Muntabhorn, 1996, 105).

The first Thai's written Constitution in 1932 was influenced by "Paris-trained" elites. Therefore, the influence of the French system and laws were quite strong. For example, the concept of "National Assembly" was

⁸ The decision was made basically as a compromise between different groups of the framers of the Constitution of Indonesia.

obviously taken from France, even though in the end, the form and function of Thailand's National Assembly turned to be different from those in France. The other adopted concept was the 'constitutional monarch', deriving from the Western concept, especially the United Kingdom. Thailand had been long stood as an absolute monarch but it was radically changed when the concept of 'sovereignty of the people' crept into the young reformists' mind back in 1932. Subsequently, in 1935, the European continental system heavily influenced the making of the first Civil and Commercial Code of Thailand (Muntarbhorn, 1996, 107). Later in the century, Thailand membership in the international organizations has also a significant influence in the making of Thailand laws. Although since the first written constitution of Thailand, it recognized the concept of "rights and duties of the Siamese people", the most comprehensive provisions of human rights in the Constitution were laid down after the Thai submission to the United Nations of the 1949 Constitution. Furthermore, the ratification of the International Covenant on Civil and Political Rights (ICCPR) in 1999 by the Thai government has also made the range of rights that Thailand had agreed to respect (Streckfuss and Templeton in McCargo, 2002, 73).

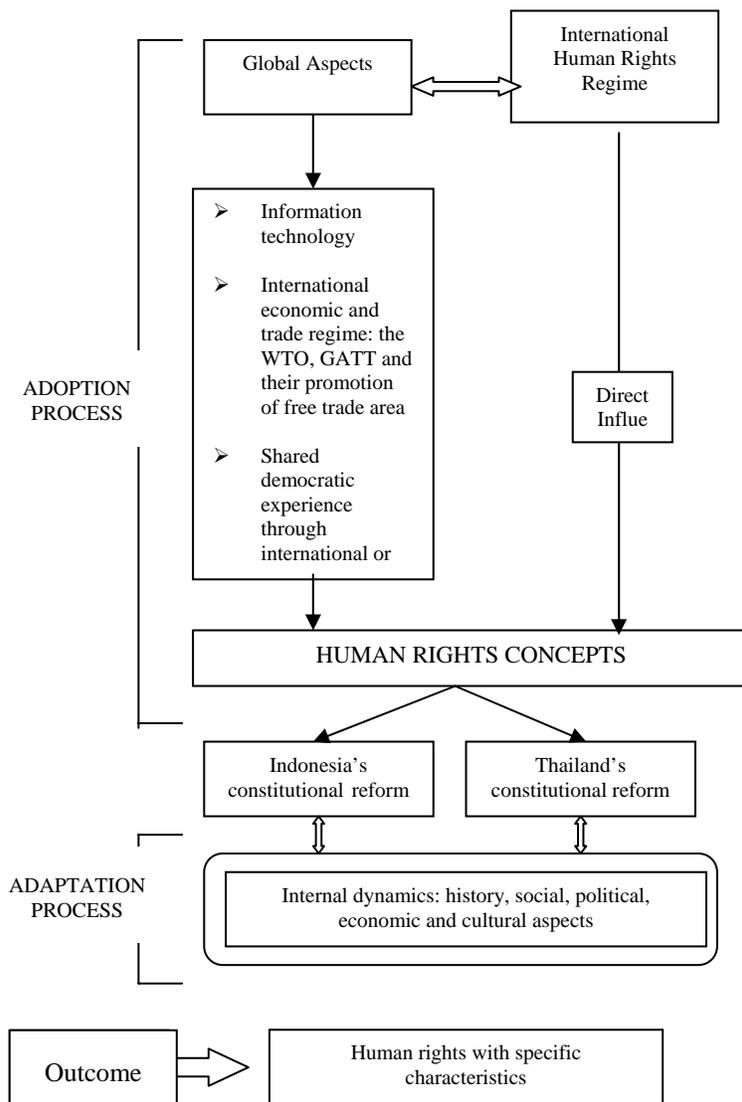
There are many similarities and differences between the constitutional development in Thailand and Indonesia which influenced the process after the year of 1997. The most similar feature on Indonesia's and Thailand's constitutional culture derived from how the ruling elite used the constitution to give them legitimating power in order to preserve and protect their interests. The second is the political culture of both countries shared the power between the civilian and the military, which gives the military a strong political power in the government and also in the people representative bodies (McDorman, in Johnston and Ferguson (eds.), 1998, 228). The third one relates to the rights of the people, where it is usually 'attached' with the duties of the people as good citizens' (McDorman, 1998, 233). Lastly, both constitutions have some 'messages' from the international economic regime as one consequence of the State's engagement with them. These similarities have resulted in similar types of reforms which both countries attempted to undertake.

Besides the similarities, there are also differences between Thailand and Indonesia in constitutional reform process. These differences relate to how the constitutions have been functioned, used or given meaning by the State's constituents in both countries. In Thailand, in order to give legitimacy to the new ruling military regime which has got their power through military coups, the constitution of Thailand is changeable (McDorman, 1998, 233; Hassal, 2000, 115). The constitutions usually give the regime which just came into power a protection of their power and also distribute its power among their supporters. This has made the constitution making or reform in Thailand a familiar action. Meanwhile, the sacredness of the 1945 Constitution of Indonesia has made the process of reforming the Constitution in Indonesia

quite difficult, especially after the long period of the 'constitutional inviolability' (CIDES, 2003).

After 1997, due to similar 'pressures' and 'influences' the constitutional reform process in both Thailand and Indonesia has created concepts of human rights which have specific characteristics (see Picture 2).

Figure 2
The adoption and adaptation processes of human rights concept in Thailand and Indonesia



In both Thailand and Indonesia, the concept of human rights is not new. In Thailand and Indonesia the concept was long recognized although in a form of a very basic right such as the right to live or the right to stay and make a living in one place or one Kingdom. However, the most comprehensive human rights provisions that have been provided within the newly reformed constitutions in both countries after the year of 1997 is generally based on the adaptation from the Universal Declaration of Human Rights 1948. The Table 1 below shows that some of the substance of human rights in the Universal Declaration of Human Rights 1948 have been ‘modified’ in the 1997 Constitution of the Kingdom of Thailand and in the (Amended) 1945 Constitution of the Republic of Indonesia.

Table 1
Comparison between substances of fundamental rights and freedoms’ provisions in the UDHR, Thailand and Indonesian constitutions

Universal Declaration of Human rights	The 1997 Constitution of the Kingdom of Thailand	The 1945 Constitution of the Republic of Indonesia
The right to live, liberty and security	Yes, in Section 31 Par. 1: with specific address to ‘rights and liberty on his or her life and person’	Yes, in Article 28A: there is no word ‘liberty’
Recognition and equal protection before the law	Yes, in Section 30 Par. 1 and 2: it does not mention ‘recognition’	Yes, in Article 28D
Rights to property	Yes, in Section 48 Par. 1: however ‘the extent and the restriction of such right shall be in accordance with the provisions of the laws’	Yes, in Article 28H
Right to religion	Yes, Section 38 Par 1: mentions in particular “sect or creed” with limitation of its exercise that “it is not contrary to his or her civic duties, public order or good morals”.	Yes, in Article 28E: it does not mention the freedom to change religion
Right of education	Yes, in Section 43 Par. 1	Yes, in Article 28E (1): it does not mention that the elementary education shall be free of charge.
Right to information and communication	Yes, in Section 37, Section 58 and Section 59: limitation for censorship, detention or disclosure of communication	Yes, in Article 28F

	by "security of the State or maintaining public order or good morals".	
Freedom of speech and freedom of association	Yes, in Section 39 Par.1, Section 44 Par. 1 and Section 45 Par. 1: specifically mentions "liberty to unite and form an association, a union, league, co-operative, farmer group, private organization"	Yes, in Article 28E
Right to health	Yes, Section 52 Par. 1	Yes, Article 28H: does not mention medical care for indigent people, it specifically mention "welfare living in both physically and spiritually", does not mention the right of housing only "a place to reside"
Cultural right	Yes, Section 46: mentions in quite complete statement "the right to conserve or restore their customs, local knowledge, arts or good culture of their community and of the nation and participate in the management, maintenance, preservation and exploitation of natural resources and the environment in a balanced fashion and persistently as provided by law"	Yes, Article 28I (3): does not mention "the right of traditional society" it says, "Cultural identity and traditional society rights shall be respected in line with age progress and human civilization".

D. Human rights with specific characteristics in Thailand and Indonesia's constitutions

There are some modification in the process of adapting the concept of human rights in the Thai and Indonesia's Constitutions. It is influenced by the internal factors such as social and political history, economic development and also cultural aspects of the country. The first example is cultural and religious influence. Regarding the provisions of the freedom of religion, in the 1997 Constitution of Thailand, it is stated that, "a person shall enjoy full liberty to profess a

religion...”.⁹ It does not say that the constitution protects the freedom of a person to change religion. The same substance can also be found within the 1945 Constitution of Indonesia. In Article 28E it says that, “each person is free to profess their religion and to worship in accordance with their religion...”. It also does not mention the freedom to change religion. In Indonesian context, the debate on whether people have or have not the freedom to change religion has been continuing since the discussion of human rights provision for the 1950 Transitional Constitution (Nasution, 2000, 202-205). Strong religious background –Islam in Indonesia and Buddhism in Thailand—have made both States choose to adopt only ‘half’ of the provision in the Universal Declaration of Human Rights. In both countries, religion is a very sensitive issue, since it relates to ‘majority’ interest –the majority of Muslims in Indonesia and the majority of Buddhist in Thailand. One reason for this, as it was said by Sajid Husein Abubakar in the discussion of the relation between the State and religion in the *Konstituante*¹⁰ in 1958, is that, “...each religion have its own dignity, and people cannot intentionally encouraged to leave his or her religion by legitimating it with a constitutional provision” (Nasution, 2000, 204). The praise to religion, (Hassal, 2000, 113)¹¹ especially those of majority religion in Thailand and Indonesia, has made the discussion on certain provision on human rights, such as the freedom to change religion, must be decided very carefully. This careful consideration has resulted in the exclusion of this specific part of freedom of religion in both constitutions.

In the provision related to freedom of speech, in both countries’ constitutional provision still consist of some limitations such as not to damage the State security, public order, or good morals. In the Thai Constitution, the freedom of speech and the press still prohibits the advocacy of communism, criticism of the government, and incitement of ethnic, racial or religious tensions (Peerenboom, 2004, xii). It is also the case if it relates to the dignity of the Thai monarchy (Streckfuss and Templeton, 2002, 79; McCargo, 2002 63). It also becomes the duties

⁹ Article 38 of the 1997 Constitution of the Kingdom of Thailand.

¹⁰ The Indonesian Parliament of the Federal Republic of Indonesia 1956-1959.

¹¹ He notes that, “Thailand may be a constitutional democracy with a monarch as head of state, but *it is certainly also a contemporary Buddhist kingdom.*”

of Thai people according to Section 66 of the 1997 Constitution which says, '[e]very person shall have a duty to uphold *the nation, religions, the King and the democratic regime of the government* with the King as Head of the State under this Constitution.'¹² With the adoption of constitutional monarchy system, Thailand had agreed to put the King as the head of the State. The famous Western saying that, 'the King can do no wrong', in Thailand perspective has been added by the recent King Bhumibol and become, 'the King can do no wrong because he has love, especially in a country that upholds many traditions'(McCargo, 2002, 63). We can see how strong traditional and cultural background has crept into the adopted concept and made a specific characteristic of Thai's constitutional monarchy system. That is also why the respect of the Thai's had to their King has limited their freedom of speech such as not to endanger or insult the monarch.

The adaptation of the concept freedom of speech is even poorer in the Indonesia's case. Article 28 of the 1945 Constitution says, "[f]reedom of association and assembly, of verbal and written expression and the like, *shall be regulated by law*."¹³ According to Article 28E (3) the freedom of association is recognized, yet in its implementation it will refer back to the main provision related to freedom of association which says that freedom of association shall be regulated by law (Article 28). The statement "shall be regulated by law" has become the most significant feature in the 1945 Indonesian Constitution related to freedom of speech and association.¹⁴ Some important points can be drawn from this statement. Firstly, this provision does not reflect the same meaning as if the statement is "the Government protects the freedom of speech and association". "Regulated by law" means that there is a possibility that legislation made subsequently may not protect freedom of speech and association instead 'regulating' it. There is a significant difference between

¹² Emphasis added.

¹³ Emphasis added.

¹⁴ See Timothy C. Lindsey, *Paradigms, paradoxes and possibilities: Towards understandings of Indonesia's legal system*, in Taylor (ed), above n 1 pp 90- 110 at 101. In his study, Lindsey found that in Indonesia, law cannot merely found within the written legislations, but mostly in governmental document such as the Presidential Decree, Ministerial Decree, or other government regulations and also in the real common practice of the public authorities.

‘protect’ and ‘regulate’. Regulate can also mean that there is possibility that it would contain limitations or even certain requirements that would restrict the exercise of the freedom. There is no guarantee that ‘the law’ will protect freedom of association. Secondly, this provision delegated its constitutional power to an Act. This means, the government has an authoritative power to make laws related to freedom of speech, association and assembly. Both arguments strengthen the consequence that there is ‘no constitutional protection’ explicitly stated for the freedom of speech, association and assembly in Indonesia.

Economic development also plays an important factor in the adjustment process of the concept of human rights in Thailand and Indonesia. In Indonesia for example, the provisions, which relate to positive rights¹⁵ such as the right to education¹⁶, the right to health or housing¹⁷, will have a quite long consideration. For these rights, the government is responsible to realize these rights. Government of the State whose economic development does not support the fulfillment of those rights will re-consider putting the complete provision of those rights and make them their constitutional responsibilities. Although, there are no provisions saying that elementary education shall be free, according to Article 31 there is a constitutional provision stating that the government shall provide at least 20% of the State Budget and Regional Budget to fulfill the needs of national education. By this means, there are certain rights, which have been modified depending on the economic condition of the country. Therefore, the creation of a constitutional obligation for the government will always consider specific conditions of the country.

There are some other specific features in both Thailand and Indonesian Constitution, which developed in regards to the political and social changes in each country. For example in the 1997 Constitution of Thailand, there is one provision related to a specific characteristic of the political history of Thai’s government that is the *coup d’etat*. Coups

¹⁵ Positive rights are rights which give the State responsibility ‘to do something’ to make sure of its realization.

¹⁶ Article 28C and 28E (1) of the 1945 Constitution of the Republic of Indonesia.

¹⁷ Article 28H (1) of the 1945 Constitution of the Republic of Indonesia.

have been a specific characteristic of Thai constitutional development. There were 22 (twenty two) coups occurred in the period of 1932 to 1997. To prevent the occurrence of coups in the future Thai democratic life there is one specific section which regulates the prevention of coup. Section 63 of the Thai 1997 Constitution states:

No person shall exercise the rights and liberties prescribed in the Constitution to overthrow the democratic regime of government with the King as Head of the State under this Constitution or to acquire the power to rule the country by any means which is not in accordance with the modes provided in this Constitution.

A second example can be seen in the provision related to the right to participate in the government decision-making process in the 1997 Constitution of the Kingdom of Thailand. Section 60 of the 1997 Thai Constitution says:

“[a] person shall have the right to participate in the decision-making process of State officials in the performance of administrative functions which affect or may result of its consideration within the appropriate time, as provided by law.”

This reflects the process of the people’s participation in the making of the 1997 Constitution of the Kingdom of Thailand where the aspirations of the Thai people were recognized through public hearings and local representation in the Constitution Drafting Assembly.

In the Indonesian example, large numbers of human rights violations especially to those of traditional communities as become one internal feature, which influence the discussion of the Amendment of the 1945 Constitution. Cultural diversity and how the cultural rights of traditional communities in Indonesia have been violated,¹⁸ has resulted in local reactions particularly during the reformation era. The separatist movement have flourished, wanting either to separate or demand more

¹⁸ With the enactment of the Village Government Act No. 5 of 1979. The smallest structure of government in Indonesia has become uniform and there were no longer traditional governments in the traditional communities. This impacted the development of traditional communities since traditional government is the ‘head’ of traditional communities. The abolishment of traditional government has made the traditional communities and its culture slowly began to die. In some areas such as the West Sumatera, the traditional culture still strongly maintained even though the main organization of the traditional culture that is Nagari was abolished.

autonomy to determine their own future. For this reason, the rights of traditional communities and the protection of cultural heritage were put as one of the main reform agenda in Indonesia. The result is the amendment of Chapter VI on the Regional Government Article 18 of the 1945 Constitution, which gives the regional government the autonomy to administer themselves. The Regional Government has also given the authorities whether they want to apply the old structure of local administrators such as *Marga* in East Sumatera or *Nagari* in West Sumatera.¹⁹ The issue of local administrators not only influences the structure of the State, it has also been crept to the substance of human rights in a form of collective rights. Article 28C (2) reads, “[e]ach person has the right to advance themselves in struggling to obtain their collective rights to develop their community, their people, and their nation.” Collectivism is still become a strong characteristic of Indonesian people, especially for those living in the rural areas.

This paper has discussed some significant examples of the adaptation process in regard to the substance of human rights provisions according to internal dynamics of each country. There are similar issues in Thailand and Indonesian constitution which is differ with the concept of human rights provided by the international human rights regime. Historical, social, political, economic and also cultural reasons have a significant influence in building a specific characteristic of the human rights concepts. This proves that full adoption of certain concept from one system to another is very unlikely since there will be further adjustments made in line with the recipients’ internal dynamics.

E. Conclusion

To summarize, the experience of both Thailand and Indonesia have shown that constitutionalizing the human rights concepts in both countries has been influenced by similar external factors as well as many internal factors. The external factors include globalization, international and regional relations (including shared democratic experiences), pressures to protect human rights from the international and regional organizations (including the strengthening civil societies all around the world), cross-cultural education and the development of

¹⁹ Both provinces are now in the trial period in re-applying the traditional government.

information and technology. The adoption of human rights concepts in their application has differed according to many internal factors such as socio-political background, the form of the State, the ideology of the State and other internal issues, which are significant in the reform process.

The lessons from Thailand and Indonesia's constitutional reform in adopting the concept of human rights show that in further process of adaptation the concept receives some adjustment with the countries specific backgrounds. Although this has not been a new conclusion, adoption of one concept will also receive the influences from the historical, social, political, economics, cultural and religious background. Finally, the writer would like to emphasize that the adoption of human rights concepts has become a global consequence since countries have become more open in sharing their experiences of their own internal development. The exchange of information including cross-cultural education in law reform process have made the function of comparative law becomes more significant. It is plausible that in the future there will be shared universal values with different emphasis in each country or, should we say 'globalized but local' values of the State?

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